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EUROPEAN COMMISSION

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ARTICLES

Commission prohibits MasterCard's multilateral interchange fees for cross-border card payments in the EEA

Lukas REPA, Agata MALCZEWSKA, Antonio Carlos TEIXEIRA and Eduardo MARTINEZ RIVERO (1)

On 19 December 2007 the Commission adopted a decision prohibiting MasterCard's multilateral interchange fees (MIF) for cross-border card payments with MasterCard and Maestro-branded consumer credit and debit cards between Member States of the European Economic Area ('the cross-border MIF') (2). The adoption of the MasterCard decision marks the end of a four-year in-depth investigation of the world's second largest payment organisation. It almost coincides with the expiry of the Commission's decision regarding VISA's cross-border MIF (3) on 31 December 2007, which had been the Commission's leading case on payment card MIFs during the preceding five years.

While no fines were imposed on MasterCard (4), the decision provides for daily penalty payments in the event of non-compliance. MasterCard has to withdraw its cross-border MIF by 20 June 2008, that is, six months after the notification of the decision. If MasterCard maintains its cross-border MIF or replaces it with measures of similar object or effect (5), the Commission can order MasterCard to pay 3.5% of its global daily turnover for the preceding business year for each day of non-compliance. MasterCard has appealed against the Commission's decision to the Court of First Instance in Luxembourg (6).

1. MasterCard's cross-border MIF

A multilateral interchange fee, or MIF, is an inter-bank fee. It is a charge levied on payment card transactions between the two types of banks involved in this transaction, that is, the cardholder's bank or 'issuing bank' and the retailer's bank or 'acquiring bank'. In the MasterCard system — as in the Visa system (7) — the charge is paid by the acquiring bank to the issuing bank. An interchange fee is called 'multilateral' when it is determined centrally, either by common consent of bank delegates or by a manager in the payment organisation who takes decisions on the member banks' behalf. This contrasts with 'bilateral' interchange fees which are agreed upon between pairs of banks. MasterCard's cross-border MIF applies only 'by default' to a cross-border payment transaction, that is, in the absence of a bilateral agreement. Bilateral agreements are in practice exceptional.

MasterCard's cross-border MIF applies only to a fraction of all MasterCard and Maestro payment card transactions in the European Economic Area (EEA) as most of these payments are domestic (8) and domestic payments are generally subject to country-specific 'domestic MIFs' (9). These domestic MIFs were not covered by the Commission's decision.

MasterCard's cross-border MIF has different levels for different types of cards (e.g. consumer and commercial cards) and for different types of transactions (chip & PIN, signature based or electronically authorised). For credit cards, the most common rates range between 0.8% and 1.2%

(1) Directorate-General for Competition, current and former members of unit D-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/34.579 *Europay (Eurocard-MasterCard)* http://ec.europa.eu/competition/antitrust/cases/index/by_nr_69.html#i34_579.

(3) In 2002, the Commission exempted a similar system proposed by Visa (see IP/02/1138) after Visa offered a substantial reform of its MIF. In particular, Visa offered to reduce the level of its fees progressively from an average of 1.1% to 0.7% by the end of 2007 and to cap fees at cost price for specific services. Visa also clarified fees and allowed banks to reveal information about the MIF to businesses. The exemption, however, expired on 31 December 2007 and Visa has been obliged to ensure that its system complies with EU competition rules since then. See the Commission Decision of 24 July 2002 ('VISA II'), OJ L 318, 22.11.2002, p. 17.

(4) The MasterCard MIF was notified in 1992 and was granted immunity under Regulation 17/62 until 1 May 2004. Due to the specific circumstances of the case, the Commission did not use its powers to impose fines on MasterCard after 1 May 2004 but rather gave MasterCard time to comply with the remedy under the threat of periodic penalty payments.

(5) Non-compliance is also defined in the decision as involving a situation where MasterCard adopts measures of equivalent object or effect to its current cross-border MIF.

(6) MasterCard did not, however, request interim relief. The decision is therefore enforceable.

(7) Competition Policy Newsletter 2002 Number 3, p. 33.

(8) In a press conference after the adoption of the Commission's decision, MasterCard managers estimated that the cross-border MIF applies to 5% of MasterCard's total transactions with payment cards in the EEA.

(9) In at least eight Member States, namely Belgium, Ireland, Italy, the Czech Republic, Latvia, Luxemburg, Malta and Greece, MasterCard's member banks have adopted the cross-border MIF as the domestic MIF.

and for debit cards between EUR 0.05 + 0.40% to EUR 0.05 + 1.05% (10). Cross-border MIF levels were traditionally set by a pan-European body of bank delegates and — from September 2006 onwards — by a MasterCard manager.

2. Article 81(1) EC — Theory of harm

The Commission concludes in its decision that MasterCard's cross-border MIF infringes Article 81 of the Treaty by inflating the cost of card acceptance for merchants and shoppers, without leading to objective efficiencies or related benefits to consumers. The price banks charge to merchants for acquiring services — that is, for contracting with merchants so that they may accept payment cards as a means of payment — is to some extent pre-determined by MasterCard's cross-border MIF. MasterCard's cross-border MIF artificially inflates the base on which all acquiring banks set their charges to merchants and at the same time shares out the profits between acquiring and issuing banks with the latter obtaining the fees and hence guaranteed revenues per card transaction (11).

In the absence of this MIF, merchants (and ultimately their customers) would incur lower cost for payment card acceptance at shops. Merchants could then exert countervailing power over acquiring banks by playing one acquirer off against the other and by contracting with the acquirer that offers the best price for its services without being constrained by multilaterally agreed interchange fee costs. This competitive process would lead overall to lower interchange fees and — *in extremis* — to no interchange fees at all. In the extreme hypothesis where no interchange fees *at all* are paid by acquiring banks to issuing banks in a scheme such as MasterCard's, each bank would set its prices according to its individual profit-maximising strategy based on its competitive position. In the current situation, merchants are typically unable to negotiate a price below the invisible floor of the MIF. The decision therefore concludes that MasterCard's MIF is an instrument that has the *effect* of restricting price competition between acquiring banks within the meaning of Article 81(1) EC (12).

A considerable part of the Commission's decision is dedicated to analysing whether the MasterCard MIF is necessary for the viability of the MasterCard scheme.

In line with its *VISA II* decision (13) the Commission takes the view in the MasterCard decision that the only provision necessary for the operation of an open payment card system such as MasterCard's, apart from technical arrangements on message formats and the like, is the obligation on the creditor bank to accept any payment validly entered into the system by a debtor bank and a prohibition on ex post pricing by one bank to the other. A mechanism such as a MIF that shifts profits between acquiring and issuing banks is not objectively necessary for the banks' cooperation, as issuing and acquiring services can be remunerated directly by the respective consumer groups.

The decision demonstrates the viability of the MasterCard scheme in the absence of the cross-border MIF, amongst others, by providing examples of five other domestic payment card schemes that operated for decades without any MIF in Europe. These schemes are Pankkikortti in Finland, Bancomat in Luxembourg, Dankort in Denmark, PIN in the Netherlands and BAX in Norway. The Commission's analysis also draws from publicly available data from the Australian Reserve Bank, which empirically analysed the impact on the market of its regulation of MasterCard's and Visa's MIFs in Australia (14). The empirical strand of the Commission's objective analysis takes up around 25 pages of the decision and is based on the standard set out by the Court of First Instance in its *O2* (15) and *Métropole* (16) case law.

One other important aspect of the Commission's analysis under Article 81(1) EC is that it considers the MasterCard payment organisation to be an 'association of undertakings' and the MIF to be a 'decision' by such an association.

In Europe, the MasterCard payment organisation consists of several thousand members which are financial institutions. This organisation is managed in a decentralised manner by boards of bank delegates and by managers. In May 2006

(10) http://www.mastercard.com/us/company/en/corporate/interchange_fees_europe.html.

(11) The Commission's quantitative analysis indicates that the 'floor effect' of MasterCard's cross-border MIF may account for up to 70% of the price charged to merchants for accepting MasterCard's credit cards in Member States where the cross-border MIF also applies to domestic transactions.

(12) The decision gives grounds for the possibility of a restriction 'by object' but ultimately leaves this open as a restriction can sufficiently be demonstrated based on the effects of the MIF.

(13) Commission Decision of 24 July 2002, VISA II, at paragraph 59 with further references.

(14) After MasterCard's and Visa's MIFs were reduced by roughly 50% in 2003 in Australia, MasterCard's and Visa's combined market shares and their sales volumes kept increasing despite MasterCard's preceding claim that such a move could trigger a 'death spiral' for its scheme.

(15) Case T-328/03, O2 v *Commission,* judgment of 2 May 2006 (not yet reported).

(16) Case T-112/99, *Métropole Télévision and others v Commission,* [2001] ECR II-2459.

MasterCard restructured its global operations, culminating in an Initial Public Offering (IPO) of the holding company MasterCard Incorporated. MasterCard argued in the administrative proceedings that from May 2006 onwards, when the decisions on the cross-border MIF were removed from the member banks and delegated to a manager in MasterCard Incorporated, the Commission could no longer apply Article 81 to its cross-border MIF. The MIF would, in MasterCard's view, no longer be a decision by an association; it would be 'imposed' by a franchisor (MasterCard Incorporated) upon its franchisees (the member banks). The Commission disagreed and applied Article 81 EC to MasterCard's MIF for both the periods before and after the IPO. The Commission's case is that the governance changes in the organisation did not modify the decisive grounds for considering the organisation to be an association of undertakings.

The analysis under Article 81(1) EC also covers the effects of inter-system competition. As in its *VISA II* decision ([17]), the Commission expresses its concern that competition between Visa and MasterCard creates upward pressures on their respective MIFs. When open payment card systems such as MasterCard compete for banks to join their network or issue their cards instead of issuing the cards of other networks, they do so by increasing financial incentives for issuers by raising the interchange fees that issuers can earn. This leads to an upward spiral. The decision demonstrates this effect on the basis of empirical evidence from minutes of MasterCard board meetings ([18]). Finally, as the European Central Bank pointed out ([19]), the proceeds that banks can derive from MIFs also play a role in determining their strategies for rendering their card portfolios compliant with the requirements of the Single Euro Payments Area. The evidence indicates that interchange proceeds have indeed become an artificial element of inter-system competition which increasingly works to the detriment of cost-efficient domestic card schemes in Europe that have operated for decades without a MIF. The decision points out that MasterCard's MIF risks inflating merchant fees in countries where banks may decide to replace their domestic debit cards with Maestro cards.

([17]) Commission Decision of 24 July 2002, *VISA II,* paragraph 80.

([18]) Note that the Australian Reserve Bank made similar observations on the effects of interchange fees used in the VISA and MasterCard payment card systems. The Reserve Bank concluded that inter-system competition increased interchange fees in Australia and furthermore led to a shift from low-cost debit to high-cost credit card usage.

([19]) ECB: The Eurosystem's Views on a SEPA for Cards, published in 2006, page 2: *'The decision to close national card schemes and replace them with an international one may be driven by the following two considerations: 1) this represents a quick and easy way to adapt to the SCF, and 2) this is an attractive solution to banks as international card schemes typically apply higher interchange fees than national schemes (and the latter tend to be partly retained by the banking system).'* (http://www.ecb.int/pub/pdf/other/eurosystemsviewsepacards200611en.pdf).

3. Article 81(3) EC — Efficiencies and consumer benefits

The decision analyses in detail whether MasterCard's cross-border MIF enhances the efficiency of the scheme to the benefit of consumers. The Commission's analysis applies the standard set out in its Notice on Article 81(3) EC ([20]), which requires that efficiency claims must be substantiated so that the following can be verified: the *nature* of the claimed efficiencies; the *link* between the agreement and the efficiencies; the *likelihood* and *magnitude* of each claimed efficiency and *how* and *when* each claimed efficiency would be achieved.

MasterCard's central claim is, in a nutshell, that its MIF helps the scheme to optimise system output by balancing the demands of cardholders and merchants. Cardholders would be less willing to pay for card usage than merchants for card acceptance. Costs would, however, be skewed towards the issuing side. By transferring revenues from the acquiring side to the issuing side, MasterCard's MIF is said to alleviate a cost inequality and to achieve a balance between cardholder and merchant demand to maximise system output. This process is said in turn to lead to a number of objective efficiencies which MasterCard claims represent the technical and economic progress of payment card systems as compared to cash and cheque based payment systems.

3.1 MIFs may enhance efficiencies in a card scheme, but evidence is required

As in its *VISA II* decision ([21]), the Commission's MasterCard decision does not dispute that an interchange fee agreement can in principle contribute to economic and technical progress within the meaning of Article 81(3) EC. For instance, in a payment card system characterised by network

([20]) Commission guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97, paragraph 51.

([21]) See Commission Decision of 24 July 2002, *VISA II,* paragraphs 81 and 83.

externalities, interchange fees may help optimise the value of the network to its users (merchants and cardholders) ([22]).

Theoretical models such as the one written by *William Baxter* in 1983 ([23]) aim —based on certain assumptions — at calculating such 'optimal' allocation of issuing and acquiring costs using interchange fees. However, whether in practice a MIF should be paid by acquirers to issuers or *vice versa,* and at which level it should be set to enhance scheme output, cannot be determined in a general manner by economic theory alone. Rather, a causal link between the MIF and concrete efficiencies must in particular be demonstrated *empirically.* No presumption exists that MIFs in general enhance the efficiency of card schemes. A MIF may be used by banks to achieve efficiencies and to extract rents. The Commission's conclusion on the efficiencies of a MIF therefore depends on the concrete evidence brought forward by the parties.

3.2 *Criteria to assess the efficiency of a MIF under Article 81(3) EC, first condition*

The decision holds that there is no single decisive criterion — such as the level of a MIF –— for assessing whether a MIF fulfils the first condition of Article 81(3) of the Treaty. Rather, the existence of objective appreciable efficiencies is assessed in relation to the MIF as such, the effects it produces on the market and the manner in which it is set. In assessing whether a MIF such as MasterCard's contributes to technical and economic progress, the Commission follows a three-step approach:

i. Is the model underlying the MIF based on realistic assumptions?
ii. Is the methodology used to implement that model objectively verifiable and reasonable?
iii. Does the MIF indeed have the positive effect on the market to the benefit of both cardholders and merchants (and their customers) which the model claims?

As to the burden of proof, the decision requires that the efficiency claim must be founded on a robust and compelling analysis that relies in its assumptions and deductions on *empirical* data and facts.

As Commissioner Kroes underlined in her press conference after the adoption of the decision ([24]), it is not sufficient that a MIF simply increases the sales volumes of a scheme to the sole benefit of the member banks. Rather, a MIF should contribute to *objective* efficiencies such as, for instance, promoting more efficient payment means over less efficient ones.

In the case at hand MasterCard's efficiency claim failed the above test.

First, the model underlying MasterCard's MIF — the Baxter framework — is based on unrealistic assumptions, such as perfect competition among both issuing and acquiring banks and the capacity of merchants to sufficiently constrain the bodies setting a MIF if a MIF is set at an inefficient level. The usefulness of this model for setting MIFs is therefore severely limited ([25]).

Second, MasterCard could not establish a conceptual link between the problems allegedly addressed by its MIF and the methodology used by MasterCard to implement the model. For one thing, MasterCard's methodologies lack a rigorous assessment of the willingness to pay on both sides of the system. The empirical basis of the direction and the amount of the MIF payment is therefore inadequate. The methodologies are conceptually unconvincing and sometimes even arbitrary.

Third, MasterCard failed to provide empirical evidence of the actual effect of its MIF on the market. While MasterCard claims that the use of a MIF helps maximise its system output relative to a situation with no MIF, this claim was not supported by empirical evidence. Statistics from the European Central Bank, on the contrary, indicate that precisely in countries where domestic card schemes operated without a MIF for decades, card usage per capita is among the highest in Europe ([26]). This raises the question whether a MIF can do more harm than good when it comes to spurring greater card usage in Europe. The Commission decision therefore requires empirical evidence of the actual effects of a MIF. Abstract models alone cannot suffice to demonstrate claimed objective efficiencies.

([22]) Network externalities exist when the value of a product to any user is greater the larger the number of other users of the same product.

([23]) *Baxter,* Bank interchange of transactional paper. Legal and Economic Perspectives, Journal of Law & Economics, vol. XXVI (October 1983), page 541.

([24]) http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/832.

([25]) The assumption of perfect competition in both issuing and acquiring banking industry, for instance, excludes any type of exercise of market power in this model.

([26]) European Central Bank, Blue Book, 'Payment and securities settlement systems in the European Union and in the acceding countries. Addendum', 2005, based on diagram 7.4a on page 34.

3.3 Criteria to assess consumer benefit under Article 81(3) EC, second condition

In setting a MIF the member banks of a card scheme must guarantee a fair share of the benefits to *all* customers, not only to those that are on the side of the scheme which receives the MIF. In a scheme such as MasterCard's, where the MIF is paid by the acquirer to the issuer, the efficiencies must in particular counterbalance the restrictive effects that disadvantage merchants (and subsequent purchasers).

The Commission therefore reviewed how MasterCard factually establishes the maximum level of the cross-border MIF which is ultimately 'paid' by merchants and their customers. This 'cap' is in practice determined through regular cost studies which MasterCard undertakes for most of its payment products. The decision states that some of the cost components of MasterCard's methodology should be discounted as they do not relate to services that appear to sufficiently benefit merchants. For instance, costs incurred by card issuing banks which are not technically necessary for executing a payment transaction and which are related to the provision of consumer loans should not be taken into account when setting a cap on the MIF ([27]). Hence, without further evidence — which MasterCard failed to submit — the Commission could not simply assume that by pursuing its aim of maximising system output MasterCard was also creating objective efficiencies that benefit *all* customers, including those that ultimately bear the cost of a MIF (here: merchants and their customers).

In conclusion, to satisfy the second condition of Article 81(3) EC, the methodology used to implement a model for setting a MIF must not only be objective and reasonable (see above for Article 81(3) EC, first condition), but also sufficiently allow those scheme customers that are ultimately 'paying' the MIF to obtain a fair share of the benefits. This was not established for MasterCard's MIF.

([27]) More specifically, in the consumer credit and charge cards segment it remained unproven that merchants benefit from bearing the financial burden of issuers for the provision by issuers to cardholders of a so-called 'free funding period', from writing off certain bad debts and from collecting certain debts from cardholders. In the debit cards segment it remained unproven that merchants benefit sufficiently if debit card interchange fees are inflated by including issuing banks' costs of setting up and managing current bank accounts.

4. Context and importance of the decision

4.1 Sector inquiry into retail banking

The MasterCard decision follows the Commission's sector inquiry into retail banking in 2005 and 2006, which found that interchange fee agreements might stand in the way of a more cost-efficient payment cards industry and of the creation of SEPA ([28]). The inquiry's interim report indicated that on average issuing banks pass through only 25% of the proceeds they obtain from a MIF by means of a reduction in cardholder fees and that issuing could largely remain profitable if banks issued credit cards without any proceeds from a MIF ([29]). The report also unveiled differing bank views on the purpose of a MIF, with some banks describing MIFs as balancing mechanisms for network externalities and others as an issuer's 'fee for services rendered' to acquirers and merchants.

4.2 SEPA

The MasterCard decision was long awaited by the industry and the European Central Bank ([30]) because it was expected to bring more legal clarity to the Single Euro Payments Area (SEPA) project ([31]). This industry-driven project will allow technical interoperability of cards across Europe, thereby enhancing the scope for cross-border card usage and competition to the benefit of financial institutions and their customers. The MasterCard decision supports the SEPA process at least in two respects.

First, the decision clarifies the Commission's approach to MIFs after the expiry of the *VISA II* Decision on 31 December 2007. As Commissioner

([28]) Note, however, that the case files for the sector inquiry and the MasterCard decision were strictly kept apart for procedural reasons.

([29]) IP/07/114 and MEMO/07/40. For details of the pass-through calculations, see http://ec.europa.eu/competition/sectors/financial_services/inquiries/interim_report_1.pdf, page 12 and for the profitability analysis, see page 62 onwards.

([30]) http://www.ecb.int/pub/pdf/other/eurosystemsviewsepacardsen.pdf.

([31]) The SEPA is defined by industry stakeholders as an area within Europe where customers can make and receive payments in euro which is not entirely identical to the euro area. Cards issued, for instance, in Sweden or the UK can be used by cardholders to make euro transactions in, say, France or Germany. When used in this way, such card payments are covered by the SEPA project. The aim of this project — which is a self-regulated initiative by the payment cards industry in Europe — is that as of January 2008 banks in the SEPA will begin to issue and acquire or otherwise process payment cards that are compliant with the minimum requirements set out in the European Payment Council's SEPA Cards Framework.

Kroes underlined at her press conference on 19 December 2007 (32), the MasterCard decision does not declare MIFs illegal as such (33). The Decision, moreover, does not 'regulate' MasterCard's MIF at a certain level. Rather, the decision provides for a flexible framework which leaves the initiative in the industry's hands. Although much of the analysis in the MasterCard decision is case-specific, the approach used by the Commission to analyse a MIF under Article 81 EC is of general importance. For example, the Commission's analysis of the Baxter framework is of interest beyond this individual case, as other card schemes operate with a MIF that is said to balance network externalities according to this framework.

Second, the decision supports the SEPA by preventing the payment card aspects of the project from leading to permanent price increases to the detriment of consumers. In several Member States (such as in the Nordic and the Benelux countries) cost-efficient domestic payment schemes operate without a MIF. If banks replaced their existing debit cards with, for instance, MasterCard's Maestro cards, then MasterCard's MIF would determine the cost of card acceptance in the euro area.

4.3 Coordination within the European Competition Network

In the MasterCard investigation coordination within the European Competition Network was particularly intensive. Several competition authorities in the network are at present investigating the domestic MIFs of MasterCard, Visa and domestic card schemes. As such MIFs apply to entire Member States and as an effect on trade between Member States is therefore likely, Article 81 EC is being applied in these investigations. The Commission and national competition authorities have therefore taken steps to ensure smooth coordination between the ECN members through regular meetings. This approach guaranteed consistent application of the same legal framework in analysing MIFs, but may not necessarily lead to an identical outcome in all cases since market situations differ and, sometimes, different concepts underlie the domestic MIFs.

In April 2005 the Spanish competition tribunal shattered the domestic interchange fee regime in three judgments addressed to the country's three card schemes: Euro 6000, ServiRed and Sistema 4B (34). Merchants and banks in the end settled their dispute over the fees in an agreement that was subsequently turned into a time–bound commitment decision under Spanish and EU competition law which foresees gradual decreases in the fees. In September 2005 the Office of Fair Trading in the United Kingdom decided that MasterCard's domestic MIF for consumer credit cards was illegal under domestic and EU competition law. On appeal, the decision was set aside for procedural reasons. The authority subsequently started a new investigation, this time addressing both MasterCard's *and* Visa's domestic MIFs for credit *and* debit cards. This administrative procedure is still pending. In December 2006 the Polish competition authority adopted a decision prohibiting MasterCard's and Visa's domestic MIFs for credit and debit card payments in Poland (35). The decision applied both domestic competition law and Article 81 EC and is currently under appeal. Several other authorities within the ECN are also in the process of reviewing MIFs (36).

5. Conclusion

The Commission's MasterCard decision of 19 December 2007 sets out a new framework for assessing multilateral interchange fees in four-party payment card schemes such as MasterCard's. The decision further develops the Commission's policy on MIFs (37). It follows the Commission's *VISA II* exemption decision of 2002 which expired on 31 December 2007.

The order on MasterCard to withdraw its MIF within six months leaves MasterCard with several options. One is for MasterCard to determine in the network rules that card payments are to be settled 'at par' in the absence of a bilateral agreement on

(32) http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/832;http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1959.

(33) The Commission's sector inquiry into retail banking has shown that there are many diverging concepts for MIFs in the European Union. Those based on the Baxter framework are the most common as they are propagated by MasterCard and Visa.

(34) Banking Automation Bulletin of July/August 2005, Issue 221, page 2.

(35) Case DDF3-580/1/01/DL/EK.

(36) Generally, around the world, multilateral interchange fees charged by Visa and MasterCard are being scrutinised by competition authorities, competition tribunals and — exceptionally — by central banks such as in New Zealand, Australia, Israel and Canada. In the United States, agreements on multilateral interchange fees both in the Visa and the MasterCard networks are subject to class actions by merchants.

(37) For more information on the history of this policy, see *S. Ryan, E. Martinez Rivero* and *A. Nijenhuis* in Faull & Nikpay, The EC Law of Competition, March 2007, Chapter 11, 11.34.

interchange fees [38]. Another is for MasterCard to introduce an entirely new MIF provided that MasterCard can demonstrate adequately that any such new MIF fulfils the cumulative conditions of Article 81(3) of the Treaty. The decision sets out the analytical approach which the Commission will follow in analysing such a MIF. The current adverse effects of MasterCard's cross-border MIF would have to be addressed in some form.

It is expected that the Commission's decision will guide national competition authorities in applying Article 81 EC to domestic MIFs in card schemes such as MasterCard's. Ongoing coordination within the European Competition Network between competition authorities will ensure that the card payments industry obtains sufficient legal certainty to operate a business model that complies with European competition law.

(38) In a situation of at par clearing the claims of issuing and acquiring banks are established at the face value of a payment transaction without taking into account an interchange fee. Several card schemes in Europe clear at par.

The new Commission Notice on the recovery of unlawful and incompatible State aid

Christof LESSENICH, Marek KOSKA and Nuria MARIÑAS [1]

1. Introduction

The success and credibility of the Commission's State aid policy is very much dependent on the effective and timely implementation of negative Commission decisions ordering recovery. Any failure by a Member State to implement a negative decision ordering the recovery of illegal and incompatible aid effectively consolidates the competitive advantage for the aid recipient and may lead to irreparable damage to the competitive position of its competitors.

In spite of the serious consequences that a failure to implement a negative Commission decision can have, information collected by the Commission is cause for concern: there is hardly a single case in which the Member State's recovery obligation was fulfilled during the deadline imposed in the recovery decision.

The Commission therefore addressed the long duration of national recovery procedures in its State Aid Action Plan (the SAAP) [2]. Following publication of the SAAP in 2005, the Commission adopted a series of measures, which included setting up a dedicated recovery unit within DG Competition, adopting a more systematic approach to the follow-up of its negative decisions, monitoring Member States' compliance with their recovery obligations and systematically applying the *Deggendorf* [3] case law of the European Court of Justice (ECJ).

These measures have led to a very significant reduction of outstanding recovery claims and aid amounts. Out of a total of €8.96 billion to be recovered under decisions adopted since 2000, about €7.0 billion have effectively been recovered as of December 2007 [4]. Together with the aid amounts 'lost' in bankruptcy proceedings [5], the recovered amounts as of December 2007 demonstrate the fulfilment of about 92% of the Member States' overall recovery obligations. This is a significant improvement compared to the 25% reported in December 2004 and the 70% reported in December 2005.

In spite of the progress demonstrated by these figures, the average duration of national recovery proceedings remains a major concern from the perspective of effective State aid policy. Of the 47 recovery decisions still pending, 20 were adopted more than four years ago. Five were even adopted more than eight years ago. The table below shows the number of recovery decisions adopted since January 2000 and the extent to which they have already been implemented.

Year	2000	2001	2002	2003	2004	2005	2006	2007	Total
Number of recovery decisions adopted	16	20	23	10	23	12	6	9	119
Number of recovery cases closed	14	10	19	6	17	7	2	2	77

Source: DG Competition

Against this background, the new recovery notice (the Notice) explains the Commission's approach towards recovery. It aims to build on the progress made to date and to further improve implementation of the Commission's recovery decisions.

This article starts by briefly summarising the overall content of the Notice (section 2 below) and goes on to provide a more in-depth analysis of some of the key issues addressed, namely the tension between the use of national procedural law and the requirement of immediate and effective recovery and the particular problems arising in the event of actual or potential bankruptcy of the beneficiary (section 3). Finally, the article explains the new approach which the Commission intends to adopt for setting information and recovery deadlines in future decisions (section 4).

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

[2] State Aid Action Plan: less and better targeted State aid: a roadmap for State aid reform 2005-2009.

[3] See section 2 below.

[4] The statistics provided in this article refer to decisions within the remit of DG Competition. Figures are calculated as of 31 December 2007.

[5] Although it is often impossible to recover the full aid amount in bankruptcy proceedings, the economic advantage is usually cancelled as a result of the termination of the beneficiary's economic activity.

2. General overview of the Notice

The Notice mainly covers the following areas.

Principles of recovery policy

The Notice gives a general overview of the way in which the Commission's recovery policy has developed over the years and recapitulates the current legal framework, especially Articles 14 and 15 of the Procedural Regulation (6).

Article 14 of the Procedural Regulation requires the Commission to order recovery where it declares an aid measure unlawful and incompatible with the common market. The only two exceptions explicitly envisaged by the Regulation relate to situations where ordering the recovery would be contrary to a general principle of law (Article 14(1)) (7) or where the expiry of the ten-year limitation period under Article 15 of the Procedural Regulation prevents the Commission from ordering recovery.

The Notice also deals with cases where exceptional circumstances make it absolutely impossible for the Member State to implement the recovery decision. Whereas the exceptions explicitly envisaged by the Procedural Regulation prevent the Commission from ordering recovery, the absolute impossibility to implement the decision effectively provides a justification for the Member State not to comply with a Commission recovery decision. In this respect, the Notice refers to several judgments by the Community courts which clarify that 'absolute impossibility' is to be understood in a very restrictive sense. For example, the ECJ has consistently taken the view that the Member States may not rely on requirements under their national legal systems or on other types of, even insurmountable, internal difficulties (8). Where the Member State encounters unforeseen or unforeseeable difficulties in implementing the recovery decision within the prescribed time-limit, it needs to raise these difficulties with the Commission according to the principle of loyal cooperation.

Implementing recovery policy

The European Commission and the Member States both have an essential role to play to ensure that recovery decisions are implemented effectively and immediately. This is why the Notice provides best practice guidance for both the Commission and the Member States.

- In relation to the role of the Commission, the Notice confirms the Commission's intention to continue its current practice to identify the beneficiary of the aid and the amount to be recovered in the negative decision where it has the necessary information for doing so. In addition, this section describes the Commission's new approach towards the setting of recovery deadlines, which is discussed further in section 4 below.
- In relation to the role of the Member States, the Notice deals with a number of issues such as the internal responsibilities for recovery, litigation before national courts and the specific case of insolvent beneficiaries. These issues are discussed in more detail in section 3 below.

Consequences of failure to implement a negative decision

The final section of the Notice deals with the legal consequences where a Member State fails to comply with a Commission recovery decision. There are effectively three different types of legal consequences in the event of such failure to implement the decision.

- Most importantly, failure by the Member State to comply with the decision within the prescribed deadline could lead to an action before the ECJ on the basis of Article 88(2) EC.
- In cases where the ECJ has found against a Member State under Article 88(2) for failure to implement the negative decision, further failure of the Member State to complete the recovery can trigger infringement proceedings on the basis of Article 228(2) EC. The Commission would then ask the ECJ to impose penalty payments on the Member State concerned.
- Finally, the Notice deals with the implications of the *Deggendorf* case law of the Court of First Instance (CFI) in the event of failure to recover illegal and incompatible aid. In the *Deggendorf* judgment, the CFI confirmed that, in the assessment of new aid granted to the same beneficiary, the Commission may take any outstanding repayment into account (9). The Commission explains that, in the application of this judgment, it will ask the Member State submitting a new notification to commit to suspending the new aid until all outstanding aid amounts have been recovered.

(6) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, pp. 1-9).

(7) The Court has generally taken a strict approach in this respect. See para. 17 of the Notice.

(8) See, for example, Cases C-24/95 *Alcan* [1997] ECR 1591, paras 34-37; C-303/88 *Italy v Commission* [1991] ECR I-1433; C-52/84 *Commission v Belgium* [1986] ECR 89; C 6/97 *Italy v Commission* [1999] ECR I-2981, para. 34.

(9) Joined Cases T-244/93 and T-486/93 *TWD Deggendorf v Commission* [1995] ECR II-2265, para. 56.

3. Selected issues

Requirements concerning the application of national law

According to Article 14(3) of the Procedural Regulation *'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision'*. The use of national law is therefore dependent on whether the domestic legal system offers the Member State authorities the possibility to recover immediately and effectively.

The general reliance on the procedural regimes of the Member States has given rise to a considerable amount of controversy and case law. However, the ECJ is adopting a very firm approach in this respect, underlining the requirements for immediate and effective recovery. A number of recent judgments are particularly relevant in this respect and have shaped the content of the Notice.

In the *Olympic Airways* case ([10]), which was decided in 2005, the Greek authorities had argued that the creation of a valid recovery title under national law was sufficient for them to meet their recovery obligations even in the absence of actual payment. The ECJ explicitly confirmed that the Member State authorities are under an obligation to obtain the actual reimbursement of the aid. Consequently, it is not sufficient for the Member State to show that it has taken certain steps towards recovery if these steps do not lead to the recovery of the debt. The only justification for a Member State seeking to avoid actual recovery is to demonstrate that such recovery would be absolutely impossible. In the *Olympic Airways* case, the Member State had not demonstrated that this was the case.

Another good example is the *Scott* judgment, which was handed down in October 2006 ([11]). This case confirms the Member States' obligation to implement recovery decisions immediately and effectively. In the underlying case, the recovery measures adopted by the national authorities had been subject to a legal challenge before a national court. Under French procedural law, this type of legal challenge gave rise to automatic suspension of the recovery measures. The ECJ concluded that such automatic suspension did not ensure effective recovery and that this provision of national law should have been left unapplied as it prevented the immediate and effective execution of the recovery decision, as required under Article 14(3) of the Procedural Regulation.

([10]) Case C-415/03 *Commission v Greece* [2005] ECR I-3875.
([11]) Case C-232/05 *Commission v France* [2006] ECR I-70.

Suspension decisions by national courts

Where national recovery measures are referred for judicial review to the national courts, the claimants often combine their claim with an application for suspension of the recovery order until the substantive case has been decided. In the Commission's experience, such a suspension decision by a domestic court can lead to very significant delays in recovery. In addition, the legal standards and the readiness of national courts to grant such suspensions differs significantly across the EU, thus distorting competition for the companies concerned.

In this context, the Notice refers to the general ECJ case law on whether a national court can grant interim measures to claimants challenging the national implementation of a Commission decision for reasons linked to the validity of this decision ([12]). According to this case law, the national court is not entitled to grant interim measures where the claimant could have challenged the Commission decision and asked for interim relief before the Community courts. Even where such legal protection before the Community courts would not have been available (e.g. owing to lack of legal standing), the Commission considers that the national court may nevertheless only grant interim relief if the following conditions are met:

- the national court must have serious doubts as to the validity of the Community act. If the validity of the act is not already being tested before the Community courts, the national court must refer this question to the ECJ;
- the granting of interim relief must be necessary to avoid serious and irreparable damage to the claimant;
- the national court must duly take the Community interest into account; and
- the national court must fully respect previous decisions by the Community courts.

Beneficiaries in financial difficulties

Issues concerning the recovery of illegal aid often arise in relation to undertakings in financial difficulties. For such companies, the obligation to reimburse the aid can significantly worsen their financial position and may even trigger bankruptcy proceedings. The Notice therefore clarifies the case law and the approach which the Commission intends to adopt in relation to recovery from such beneficiaries.

([12]) Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR I-415; Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH a.o.* [1995] ECR I-3761.

The Community courts have repeatedly confirmed that the mere fact that the beneficiary is in financial difficulty does not impact on its repayment obligation ([13]). However, there can be situations where the assets of the beneficiary are not sufficient to meet all outstanding claims. In such cases, the ECJ has stated that the liquidation of the beneficiary can be regarded as an acceptable alternative to recovery. The reason for this approach is that, from an economic perspective, the competitive advantage of the beneficiary no longer exists in the event of formal liquidation.

The Notice confirms the Member State's obligation to register its recovery claim immediately if the beneficiary is subject to an insolvency proceeding. However, the mere registration of the claim is not always sufficient and can give rise to various difficulties. The reasons for the concerns in this respect mainly have to do with the fact that several national bankruptcy laws allow the relevant company to continue its operations, even in the absence of full recovery. In this type of scenario, the distortive effect of the illegal and incompatible aid on competition would continue. The Commission therefore saw a need to define the obligations of the Member States at different stages in the bankruptcy proceedings.

- *Refusal to register the recovery claim*. There have been instances where an insolvency administrator has refused to register a recovery claim in the proceedings. In this respect, the Notice clarifies that the Member State authorities must take all available steps to challenge the refusal of the administrator. This is prompted by the concern that, if the recovery claim were not formally registered in the proceedings, the Member State authorities would lose any means of ensuring that the Community interest is duly taken into account ([14]).
- *Decision to continue the activity of the beneficiary*. National authorities also need to challenge any decision of the administrator or the insolvency court which would allow the beneficiary to continue its activity beyond the recovery deadline unless the aid can be recovered fully.
- *Sale of assets*. The notice underlines the fact that, as long as the aid is not fully recovered, the national authorities should oppose any transfer of assets that is not carried out on market terms and/or that is conducted so as to circumvent the recovery decision ([15]).
- *Status of the claim*. Some national insolvency law systems distinguish between different categories of claims. In this respect, the Notice does not explicitly require that the Member State's recovery claim is given first-class priority but merely states that the status of the claim would be dependent on national law. However, there have been recent judgments at Member State level which suggest that, in order to ensure effective recovery, national insolvency law must not discriminate against the Member State's recovery claim as opposed to other types of claims in any way and that, consequently, the recovery claim always needs to be given first-class priority ([16]). Due account must be taken of the Community interest.

4. New approach to information and recovery deadlines

The Notice also explains the Commission's new approach towards the setting of information and recovery deadlines in its negative decisions.

The background to this new approach is that, in the past, the Commission's negative decisions only contained a single deadline. During this deadline, the Member State was required to communicate to the Commission the measures it had taken to comply with a given decision. According to the interpretation of the Community courts, this deadline (which was usually set at two months) also determined the date by which the Member State had to complete the recovery ([17]).

([13]) Case C-42/93 *Spain v Commission* (Merco) [1994] ECR I-4175; Case C-52/84 *Commission v Kingdom of Belgium* [1986] ECR I-89, para. 14 ('the Commission's objective was to abolish the aid, and … that objective could be attained by proceedings for winding-up the company'); Case C-499/99, *Commission v Spain* (Magefesa) [2002] ECR I-6031, paras 37-38 ('The Court has ... ruled that the fact that, on account of the financial situation of the beneficiary of the aid in question, the authorities of the Member State concerned could not recover the sum paid does not constitute proof that implementation was impossible, since the Commission's objective was to abolish the aid, which could have been achieved by the liquidation of the company').

([14]) See also the judgment of the Commercial Chamber of Amberg Court of 23.7.2001 in relation to the Commission's Decision of 18.10.1995, OJ L 53, 2.3.1996, pp. 41-49. In this case, the German court overruled the administrator's refusal to register a recovery claim for aid granted in the form of a capital exemption.

([15]) See Case C-277/00 *Germany v Commission* (SMI) [2004] ECR I-3925, para. 75.

([16]) This was the view taken by the German Federal Court of Justice (FCJ) in its recent SKL judgment. The FCJ held that public authorities that are obliged to recover unlawful aid have to be ranked as first-class creditors. This is the case irrespective of whether, in the absence of the State aid issue, their claim would have been treated as a subordinated claim.

([17]) Case C-207/05 *Commission v Italy* [2006] ECR I-70, paras 31-36.

To avoid possible confusion about the role of the deadline contained in the decision and to address concerns that the standard two-month period may be too short to complete the recovery proceedings at national level, the Commission has decided to set two separate types of deadlines in their negative decisions.

- Within the first two months (counted from entry into force of the decision), the Member State must inform the Commission of the measures it intends to take or has already taken to comply with the decision. Within that same deadline, the Member State also has to provide evidence that it has already sent the recovery order(s) to the beneficiary(ies).
- Within a further two-month period, the Commission's decision must then be fully implemented.

Where Member States find it difficult to comply with these deadlines, they need to raise these difficulties with the Commission according to the principle of loyal cooperation. Provided there is sufficient objective justification, the Commission may then extend the deadlines set in the decision ([18]).

5. Conclusion

Ensuring that the Commission's recovery decisions are implemented effectively is an essential element of an efficient and credible State aid policy. Although, as demonstrated above, significant progress has been made in this area in recent years, the length of recovery procedures remains a serious concern. It is hoped that the new Notice will allow the Commission and the Member States to work together more effectively to ensure that recovery decisions are implemented quickly and effectively, thus limiting the distortive effect of the underlying aid on competition in the EU.

([18]) Case C-207/05, *ibid.*

The Regional State Aid Maps for 2007-2013: Less and better targeted regional aid

Patrick DE RIDDER (1)

In May 2003 (2), the Commission announced its intention to review the Regional Aid Guidelines in order to give the Member States and the Commission sufficient time before the end of 2006 to draw up, notify and approve the regional aid maps for the period after 1 January 2007.

Taking due account of the orientations of the State Aid Action Plan, calling for less and better targeted state aid, the revised Guidelines on Regional Aid (3) (RAG) were formally adopted by the Commission on 20 December 2005. Once all language versions were available, the RAG was communicated to all the then 25 Member States along with proposals for appropriate measures, which were accepted by all the Member States. These measures stipulated that all existing regional aid schemes had to be limited to aid granted on or before 31 December 2006. All aid from 1 January 2007 had to be in line with the approved regional aid maps for the period 2007-2013.

In consequence, all regional aid schemes had to be notified again to the European Commission for its approval. In order to simplify the tasks of the Member States, the European Commission adopted on 24 October 2006, under the EC Treaty state aid rules, a Block Exemption Regulation (BER) for regional investment aid (4). Member States no longer have to notify regional investment aid schemes to the Commission if they fulfil the conditions set out in the Regulation, which are in substance identical to those set out in the guidelines. The Commission has also adopted new notification forms for regional aid schemes that do not meet the conditions of the new Regulation and thus still have to be notified individually to the Commission for endorsement prior to their implementation. This BER and the new notification forms represent a major step towards simplification of the state aid procedures in the field of regional aid.

What is regional aid?

Regional aid is defined in Article 87(3)(a) and (c) of the EC Treaty as state aid granted by Member States to promote the economic development of certain disadvantaged areas within the EU. It consists mostly in investment aid to large companies (5), targeting specific regions in order to redress regional disparities.

What is a regional aid map?

A regional aid map defines those regions of a Member State which are eligible for regional aid and establishes the maximum permitted levels of such aid in the eligible regions. These regions are known as 'assisted regions'. The adoption of a regional aid map is a precondition for a Member State to grant regional aid.

What are the criteria for qualifying as an assisted area?

Article 87(3)(a) of the EC Treaty provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered compatible with the common market. This derogation concerns only areas where the economic situation is extremely unfavourable in relation to the EU as a whole, i.e., according to the RAG, regions with a gross domestic product (GDP) per capita of less than 75% of the EU average and the EU's outermost regions (6). In addition, for regions with a GDP per capita above 75% of the EU average only since the 2004 enlargement, there is a transitional period until the end of 2010 during which they remain eligible under Article 87(3)(a).

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

(2) Commission communication on the review of the guidelines on national regional aid for the period after 1 January 2007 (OJ C 110, 8.5.2003, p. 24).

(3) Published in OJ C 54, 4.3.2006, p. 13.

(4) Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29).

(5) SMEs in assisted areas can receive a top-up on the regional aid ceiling of 10% for medium-sized enterprises and 20% for small enterprises. However no top-ups can be granted for investments with eligible costs exceeding €50 million. Member States can also provide aid to SMEs outside the assisted areas under the SME Block Exemption Regulation (OJ L 10, 13.01.2001, p. 33).

(6) These regions are defined in Article 299(2) of the Treaty (Azores, Madeira, Canary Islands, Guadeloupe, Martinique, Réunion and French Guyana).

Article 87(3)(c) of the EC Treaty is wider in scope and allows regional development aid provided it does 'not adversely affect trading conditions to an extent contrary to the common interest'. This derogation concerns areas that are disadvantaged in relation to the national average, but nevertheless have a GDP per capita above 75% of the EU average. As the regional handicap of these areas is less severe, both the geographical scope of the exemption and the aid intensity allowed are lower than for regions targeted by Article 87(3)(a). To determine the scope, the Commission has set a population ceiling at national level for each Member State in Annex V of the RAG, taking into account, among other things, population density, unemployment and GDP per capita. Within this ceiling, the Member States can then select their eligible regions according to objective criteria set out in the RAG.

What is the proportion of assisted areas in the EU?

Given the exceptional character of state aid, there should be substantially fewer assisted regions in the EU than there are unassisted regions. Moreover, given the European Council's repeated calls for less state aid and the widely shared concerns about the distortive effects of investment aid for large companies, the Commission set a limit in December 2005 on overall population coverage, corresponding to 42% of the total population of the then 25 Member States.

The mapping exercise for the period 2007-2013

In the period 2000-2006, 52.2% of the EU-25 population lived in regions eligible for regional state aid. 34.2% of the EU-25 population were living in regions considered to be disadvantaged compared to the overall EU-25 average and thus eligible for aid under Article 87(3)(a) of the Treaty, at the highest rates (30% – 50%). The other 18% lived in regions that were relatively less disadvantaged and were eligible for aid under Article 87(3)(c) of the Treaty, at the lower rates of 10% – 20%.

Under the new RAG, the overall population coverage for regional state aid is 43.1% of the EU-25 population. This includes a safety net to ensure that no Member State loses more than 50% of its previous coverage.

Regions with less than 75% of the EU-25 average GDP per capita (i.e. disadvantaged) qualify for the highest rates of aid under Article 87(3)(a), as well as for operating aid (regional aid to reduce company operating expenses). These regions constitute 27.7% of the EU-25 population. Given the huge disparity in wealth between these regions, ranging from 32.2% to 74.9% of the Community average, they are divided into three categories. The maximum aid rates for regional aid to large companies in these regions range from 30% to 50% (see table I).

Table I: Maximum aid rates for large companies.

Regional GDP as % of EU-25 GDP	% of EU-25 population	Maximum aid rates for large companies
< 75%	14.05%	30%
< 60%	6.30%	40%
< 45%	7.37%	50%

Because of their specific handicaps, the outermost regions qualify as disadvantaged under Article 87(3)(a), irrespective of their relative GDP.

What are termed the 'statistical effect regions' — which have less than 75% of EU-15 GDP but more than 75% of EU-25 GDP (3.6% of the EU-25 population) — will enjoy a transitional status as 'disadvantaged' and qualify for the lowest rates of aid under Article 87(3)(a) of the EC Treaty, with a 30% aid rate for large companies, until 31 December 2010. The situation of these regions will be reviewed in 2010. If their situation has deteriorated, they will continue to benefit from Article 87(3)(a). Otherwise, they will be eligible under Article 87(3)(c) for an aid rate of 20% as from 1 January 2011.

As regards regions with more than 75% of the EU-25 average GDP per capita, Member States will be able to allocate regional aid at lower rates (between 10% and 15%) under Article 87(3)(c) of the EC Treaty to areas they define themselves in line with their national regional development policy, subject to a maximum population coverage and some minimal conditions to prevent abuse.

Transitional arrangements are in place until 2010 for regions suffering the biggest reductions in aid rates and, until 2008, for regions losing eligibility under the new Guidelines.

Aid rates can be increased in all assisted areas by 20% for aid given to small enterprises and 10% for aid given to medium-sized enterprises.

What is the impact on the Member States?

The following table provides a comparison by Member State of the population covered under the exemptions of Article 87(3)(a) and Article 87(3)(c) in the periods 2000-2006 and 2007-2013.

Table II: Regional aid coverage by population, 2000-2006/2007-2013.

MS	Period 2000 – 2006			Period 2007 – 2013			
	Art. 87(3)(a)	Art. 87(3)(c)	Total	Art. 87(3)(a)	'Statistical effect'	Art. 87(3)(c)	Total
EU-27	38.2	16.9	55.1	32.2	3.4	10.8	46.4
EU-25	34.2	18	52.2	27.7	3.6	11.8	43.1
AT	3.4	24.1	27.5	0	3.4	19.1	22.5
BE	0	30.9	30.9	0	12.4	13.5	25.9
CY	0	100	100	0	0	50	50
BG	100	0	100	100	0	0	100
CZ	88.4	11.6	100	88.6	0	0	88.6
DE	17.3	17.6	34.9	12.5	6.1	11	29.6
DK	0	17.1	17.1	0	0	8.6	8.6
EE	100	0	100	100	0	0	100
EL	100	0	100	36.6	55.5	7.9	100
ES	58.4	20.8	79.2	36.2	5.8	17.7	59.6
FI	13.7	28.5	42.2	0	0	33	33
FR	2.7	34.0	36.7	2.9	0	15.5	18.4
HU	100	0	100	72.2	0	27.8	100
IE	26.5	73.5	100	0	0	50	50
IT	33.6	10	43.6	29.2	1.0	3.9	34.1
LT	100	0	100	100	0	0	100
LU	32	0	32	0	0	16	16
LV	100	0	100	100	0	0	100
MT	100	0	100	100	0	0	100
NL	0	15	15	0	0	7.5	7.5
PL	100	0	100	100	0	0	100
PT	66.6	33.4	100	70.1	3.8	2.8	76.7
RO	100	0	100	100	0	0	100
SE	0	15.9	15.9	0	0	15.3	15.3
SI	100	0	100	100	0	0	100
SK	88.6	11.4	100	88.9	0	0	88.9
UK	8.6	20.1	28.7	4.0	0.6	19.3	23.9

Administrative processing of the notified regional state aid maps

On average, the Commission needed 3 months, with a minimum of 1 month and a maximum of 9 months, to assess the notified regional aid maps and issue a decision (see table III). This includes the period during which the assessment was suspended pending the submission of additional information by Member States. All but two Member States (the Netherlands and Italy) were able to notify their regional aid maps before the end of 2006. The notification of the Bulgarian and Romanian regional aid maps was registered on their date of accession. For 18 Member States the regional aid map was approved before the end of 2006, thus meeting, at least for those Member States, the objective announced in 2003 to complete the whole revision exercise before the end of 2006. For 7 Member States, decisions were issued within the first three months of 2007.

Table III: Timetable for the approval of the state aid maps.

Aid No	Member State	Notification date	Decision date	Processing
N343/2006	France	1/06/2006	7/03/2007	9 months
N359/2006	Finland	9/06/2006	20/12/2006	6 months
N374/2006	Ireland	14/06/2006	24/10/2006	4 months
N408/2006	Greece	23/06/2006	31/08/2006	2 months
N431/2006	Sweden	30/06/2006	20/12/2006	6 months
N434/2006	Slovenia	4/07/2006	13/09/2006	2 months
N447/2006	Latvia	5/07/2006	13/09/2006	2 months
N459/2006	Germany	11/07/2006	8/11/2006	1 month
N469/2006	Slovakia	13/07/2006	13/09/2006	2 months
N466/2006	Estonia	14/07/2006	13/09/2006	2 months
N487/2006	Hungary	18/07/2006	13/09/2006	2 months
N492/2006	Austria	20/07/2006	20/12/2006	5 months
N510/2006	Czech Republic	27/07/2006	24/10/2006	3 months
N523/2006	Luxembourg	3/08/2006	12/10/2006	3 months
N531/2006	Poland	8/08/2006	13/09/2006	1 month
N626/2006	Spain	19/09/2006	20/12/2006	3 months
N631/2006	Malta	20/09/2006	13/10/2006	1 month
N641/2006	Lithuania	27/09/2006	24/10/2006	1 month
N673/2006	United Kingdom	11/10/2006	20/12/2006	2 months
N693/2006	Denmark	13/10/2006	21/02/2007	4 months
N727/2006	Portugal	9/11/2006	7/02/2007	3 months
N745/2006	Belgium	16/11/2006	21/02/2007	3 months
N814/2004	Cyprus	4/12/2006	24/01/2007	2 months
N1/2007	Bulgaria	1/01/2007	24/01/2007	1 month
N2/2007	Romania	1/01/2007	24/01/2007	1 month
N249/2007	The Netherlands	2/05/2007	27/06/2007	2 months
N324/2007	Italy	12/06/2007	28/11/2007	5 months

Were the objectives reached?

Reduced population coverage / Better targeted aid

The main objective of the new RAG was to ensure that the population living in assisted areas remained well below the number of people living in non-assisted areas, which means well under 50% of the total population. Without correction, the population living in assisted areas would have increased automatically to 55.1% of the EU-27 population following the accession of Bulgaria and Romania on 1 January 2007, due to the fact that all the NUTS-II regions of these Member States have a GDP below 75% of the EU average. As a result of the new mapping exercise the population living in assisted areas has been reduced to 46.6% of the EU-27 population, i.e. 35.6% in regions covered by Article 87(3)(a) and 11.0% in regions covered by Article 87(3)(c). Compared with the previous map for the period 2000-2006, the regions covered under Article 87(3)(a) shrank by 9%, whereas the regions covered under Article 87(3)(c) declined even more by 35%. This shows that the eligible population is now concentrated more in those regions most in need in an enlarged EU and that regional aid measures are thus better targeted.

Reduced aid intensities / Less aid

Another objective was also to have less state aid. This objective was obtained by reducing the maximum available aid intensities in line with the socio-economic situation of the regions eligible for national regional state aid.

An important simplification measure was the abolition of the concept of 'net grant equivalent' (NGE) in favour of the 'gross grant equivalent' (GGE). The method for calculating the NGE was initially introduced by the Commission to take account of the different tax systems of the Member States when comparing the possible economic effects of aid measures in the Member States in order to assess their distortive effects. This theoretical concept became very difficult to apply in a consistent way, given the rapid change in taxation systems and the shift in the type of aid from traditional subsidies to tax exemptions. The new approach takes account only of the discounted value of future investments and future aid elements, expressing them at their value at the same given moment in time.

As far as the regions covered by Article 87(3)(a) are concerned, the maximum aid intensities have not changed dramatically. They remain 50%, 40% and 30%, although the socio-economic situations to which these different intensities apply have been adjusted to give a clear preference to the most disadvantaged regions. The aid intensity of 50% is now only available for regions that have a GDP of less than 45% of the EU-25 average. The 40% aid intensity is available for regions with a GDP below 60% of the EU-25 average and the 30% for those with a GDP below 75% of the EU-25 average. Following enlargement, the highest aid intensities now focus on the new Member States, effectively reducing the available aid intensities in the old Member States.

For the regions covered by Article 87(3)(c), the maximum aid intensity has been effectively reduced from 20% to 15%.

The reduction in the levels of state aid, taken together with the smaller population living in assisted areas, ensures that the objectives of less and better targeted aid are clearly attained.

Any changes ahead?

Although the RAG provides for the possibility to keep part of the covered population in reserve in order to respond to future economic disasters, only France has made use of this possibility. France can now notify a supplement to its approved regional aid map in the years to come. If an economic disaster occurs in one of the other Member States, areas with a population equivalent to those they then propose for coverage will have to be taken out of the map, which is only possible at the time of the mid-term review in 2010.

In 2010 the Commission will reassess the situation of the 'statistical effect' regions. At the time of the decision on the distribution of the population over the different Member States, these regions had a GDP above 75% of the EU-25 average but below 75% of the EU-15 average. For the period 2007-2010, these regions qualify under Article 87(3)(a) of the Treaty for an aid intensity of 30%. If the mid-term assessment shows that their GDP has fallen below 75% of the EU-25 average, their status will remain unchanged. Otherwise they will become automatically eligible under Article 87(3)(c) for an aid intensity of 20% for the period 2011-2013.

Next programming period 2014-2020?

The initial proposal of the Commission on embarking upon the revision of the guidelines on regional aid was to limit regional aid to those regions that met the criteria of Article 87(3)(a) (i.e. GDP below 75% of the EU-25 average). The only exceptions proposed under Article 87(3)(c) of the Treaty were the phasing-out regions (NUTS-II regions previously eligible under Article 87(3)(a)) and the low-population areas (with a population density below 12.5 inhabitants per km²). All the other regions of the European Union could still receive state aid under horizontal objectives such as aid to SMEs, training, employment, environmental protection and RD&I. This approach would have had the merit of simplicity and would have given a clear message that regional aid is focusing on those regions most in need. This proposal fell by the wayside this time, but is maybe worth revisiting when the preparation of the next programming period starts.

EU competition policy and aid for the outermost regions

Jaime ROJO DE LA VIESCA and Brigitte LEMOIGNE (1)

1. Legal and economic features of the outermost regions

From the standpoint of state aid policy, 2007 was a significant year for the outermost regions (2). Following the expiry of the previous regional aid guidelines and the adoption of the new regional aid guidelines (RAG) for the period 2007-2013 (3), combined with the approval of the regional aid maps for each of the EU Member States, the Commission approved a series of sizable regional aid schemes specifically for these regions.

On 12 September 2007, the Commission also adopted a Communication on the 'Strategy for the outermost regions: achievements and future prospects' (4). Following the adoption of this Communication, it has since launched a consultation on the future of the EU strategy for these regions (5).

Since the outermost regions are an integral part of the European Union, they have to comply with European law. However, the EU Treaty itself provides for special treatment of these regions because of their specific economic and social situation. Article 299(2) of the EU Treaty, introduced by the Amsterdam Treaty in 1997, grants a special status to these regions and provides for specific measures to tackle the unique constraints these regions face.

The 1998 guidelines on national regional aid (6) were amended in the year 2000 (7) to take account of the Amsterdam Treaty and incorporate specific provisions for the outermost regions. A new point was added to the guidelines (8) under which operating aid in the outermost regions qualified for exemption under Article 87(3)(a) and (c) of the EC Treaty without having to be both progressively reduced and limited in time. This sort of operating aid was intended to offset the additional costs of pursuing economic activity in such regions due to the factors identified in Article 299(2) of the Treaty: 'remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development'. However, the guidelines established that it was the task of the individual Member State to determine the amount of the additional costs and to prove that they were linked to the factors identified in Article 299(2) of the Treaty.

The specific provisions introduced in the 2000 amendment of the regional aid guidelines have been kept in the new RAG 2007-2013 adopted on 21 December 2005. In parallel, the RAG allows relatively high aid ceilings for regional investment and job creation in the outermost regions. The new RAG states clearly that it is the task of the Member State in question to justify the contribution of the projected measure to regional development, and that the level of aid should be proportional to the additional costs the measure is intended to offset.

The economic situation in the outermost regions

The outermost regions have seen a significant improvement in their economic situation over the last decade. Table 1 shows the improvement in per capita gross domestic product (GDP) in the outermost regions over the two reference periods used by the Commission to determine the cut-off points for defining assisted areas in the RAG. All the outermost regions have moved closer to the EU-15 average, but it should be noted that none are above the EU-15 or EU-25 average. The improvement in their economic situation is mirrored by the evolution with respect to the national average. The only exception is the Canary Islands, due to the relatively high growth rate experienced by the Spanish economy. In the case of Madeira, the per capita GDP of the region is even above the national average. The improvement in the economic situation of all the outermost regions with respect to the EU average between 1994-1996 and 2000-2002 could be interpreted as the positive outcome of policies to stimulate regional development in these regions.

(1) Directorate-General for Competition, unit H-1 and Task Force on Ethics Security and Procedures. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors. The authors wish to thank Robert Hankin for his valuable comments.

(2) In the EC Treaty the outermost regions are the Azores and Madeira in Portugal, the Canary Islands in Spain, and the French overseas departments of Guadeloupe, Martinique, Réunion and Guyane (commonly known as the Départments d'Outre Mer — DOM).

(3) Guidelines on National Regional Aid for 2007-2013, OJ C 54, 4.3.2006, p. 13.

(4) COM(2007) 507 final.

(5) The consultation process, which will close on 31 March 2008, targets the European institutions, Member States, regional bodies and all other parties concerned, such as stakeholders, employers' associations, trade unions, academics and researchers.

(6) OJ C 74, 10.3.98, p. 9.

(7) Amendments to the Guidelines on national regional aid, OJ C 258, 9.9.2000, p. 5.

(8) Point 4.16.2.

Table 1: Trend in GDP per capita in the outermost regions

	GDP per capita Average 1994-96		GDP per capita Average 2000-02	
	EU-15=100	Member State =100	EU-15=100	Member State=100
Guyane	48.0	45.6	51.6	49.7
Réunion	45.7	42.8	55.3	53.2
Guadeloupe	40.1	37.6	61.4	59.1
Martinique	54.0	50.6	68.3	65.8
Azores	49.9	71.2	56.2	80.0
Madeira	53.7	76.7	80.1	114.0
Canaries	74.8	95.3	80.0	94.5

Source: European Commission and Eurostat.

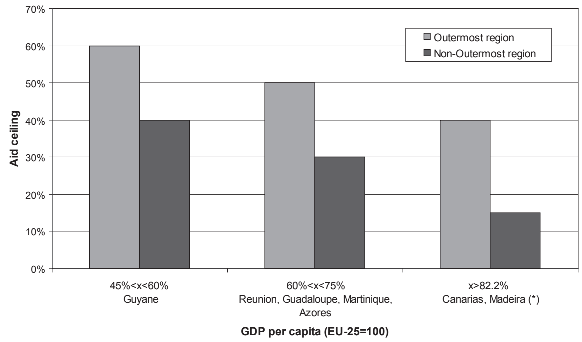
The state aid rules applied in the outermost regions are in line with the basic objective of less and better targeted aid, as defined in the State Aid Action Plan (SAAP) adopted in June 2005, which sets out an indicative roadmap for the reform of the state aid rules for the period 2005-2009. In this context, regional aid is a key instrument in achieving the economic and social cohesion objectives of the Lisbon strategy.

The recently completed review of the RAG rests on the premise that regional aid to large firms should be limited to the regions most in need, if the instrument is to preserve its effectiveness in reducing regional disparities and promoting the overall long-term competitiveness of EU industry. The objective of the RAG is therefore to refocus regional aid on the most disadvantaged regions of an enlarged EU.

In a recently enlarged Europe of 27 Member States, now incorporating 12 relatively poorer Member States, not all the outermost regions now belong to the group of the poorest regions in the EU ([9]). The reduction in aid intensities within the outermost regions between the two programming periods 2000-2007 and 2007-2013 is in line with the SAAP's aim of reducing the overall level of aid in the EU. A factor that will undoubtedly help further reduce regional aid levels is the change in allowed aid amounts from 'net grant equivalent' (NGE) to 'gross grant equivalent' (GGE) ([10]).

The regional aid ceilings in the outermost regions remain higher than for other EU regions with similar levels of economic development in continental Europe. As shown in Figure 1, the most disadvantaged outermost region, Guyane, which has a GDP per capita of between 45%-50% of the EU-25 average, has a 20% aid intensity differential comparison with a continental region characterised by a similar economic development. In the most prosperous outermost regions; the Canary Islands and Madeira, the aid intensity differential amounts to 25%, and can be up to 40% in cases where the compared region with a similar level of GDP per capita in continental Europe is no longer eligible for support.

Figure 1: Comparison of aid ceilings at EU level



(*) The cut-off point of 82.2% of EU-25 GDP per capita corresponds to 75% of EU-15 GDP per capita for the statistical regions. In some cases, regions with a level of economic development above this threshold of 82.2% of EU-25 per capita GDP might lose their support.

Source: European Commission

2. Investment aid as an instrument to promote regional development in the outermost regions

The purpose of investment aid is to compensate local businesses in the outermost regions for the permanent handicaps they face which place them at a disadvantage compared with similar businesses of the same Member State located in mainland Europe.

Investment aid is linked to initial investment in the form of land, buildings and machinery. This aid is allowed on account of its presumed positive impact on regional development and provided that it respects the conditions set in the guidelines. The criteria for fixing the regional aid intensity in the EU regions takes into account the disparity of the wealth of the region concerned relative to the EU-25 average ([11]).

([9]) Evolution of GDP per capita from 1995 (EU-15) to 2004 (EU-27) — French outermost departments: 56% to 64%, Madeira: 66% to 91%, Azores: 52% to 66% and Canary Islands: 76% to 93%.

([10]) Unlike the NGE, the GGE does not take into account the effect of taxation to calculate the grant equivalent of aid. This could lead to significant differences in the amount of aid in cases where the aid takes the form of a direct grant.

([11]) The wealth of the region concerned is measured in terms of average GDP per capita in purchasing power standard for the period 2000-2002.

In view of Article 299(2) of the EC Treaty, the RAG allows the outermost regions to be covered by Article 87(3)(a) of the EC Treaty in recognition of their special handicaps, regardless of whether the region concerned has a GDP per capita of less than 75% of the Community average. At present, the two outermost regions that benefit from this particular provision are the Canary Islands and Madeira. Both regions have a GDP per capita above the 82.2% EU-25 average ([12]). If it were not for the fact that they are outermost regions, these two regions would have remained eligible only under Article 87(3)(c) of the EC Treaty.

The Reform Treaty approved in Lisbon ([13]) on 13 December 2007 provides for permanent recognition of the outermost regions as areas coming under Article 87(3)(a) ([14]). In recognition of their structural, economic and social situation, they receive automatic recognition under Article 87(3)(a) EC Treaty irrespective of their level of economic development. This change in the wording of Article 87(3)(a) means that, regardless of their relative wealth, the Canary Islands and Madeira will retain their status as Article 87(3)(a) regions even beyond 2013.

In order to set the aid intensities for large enterprises in the outermost regions, the RAG follows a double approach. In a first stage, in accordance with point 44 of the RAG, the basic aid intensity is established by taking into account the GDP per capita of the region concerned. In a second stage, in accordance with point 45 of the RAG, a bonus is assigned to the outermost regions in recognition of their specific handicaps. This bonus amounts to 20% GGE if the region's GDP per capita is below 75% of the EU-25 average and 10% GGE in other cases. The method for calculating the aid intensities for the outermost regions is shown in Table 2 ([15]).

Table 2: Applicable aid intensity (NGE) for the outermost regions

	GDP per capita (*)	Rule applied (**)	Applicable aid intensity without bonus	Rule applied	Bonus	Applicable aid intensity with bonus
Guyane	56.76	45%<x<60%	40%	x<75%	20%	60%
Reunion	60.63	60%<x	30%	x<75%	20%	50%
Acores	61.61	60%<x	30%	x<75%	20%	50%
Guadeloupe	67.32	60%<x	30%	x<75%	20%	50%
Martinique	74.88	60%<x	30%	x<75%	20%	50%
Canary Islands	87.79	60%<x	30%	x>75%	10%	40%
Madeira	87.84	60%<x	30%	x>75%	10%	40%

(*) Average GDP per capita 2000-2002 in purchasing power standard (EU-25=100)

(**) In recognition of their permanent specific handicaps, an additional correction is made for the outermost regions in that the cut-off point of 75% of EU-25 GDP per capita for reducing the aid intensity is not applicable in the outermost regions.

Source: European Commission

In the case of Madeira and the Azores, the new RAG reduces the maximum aid intensities by more than 15 percentage points, net to gross, from the aid ceilings applicable in the previous programming period. In accordance with the transitional arrangements in point 92 of the RAG, however, the reduction is to be implemented in two stages: the initial reduction of a minimum of 10 percentage points to be applied on 1 January 2007, with the balance on 1 January 2011. Consequently, the applicable aid intensity for Madeira and the Azores is 52% GGE until 31 December 2010, falling to 40% and 50% GGE, respectively, as from 1 January 2011 to 31 December 2013.

In addition, the bonuses for small and medium-sized enterprises in the RAG also apply to the outermost regions: a 20% bonus for aid granted to small enterprises and 10% for medium-sized enterprises.

Simplification of procedures

The approval of the Block Exemption Regulation on regional investment aid ([16]) (BER RAG) in the second half of 2006 provided a new opportunity

([12]) 82.2% of the average EU-25 GDP per capita corresponds to 75% of the EU-15 average GDP per capita, which is the cut-off point in the RAG for 'statistical effect' regions.

([13]) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, OJ C 306, 17.12.2007, p. 1.

([14]) The provision ensuring the recognition of the outermost regions as regions covered by Article 87(3)(a) was inherited from the Constitutional Treaty adopted and signed by all Heads of State and Government in 2004.

([15]) For example, Guyane, which has a GDP per capita of 56.76% of the EU-25 average, can apply the basic aid ceiling for regions with a GDP per capita between 45% and 60% of the EU average, which is 40%. In addition, it has the bonus of 20% for outermost regions with a GDP below 75% of the EU-25 average. Consequently, the aid ceiling for Guyane amounts to 60% NGE.

([16]) Commission Regulation No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid, OJ L 302 of 1.11.2006.

for Member States to put into effect transparent investment aid schemes that comply with the Regulation without the need to wait for a Commission state aid decision.

In the case of the outermost regions, Portugal has so far introduced two transparent investment aid schemes under BER RAG with registration numbers XR 196/2007 — Incentive Scheme for the regional development of Acores, SIDER (17) — and XR 152/2007 — Regional fiscal aid for investment in the Autonomous Region of Madeira.

The regional block exemption regulation is one instrument the outermost regions can use to put into effect transparent initial investment aid schemes. It is a quite attractive instrument for awarding regional investment aid to companies in these regions given the higher aid intensities that apply there, in particular for small and medium-sized enterprises.

3. Operating aid to compensate for permanent handicaps

In addition to investment aid, the outermost regions can award aid to reduce a company's operating expenses. Examples of operating aid include public contributions to fund the working capital of the company or to reduce its labour costs or any other operating expenses. This type of aid is considered to have the largest potential to distort competition, since it allows beneficiaries to increase their operating profits by the amount of support received. Its use is thus severely restricted, and even where allowed, it normally has to be provided on a temporary and degressive basis.

In the case of the outermost regions, however, operating aid that is not progressively reduced or limited in time may exceptionally be granted to offset the additional costs of exercising economic activity due to the factors set out in Article 299(2) of the Treaty. The projected aid measures have to be justified in terms of their contribution to regional development and their level must be proportional to the handicaps they seek to alleviate (18). It is for the Member State to demonstrate the existence and relevance of these handicaps.

In view of the specific constraints faced by the outermost regions, the Commission has introduced a 'safe harbour' provision in RAG 2007-2013 under which operating aid of up to 10% of the turnover of the beneficiary may be awarded without the need for specific justification. This provision in footnote 74 of the RAG has been used so far only in a single case involving an aid scheme to support local beer producers in Madeira (19).

It is thus up to the Member State concerned to demonstrate that any proposed aid above the 10% turnover of the beneficiary is justified in terms of its contribution to regional development, and that its level is proportional to the additional costs linked to the factors identified in Article 299(2).

To be approved by the Commission, operating aid in the outermost regions should meet the following criteria:

— It should in principle only be granted in respect of a predefined set of eligible expenditures or costs (20) and limited to a certain proportion of those costs;

— The amount of aid must be limited to what is necessary to offset an identified and quantified handicap;

— The Member State should demonstrate that there is no risk of overcompensation, in particular through the combination of different types of aid under other schemes. In such cases the Member State must specify, for each scheme, the method by which it will ensure that there is no overcompensation.

The additional transport costs faced by businesses operating in the outermost regions may also be offset by specific measures. They can cover the cost of transporting the locally produced good to the mainland territory of the country concerned or transporting primary commodities, raw materials or intermediate products from their place of production to the final processing location within the outermost region concerned. Export aid is excluded.

Such aid to transport must be objectively quantifiable in advance, and an annual report must be drawn up to show, among other things, the operation of the ratios used. The estimate of additional costs must also be based on the most economical form of transport and the shortest route using that form of transport between the place of production or processing and commercial outlets, including any external environmental costs of the transport.

(17) Extension of state aid case No XR 51/2007.

(18) Operating aid commonly takes the form of tax exemptions or reductions in social security contributions where these are not linked to eligible investment costs.

(19) Commission Decision of 10 October 2007 on state aid case No 293/2007 — reduced excise duty for locally produced beer in Madeira.

(20) For example, replacement investment, transport costs or labour costs.

So far, the Commission has approved one scheme to compensate for additional transport costs between mainland France and the French départements d'outre-mer (DOM) ([21]).

The Commission will not approve any operating aid to the financial services sector or for intra-group activities under the RAG, since support for such activities is likely to result in a substantial distortion of competition while not significantly contributing to regional development. The activities concerned can be shifted from one location to another for tax optimisation purposes without creating a significant number of jobs and stimulating local activity ([22]). However, non-sector-specific schemes aiming to offset additional transport and employment costs and covering these activities as well can be approved under point 78 of the RAG.

In order to assess the effect of operating aid on trade and competition, the new RAG requires the Member State concerned to submit an annua1 report on each outermost region, giving for each operating aid scheme a breakdown identifying the total expenditure or estimated foregone revenue as well as the ten main beneficiaries (according to the level of aid received), together with the amount of aid granted and the sector concerned. These reports should enable the Commission to check the proportionality of the measure at the micro level.

4. Recent application

In what can be understood as an effort to consolidate the mechanisms to offset the additional costs faced into a single aid scheme, both Spain and Portugal have proposed single large schemes covering the various sources of additional costs. This approach is welcome on purely efficiency grounds, since it allows the Commission to perform an overall assessment of the proportionality of the measure without the need to introduce additional provisions to limit the potential cumulation of the aid with other measures compensating for the same additional costs (e.g. requiring a commitment from the Member State that aid under one measure cannot be cumulated with aid from another).

In contrast, France opted to implement a separate measure for each of the additional costs identified. Consequently, it notified ten different aid schemes to the Commission. Since all ten schemes had to be assessed in accordance with the RAG, and since an important element in the assessment is the cumulation of aid from different measures, possibly leading to over-compensation, the Commission considered the ten schemes together in a common decision taken on 18 July 2007 ([23]) to improve transparency and effectiveness. These cases involved both investment and operating aid.

In the case of Spain, the Economic and Fiscal Regime (REF) ([24]), the Special Economic Zone (ZEC) ([25]) and the tax on imports and delivery of goods in the Canary Islands (AIEM) ([26]) schemes provide for a series of tax advantages to companies established in the Canary Islands. The REF offers tax advantages by exempting companies from paying transfer taxes, plus a fiscal discount on the income from the sale of goods produced in the Canary Islands. The REF can also take the form of a tax reduction on those profits generated in the region which are set aside to constitute an investment reserve in the Canary Islands (RIC). The ZEC provides tax advantages in the form of a reduction in the rate of corporate tax, plus a tax exemption from transfer tax and from the Canary Islands' indirect tax. In budgetary terms, for the period 2007-2013, the foregone fiscal revenue under the REF is EUR 7 billion, approximately EUR 1 billion per year, while for the ZEC the indicative budget is estimated at EUR 261 million for the period 2007-2019. Consequently, given the resources mobilised, the REF has an enormous potential to contribute to regional development, while the ZEC remains more limited in scope.

Part of the REF was considered to qualify as regional investment aid. This part complied with the conditions set for regional investment aid in

([21]) Commission Decision of 29.5.2008 on State aid case N 199/2007 — aide au soutien au fret.

([22]) See Commission notice on the application of the state aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.

([23]) Commission decision of 18.07.2008 on state aid cases N 522/2006 — FR — Loi de programme pour l'outre-mer –Aide fiscale, N 524/2006 — FR- Déductibilité de la TVA sur certains produits exonérés, N 529/2006 — FR — octroi de mer, N 540/2006 — FR — Contrat d'accès à l'emploi, Aide d'État N 542/2006 — FR — Exonération des charges sociales patronales, N 559/2006 — FR — Abattement d'un tiers sur les résultats des bénéfices réalisés dans les DOM, N 560/2006 — FR — Taxe réduite sur les salaires, N 627/2006 — FR — Fonds de garantie 'Fonds DOM', N 667/2006 — FR — Soutien à l'emploi des jeunes diplômés, N 668/2006 — FR — Prime à la création d'emploi, OJ C 14, 19.01.2008.

([24]) Commission decision of 20.12.2006 on State aid N 377/2006 — ES — Régimen Económico y Fiscal de Canarias (REF), OJ C 30, 10.2.2007.

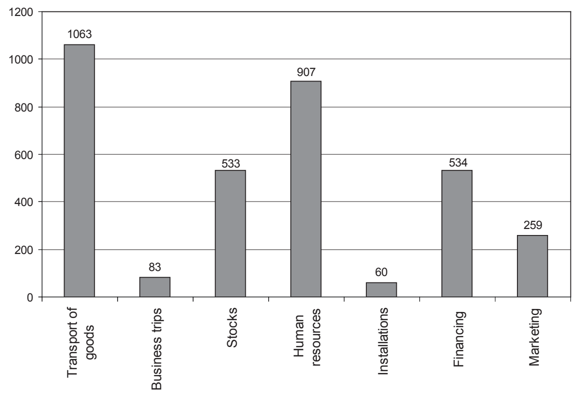
([25]) Commission decision of 20.12.2006 on State aid N 376/2006 — ES — Prorroga del Régimen de ayudas de la Zona Especial Canaria (ZEC); ayuda N 708/98, modificada por N 94/2003, N 563/2006, OJ C 30, 10.2.2007.

([26]) Commission decision of 16.4.2008 on State aid NN 22/2008 — ES — Arbitrio sobre las importaciones y entregas de mercancías en las Islas Canarias.

the RAG and respected the ceiling applicable in the Canary Islands (40% GGE for large enterprises). The remaining measures under the REF were considered to qualify as operating aid.

The justification for the operating aid part of these schemes was provided by two studies carried out by an independent research organisation, the *Centro de Estudios Económicos de la Fundación Tomillo* (27). The studies estimated the additional costs faced by the Canary Islands economy and justified the proportionality of the two measures, the REF and the ZEC, at the macro-aggregate level. Table 2 shows the estimated additional costs of the private sector in the Canary Islands in 1999 as reflected in one of the studies submitted to the Commission.

Figure 2: Additional costs of the private sector in the Canary Islands, 1999



Source: Consejería de Economía y Hacienda. Los Costes de la Ultraperiferia Canaria, 2001

The additional costs of the private and public sectors in the Canary Islands amounted to 16.2% of its GDP in 1999 and 2.4% of GDP in 2001, respectively. In line with the results of the studies submitted, the additional costs of the Canary Islands were estimated at around EUR 4.4 billion in 2000 and EUR 5.9 billion in 2004.

Given that the REF and ZEC are the two main operating aid schemes in the Canary Islands, the Commission considered both measures together to assess their proportionality. Since the combined advantage conferred by both aid schemes remained significantly below the additional costs faced by the beneficiaries in the Canary Islands, the Commission concluded that the measures did not in principle result in overcompensation and were proportional and targeted to the specific handicaps they were seeking to alleviate.

In addition, the Spanish authorities provided evidence quantifying the contribution of the aid to regional development. This was based on the results of an empirical study carried out by an independent research organisation, the *Fundación de Estudios de Economía Aplicada* (FEDEA) (28). For this purpose, the study compared the economic situation of the Canary Islands with and without the scheme (29). The main results, for the period 1994-2004, were that the REF resulted in an increase of 0.20% in the region's GDP (from 3.43% to 3.63%), an increase of 0.20% in per capita income (from 1.60% to 1.80%), an increase of 0.15% in regional employment (from 4.36% to 4.52%), and a decrease of 0.124% in average unemployment (from 16.82% to 16.69%), and an increase in 0.05% (from – 0.89% to – 0.85%) (30). In addition, the study also provided projections for the application of the scheme until 2013. The results from the simulations indicated that the Canary Islands would grow at an annual rate of 3.5% with the REF and at a rate of 3.28% without it. The average increase in real income per inhabitant in the Canary Islands would amount to EUR 400.

In the case of Portugal, the Zona Franca da Madeira (ZFM) (31) comprises an industrial free zone, an international services centre and an international shipping register. The indicative budget of the ZFM for the period 2007-2020 is estimated at EUR 300 million (approximately EUR 22.5 million per year). The new companies licensed to conduct business in the ZFM in 2007-2013 will benefit from a reduced tax rate of 3% in 2007-2009, 4% in 2010-2012 and 5% in 2013-2020. Access to the scheme will be restricted to companies that meet specific eligibility criteria, based on the number of permanent jobs created. The tax benefits will be limited by a ceiling on the taxable base per company, which ranges from €2 million (where less than three new jobs are created) to €150 million (where more than 100 new jobs are created). At the macro level, a study provided by the Portuguese authorities estimated the additional costs of Madeira to be EUR 400 million, or 16.7% of its GDP, in 1998. The proportionality of the measure was demonstrated, since the budget

(27) Consejería de Economía y Hacienda. *Los Costes de la Ultraperiferia de la Economía Canaria*. 2001 and Consejería de Economía y Hacienda. *Los Costes de la Ultraperiferia en el Sector Público Canario*. 2004.

(28) S. Sosvilla Rivero, E. Martínez Budría and M. Navarro Ibáñez, *'Efectos macroeconómicos de los incentivos del Régimen Económico y Fiscal de Canarias en el período 1994-2013'*, FEDEA, Madrid, 2006.

(29) The results are based on simulations using the HERMIN macro-econometric model.

(30) Measured in terms of annual cumulative growth.

(31) Commission decision of 27.6.2007 on state aid No 421/2006 — PT — Zona Franca da Madeira, OJ C 240, 12.10.2007.

for the measure, corresponding to EUR 300 million in foregone tax revenues until 2020, remains well below the additional costs identified. At micro level, the tax advantages provided by the measure are also capped, with the ceiling depending on the number of jobs created by the aid beneficiary.

The ten aid schemes approved in 2007 for the French overseas departments under the EU state aid rules concern exemptions from tax and social security contributions. The total budget for these measures amounts to EUR 1.8 billion a year. The Commission decisions on these measures have introduced a double limit on the amount of aid to be awarded. The Commission notes that the additional costs covered by each of the measures have been identified (see table below). It has also carried out an overall review of the level of aid in relation to the gross domestic product of the four overseas departments to assess the proportionality of the measures in relation to the additional costs, since no overall quantification of private and public sector costs for the French overseas departments was provided by the French authorities. The Commission notes that the total aid notified is equivalent to around 6.5% of the total GDP of the overseas departments, which is proportional to the overall additional costs borne by beneficiaries in these regions on the basis of comparable information for the Spanish and Portuguese outermost regions. The Commission has also concluded that there are few overlaps between costs, and where there are potential overlaps, the cumulation rules also apply.

Table 3: Aid schemes to compensate for additional costs in the French overseas departments

Aid No	Measure	Budget EUR million per year	Additional costs
N 522/06	Loi de programme – aide fiscale	360.00 (*)	Loan scarcity, cost of capital for investments
N 524/06	TVA non perçue récupérable	200.00	Transport and import storage
N 559/06	Abattement taxe sur bénéfices (non cumulation with N 522/06)	75.00	Production cycle and long term return on investment
N 529/06	Octroi de mer	165.00	Reduced level of physical capital per worker
N 542/06	Exonération charges patronales (non-cumulable avec d'autres régimes sociales sauf 667/06)	850.00 (**)	Reduced productivity levels per worker
N 540/06	Contrat accès à l'emploi (non-cumulable avec 542/06 ou 667/06)	32.00	Additional costs of recruitment resulting from long term unemployment
N 667/06	Soutien emploi jeunes diplômés	0.960	Additional costs of recruitment of young managers
N 668/06	Prime à l'emploi	0.867	Travelling expenses of business people to the continent
N 560/06	Taxe réduit sur les salaires	105.00	Additional wage benefits to attract qualified people from metropolitan France in particular for certain services
N 627/06	Fonds de garanties	8.10	Access to credit in particular for small enterprises

(*) The breakdown of this budget is as follows:
— EUR 151.5 million to support economic operators in the overseas departments via the retrocession mechanism
— EUR 208.5 million to reduce taxes for individual investors

(**) The EUR 850 million corresponds to the total envelope for exemptions from employers' social contributions in the overseas departments. EUR 400 million corresponds to the additional aid agreed under the 'Loi de Programme' for the outermost regions in connection with the national system.

Source: European Commission

5. Conclusions

The rules on state aid for regional purposes have always been relatively favourable to the outermost regions of the EU. The new RAG 2007-2013 ensures continuity in the approach followed by the Commission to assess the compatibility of aid measures for the outermost regions with the common market. The underlying rationale is that the aid is a means to restore the competitive situation in the market should the permanent handicaps not have existed. By offsetting the additional costs faced, the aid allows companies in the outermost regions to compete on an equal footing with their continental European counterparts.

The aid intensities for initial investment in the outermost regions under the RAG 2007-2013 reflect the recent changes in the economic situation of the outermost regions and the changes in the EU economic landscape due to the recent enlargement.

The Member States have not made full use of the new instruments available under the RAG to simplify the treatment of state aid schemes. For example, in view of the relatively favourable aid intensities for the outermost regions, Member States could have used the BER RAG more extensively to implement transparent investment aid schemes. Aid schemes for initial investment have proven to be a useful instrument in promoting regional development in the outermost regions. Furthermore, Member States have not made significant use of the new 'safe harbour' provision in the RAG to award operating aid of up to 10% of the turnover of beneficiaries in the outermost regions without the need for justification.

To allow the Commission to assess the impact of operating aid measures on competition and trade, RAG 2007-2013 clarifies that it is the task of the Member States to identify and quantify the handicaps faced and to demonstrate that the proposed measures are proportionate to these handicaps. This is still an ongoing process, and the reporting obligation introduced in the RAG will enable both the Commission and the Member States to check that the operating aid remains proportionate and does not lead to overcompensation of beneficiaries and effectively contributes to regional development. This policy could be interpreted as a move towards greater public accountability. Under this approach, Member States are allowed to design measures to support outermost regions when they effectively contribute to regional development and do not lead to overcompensation of costs, resulting in a waste of taxpayers' money.

The changes introduced by the Treaty of Lisbon in the wording of Article 87(3)(a) of the EC Treaty imply that the outermost regions, irrespective of the evolution of their relative wealth, will in future be guaranteed the same specific treatment as areas where the standard of living is abnormally low or where there is serious unemployment.

Fortis/ABN AMRO: When do bank mergers raise competition concerns?

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On 3 October 2007, the Commission cleared the acquisition of certain assets of the Dutch banking group ABN AMRO by the Belgo-Dutch financial services group Fortis subject to divestiture commitments. The acquired assets included most of ABN AMRO's activities in the Netherlands (except certain large corporate customers) as well as its worldwide private banking and asset management business. This take-over formed part of the break-up bid for ABN AMRO by Royal Bank of Scotland, Banco Santander of Spain, and Fortis.

Even before the merger, the Netherlands was one of the most concentrated banking markets in Europe. The merger raised significant competitive issues because it combined two of the five largest banks in the Dutch retail banking market. In commercial banking, the proposed merger would have brought together the first and fourth largest banks. Following the Commission's first-phase investigation, Fortis offered to make divestiture commitments, which removed the Commission's competition concerns.

The *Fortis/ABN AMRO* case concerned one of the few banking mergers with a Community dimension to have raised competition issues. The only phase II case in the sector, the proposed merger, in 2001, of the Swedish banks SEB and Föreningssparbanken, was withdrawn by the notifying parties after the Commission had issued a Statement of Objections. We are therefore taking this opportunity to outline the analytical approach taken in the conditional clearance decision on *Fortis/ABN AMRO*. The following sections provide an overview of the Commission's analysis of the main product areas affected by the merger: retail banking and commercial banking. For a more detailed insight, also into other product markets covered by the investigation, we refer to the public version of the decision, which is available on DG Competition's website under case number COMP/M.4844 *Fortis/ABN AMRO* (2).

(1) Directorate-General for Competition, units 02, D-1 and D-4. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

(2) http://ec.europa.eu/competition/mergers/cases/decisions/m4844_20071003_20212_en.pdf.

Product market definition

The Commission's approach in product market definition largely followed previous decisions in the sector, such as COMP/M.2567 *Nordbanken/Postgirot* and COMP/M.3894 *Unicredito/HVB*. Markets were defined on a product-by-product basis within three overall segments:

(i) retail banking (products supplied to private individuals),

(ii) corporate banking and

(iii) other financial services.

A further distinction was made in the corporate banking segment between large corporate customers on the one hand and other commercial customers, including small and medium-sized enterprises (SMEs), on the other. These two customer groups were found to belong to separate relevant product markets because large corporate customers require more complex products (e.g. bonds issues as opposed to loans) and have access to a wider range of international financial service providers than SMEs, who depend largely on domestic branch-based banks.

However, there is no obvious single parameter by which companies can be designated as SMEs or large corporate customers. Individual banks segment the market in different ways, i.e. some international banks may target only blue-chip companies while others may also be interested in smaller corporate customers. The potential profitability of customers may depend not only on their size by turnover, but also on other characteristics that make them attractive (e.g. international activities). However, because Fortis was found to designate customers with a turnover of up to €250 million as SMEs and served them through local business centres, the acquisition affected this customer group in a distinct fashion. On the other hand, Fortis served customers with a turnover below €2.5 million through its retail branch network. Therefore, the Commission concluded that banking products for commercial customers within this turnover range formed distinct relevant product markets for the purpose of assessing this particular concentration. However, this definition was specific to the Fortis case due to the characteristics of the Dutch market.

Because all of the main financial service providers in Netherlands operate branch networks across the country, the Commission defined the relevant geographic market as national for both the retail and commercial banking markets.

Assessment

The main horizontal overlap between Fortis and ABN AMRO assets was in the supply of financial services to commercial customers and private individuals in the Netherlands.

Banking markets for commercial customers in the Netherlands

In its market investigation, the Commission found that the banking markets for commercial customers in the Netherlands could be characterised as relationship markets in the sense that customers have an ongoing relationship with one or more banks through which products are purchased. Current accounts and, to a lesser extent, loans form the most important 'gateways' through which a customer relationship is established and future sales are made. The customer relationship provides the bank with important information about a customer's potential profitability, such as income, wealth and risk profile. There is generally an asymmetry in the information available to the customer's incumbent bank and to competitors about these competitive parameters. The asymmetric information makes it more difficult (and thus costly) for banks to attract customers from competitors. Setting a lower price to attract customers may result in an adverse selection where incumbents retain (through appropriate incentives) the most profitable customers (e.g. SMEs with a low bankruptcy risk, heavy users of profitable products, etc.) and where the new entrant collects the less profitable business. The asymmetric information problem, together with customers' general inertia (reluctance to go through the trouble of switching banks), leads to relatively low customer turnover and only modest shifts in market shares over time.

In setting their prices and conditions, competing banks thus face a trade-off between competing aggressively to grow quickly and, alternatively, focusing on extracting revenue from their existing customer base. The incentive for the latter increases as a bank's market share (existing customer base) rises. Concentration levels are thus likely to be correlated, at least to some degree, with market power.

The market for banking products for commercial customers in the Netherlands was highly concentrated prior to the merger. Four banks, Rabobank, ABN AMRO, ING Bank / Postbank and Fortis Bank, together controlled more than 90% of the Dutch commercial banking market, when measured by main banking relationship. Through the proposed acquisition, Fortis' market share would have increased from less than 10% to more than 40% for banking services for commercial customers measured by main banking relationship and even higher for a number of specific commercial banking products. Overall market concentration measured by the Herfindahl-Hirschman Index (HHI) would have increased from approximately 2600 to more than 3000. The Commission's market investigation also showed that fringe competitors, such as Friesland Bank, SNS, van Lanschot and GE Artesia, were not regarded as viable alternatives by most customers.

Given the economic characteristics of the market (such as high barriers to entry and expansion, information asymmetry), Fortis/ABN AMRO's high combined market share in excess of 40% and the substantial increase in the concentration level (HHI) raised concerns that effective competition would be significantly impeded. The serious doubts were confirmed and further reinforced by additional evidence about Fortis' competitive role and its market positioning collected during the Commission's Phase I market investigation.

One would have expected that Fortis, as the smallest of the main banks, had an incentive to be an active competitor in the market aiming to expand its market share (rather than maximising returns from the existing customer base). Because of the competitive characteristics of the commercial banking market (asymmetric information about the risk profile of potential customers), such market share expansion can progress only slowly. In addition, one would have expected Fortis to employ both price and non-price strategies in attracting customers. The Commission's market investigation confirmed that this had indeed been the case. In contrast to the retail banking market, where Fortis's brand image was comparatively weak, Fortis's commercial customers considered it as more likely to compete aggressively on price than the other banks. This strategy, which was also recognised by a number of external market studies, had enabled it to progressively increase its market share among commercial customers, despite the substantial barriers to entry and expansion. Fortis' incentive to compete for increased market share was likely to diminish after the merger, which would have transformed it from challenger to market leader.

In addition, the investigation also found that Fortis and ABN AMRO were close competitors with similar strengths, in particular among companies with international activities and in the products required by this customer segment. ING had a similar profile, whereas Rabobank's most cited strength lays in its local presence. Conversely, the lack of international reach was Rabobank's most quoted weakness. Due to the sunk costs involved in setting up a branch network and because of the asymmetric information problems inherent to the market, barriers to entry were found to be particularly high in SME banking. For example, progressive entry via online banking is generally not possible for potential competitors. Finally, there were no indications that commercial customers had any countervailing buyer power vis-à-vis the leading banks. On the contrary, the small and medium-sized companies in this product segment largely depend on the domestic banks for their financing. They would have been left with very limited choice post-merger.

The Commission hence concluded that the acquisition raised serious competition concerns in the market for banking services supplied to commercial customers. Fortis addressed the Commission's concerns by offering to divest the Hollandsche Bank Unie (HBU), a subsidiary of ABN AMRO focusing on commercial customers, together with a number of local commercial banking offices in the ABN AMRO organisation. The size of the divestiture package exceeds the competitive overlap in the affected product markets, thus ensuring the viability of the divested business and allowing for possible customer attrition in the divestiture process. To ensure that the divested business can be a viable competitive force on the Dutch market, the remedy package requires that the purchaser must be an international bank with a brand recognition comparable to Fortis pre-merger.

Banking products for private individuals (retail banking)

Like the commercial banking sector, the Dutch retail banking market was already highly concentrated pre-merger. The four leading banks (ING, Rabobank, ABN AMRO and Fortis) controlled more than 90% of the market and the pre-merger HHI was above 3000. However, Fortis held only a small market share (below 10%). A fifth competitor, SNS Bank, operated on a similar scale to Fortis. Thus, unlike in the commercial market, the acquisition only slightly increased the concentration level. The merger involved the third- and fourth-largest banks in the Netherlands (with Fortis being a distant number four in terms of market share). With a market share in current accounts below 25%, the merged entity remained the third largest player in the Netherlands after ING/Postbank and Rabobank. In particular, the increase in HHI remained near the 'safe harbour' threshold — 150 — set by the Commission's Horizontal Merger Guidelines. Apart from the three market leaders (ING/Postbank, Rabobank and Fortis/ABN AMRO), there remained one additional competitor, SNS Bank, with a market share and branch network comparable to Fortis pre-merger. The market shares as measured by the number of ATMs, which constitute an important barrier to entry, were similar to the relative size of the branch networks and the market shares in retail banking.

In contrast to the commercial banking markets, Fortis's market share in retail banking had not changed significantly over the previous three years. The results of the market investigation also did not indicate any consistent pattern of customer switching from the major banks to Fortis. Finally, the market investigation did not indicate that Fortis and ABN AMRO were closer substitutes in the overall retail market to each other than to any other universal bank. It appeared that ABN AMRO had a reputation of catering to 'mass' affluent clients whereas Fortis' market positioning was influenced by the fact that its Dutch retail division originated from the acquisition of a savings bank positioned towards the lower end of the market.

Apart from looking at current accounts, the Commission also conducted a separate analysis of the remaining retail banking product markets, including savings accounts, consumer loans, mortgages, mutual funds and private banking services. Because market power for many retail banking products is primarily at the distribution level (as opposed to the product generation level), competitive conditions were similar to the current accounts market, albeit with product-specific variations. For example, there had been significant new entry into the Dutch consumer loan market in recent years. In mortgages, independent mortgage brokers represented an important distribution channel, which provided additional opportunities for new entrants without an existing branch network. In general, the Commission's investigation showed that there had been more new entry in the retail banking segment than in commercial banking, and competitors other than the Big Four banks played a more important role.

Based on the prevailing market structure, the market's competitive characteristics and Fortis/ABN AMRO's relative market positioning, the Commission hence concluded that no competition concerns would arise in the retail banking markets.

Outlook

The Fortis/ABN AMRO case provides an interesting case study of the Commission's assessment of mergers in the banking sector. In the two main product areas affected, the investigation led to opposite conclusions — serious competition concerns in commercial banking, no concerns in retail banking. To arrive at this conclusion, the Commission collected extensive empirical evidence in Phase I, before concluding that there were competition concerns in commercial banking, but not in retail banking.

The substantial divestiture commitment accepted by the Commission includes a number of safeguards, including an up-front buyer clause and stringent purchaser requirements, to ensure that the competitive conditions prevailing pre-merger are restored.

The notion of economic advantage in the context of reforms to pension regimes

Daniel BOESHERTZ and Bernadette FREDERICK (1)

In recent years, in the face of an ageing population, some Member States have carried out in-depth reforms of their social security regimes. These reforms have raised the question of their compatibility with the Community rules on state aid.

This article looks at two decisions adopted by the Commission on 10 October 2007. These decisions relate to the reform of the pension regime in the banking sector in Greece (2) and the reform of the pension scheme for La Poste's public servants in France (3).

The object of this article is to examine how the key notion of economic advantage in the sense of Article 87(1) EC Treaty has been interpreted by the Commission.

The key issue raised by the reforms

The ultimate objective of the above-mentioned reforms is to put certain undertakings on an equal footing with their competitors in terms of pension costs. A legacy of the past, these special pension regimes used to impose higher pension costs on these companies, often to fund, as in the Greek case, more generous pension systems for their employees.

The pension reform in the Greek banking sector

First-pillar pension insurance in Greece is a public law system, enshrined in the constitution. It is universal, compulsory, endowed with statutory force and redistributive (i.e. financed on a pay-as-you-go basis). The first-pillar system provides two levels of insurance: main insurance (about 80% of total pension benefits) and supplementary insurance.

(1) Directorate-General for Competition, unit F-3, and Directorate-General for Energy and Transport, unit A2 (previously Directorate-General for Competition, unit D3). 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 Decision of 10/10/2007 on the reform of the organisation of the supplementary pension regime in the banking sector (Case N 597/2006), OJ C 308, 19.12.2007, p. 9.

(3) Commission Decision of 10/10/2007 on the reform of the financing of the pension scheme of La Poste's public servants in France (Case C 43/2006 ex N 410/2006), OJ L 63, 7.3.2008, p.16.

Whereas all bank employees are insured with the main pension scheme, IKA-ETAM, for their main pension, supplementary pension insurance in the banking sector is organised on a fragmented basis. Bank personnel recruited before 1 January 2005 are affiliated either to ETEAM, the general social security scheme providing basic supplementary insurance for employees, or to separate insurance bodies, depending on the banks they work for.

The banks affiliated to separate insurance bodies for supplementary insurance pay an employer's contribution at least equal to and usually higher than the contribution rate paid by the banks affiliated to ETEAM (i.e. 3% of gross income). In addition, they may also have to pay an additional one-off annual contribution in order to cover any deficit of their insurance body.

The reform provides for the optional integration of these separate insurance bodies within the general social security regime.

Technically, supplementary pension rights under the special regime can be divided into two categories:

a) basic supplementary pension rights, corresponding to the supplementary pension rights provided by the compulsory supplementary insurance scheme;

b) specific supplementary pension rights for bank personnel, calculated as the difference between the pension rights provided by the separate insurance bodies and the basic supplementary rights.

The reform allows the basic supplementary pension rights to be transferred to ETEAM in exchange for the payment of ETEAM contributions by employers and employees. This means that the reform will relieve the banks from the obligation of ensuring the viability of their insurance bodies. As far as the specific supplementary pension rights are concerned, the banks will fully finance the financial charge incurred by the take-over of these rights.

This article will focus on the issue raised by the transfer of the basic supplementary pension rights to the general social security regime (4).

(4) The Commission has verified that the banks will fully finance the cost of the transfer of the specific supplementary pension rights to the general social security regime and has hence concluded that this transfer does not contain any aid elements.

La Poste

In addition to the 120 000 employees working under contracts similar to those used by private operators, 180 000 public servants are currently working for La Poste, the French Post Office. The pension rights of these public servants are defined in the *'Code Général des pensions civiles et militaires de retraites'* (general civilian and military retirement pensions code), and are similar to the rights of other public servants.

The system is managed by the State and is financed on a pay-as-you-go basis. However, under a specific law dating back to 1990, La Poste was obliged to finance all the pension costs of the retired officials it used to employ. In other words, unlike other employers, which pay a 'withholding' contribution that discharges them from any additional pension liabilities towards their employees ([5]), La Poste used to pay every year the full cost of the pensions of its retired officials (i.e. on top of the contributions deducted from the wages of its current employees, La Poste was paying to the State an additional amount to cover the yearly cost of pensions for its retired officials). This led La Poste to bear higher costs than required under the standard pension regime for both public servants and other employees ([6]).

In 1991, La Poste started to progressively replace its civil servants with contractual employees coming under the standard social security system (also a pay-as-you-go system). The transition from a situation where La Poste had only public servants to one where it had mainly employees on a contract basis under the standard pension regime then began to create unaffordable pension charges, especially in the light of the liberalisation of postal activities.

To address this situation, France first decided in 1998 to cap the employer's contribution due from La Poste at the 1997 level (in constant euros), responsibility for the balance being assumed by the State. Then, under a new reform in 2006, which replaced the 1998 cap, La Poste was to pay an employer's contribution based on a 'competitively fair rate' (CFR). The CFR is intended to bring the obligatory contributions paid by La Poste for its public servants into line with those paid by other undertakings in the postal and banking sectors (which employ workers under the ordinary rules governing social security contributions, including pensions).

The key issue

Article 87(1) of the EC Treaty states: *'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'*

Therefore, in order to determine whether the reforms at issue do contain state aid elements within the meaning of Article 87(1) EC Treaty, it must be established whether the measures confer an economic advantage on the undertakings concerned by the reform.

It follows from the above that the key issue raised by the two pension cases is whether the alleviation of part of the costs of the special pension regimes is likely to give an economic advantage to the undertakings concerned.

The existence of an economic advantage: the approach followed by the Commission

It is established case law of the European Court of Justice that an economic advantage exists if the measure being assessed enables the undertakings concerned to avoid having to bear charges that would normally have had to be met out of their own financial resources, thereby preventing market forces from having their normal effect ([7]).

In this context, a normal charge is a *'normal burden inherent in the day-to-day […] management or usual activities […] of an undertaking'* ([8]). *The Court has also stated that 'an aid consists of a mitigation of the charges which are normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question […], whereas a special charge is, on the contrary, an additional charge over and above those normal charges'* ([9]).

In the light of the above, the Commission considers that whether a charge is normal or not has to be determined by reference to the general system of charges in question. Consequently, the determination of a reference framework is of particular importance, because the existence of an economic

([5]) Withholding contributions are the norm for both private and public businesses in France.
([6]) The fact that La Poste did not benefit from the withholding contributions regime also meant that it remained liable towards its officials for their acquired pension rights. This debt, recorded as an off-balance-sheet liability until 2006, amounted to €76 billion in 2005.

([7]) Case C-301/87 *France v Commission* [1990] ECR p. I-307, paragraph 41.
([8]) See for instance Case T-55/99 *Spain v Commission* [2000] ECR p II-3207, paragraph 82.
([9]) Case C-390/98 *HJ Banks* [2001] ECR p. I-6117.

advantage can only be established by comparison with a given system of financial charges considered to be 'normal' in the geographical area of reference.

It follows that the Commission has to establish a legal reference framework, a 'benchmark', in order to determine whether the pension costs in question are 'normal charges' for the undertaking concerned.

If so, any alleviation of these 'normal charges' should be considered as conferring an economic advantage upon the undertaking concerned in the sense of Article 87(1) of the EC Treaty.

Here, it has to be recalled that, for the application of Article 87(1), the only question to be considered is whether a state measure favours certain undertakings or the production of certain goods in comparison with other undertakings in a comparable legal and factual situation in terms of the objective pursued by the measure in question. It is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation previously, or even remains unchanged ([10]).

Concrete example: the pension reform in the Greek banking sector

Determination of the reference system

Applying this methodology to the pension reform in the Greek banking sector, the Commission considered that the system of charges affected by the reform was the system of financial charges borne by undertakings for the financing of basic supplementary pension rights for employees under a pay-as-you go pension regime.

Accordingly, the Commission considered that the reference framework was the general social security system providing basic supplementary insurance for employees, i.e. ETEAM, for the following reasons.

First, the supplementary pension rights provided to pensioners by ETEAM are strictly identical to the basic supplementary pension rights. Indeed, basic supplementary pension rights are by definition the supplementary pension rights provided by the compulsory supplementary insurance scheme.

Second, the legal status of persons affiliated to ETEAM is the same as that of the population concerned by the reform.

([10]) Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECR p.I-8365, paragraph 41.

Third, the financing system of ETEAM follows the same logic, i.e. pay-as-you-go. By law, ETEAM is financed through compulsory contributions (3% of gross income) paid by employees and employers. The contributions are managed and apportioned in accordance with the rules of ETEAM, which operates on a pay-as-you-go basis.

Finally, the majority of banks in Greece are already affiliated to ETEAM for supplementary pension rights. These undertakings are indeed '*in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question*' ([11]).

Determination of the normal charges arising from the normal application of the reference framework

Having defined ETEAM as the reference framework, the Commission then established the financial charges inherent in the day-to-day management or usual activities of an undertaking affiliated to ETEAM.

The financial charges arising from the normal application of the rules of ETEAM are defined, in line with the case law, as the 'normal charges', i.e. the charges inherent in the day-to-day management or usual activities of an undertaking affiliated to ETEAM.

Due to the pay-as-you-go nature of ETEAM, these normal charges are <u>exclusively</u> the annual employers' contributions paid by the undertakings affiliated to ETEAM. In a pension regime organised on a pay-as-you go basis, the payment of their regular contributions indeed frees employers from any future commitment towards their employees for basic supplementary pensions.

Assessment of the reform

On the basis of the above considerations, the Commission finally determined whether the reform exempts the banks concerned from paying partially or totally the employers' contributions due under the normal application of the rules of ETEAM.

The Commission noted that, after the reform, as far as basic supplementary pension rights are concerned, the contribution rates paid by banks to ETEAM will be at least equal to the rates paid by other undertakings affiliated to ETEAM. In other words, the banks opting for integration will not be relieved from paying financial charges arising from the normal application of the rules of ETEAM.

([11]) Case *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke,* cited above, paragraph 41.

The Commission acknowledged that the reform would relieve the banks from financial charges relating to their last-resort responsibility to ensure the viability of their insurance bodies. If a deficit arises between the contributions paid (by both employers and employees) and the basic pension benefits paid under the pay-as-you-go system, it will be taken in charge by society as a whole and no longer by the banks.

The remaining issue was therefore to determine whether the obligation to cover a deficit of the insurance body, beyond the payment of employers' contributions, is inherent in the day-to-day management or usual activities of an undertaking affiliated to ETEAM. If not, the financial charge arising from this obligation would not be a normal charge for an undertaking affiliated to ETEAM, but would be a 'special charge' ([12]).

The Commission first noted that the financial charge arising from an obligation to cover a deficit in a pay-as-you-go pension regime is not a normal charge for an undertaking affiliated to ETEAM. In other words, this financial charge is not a charge arising from the normal application of the rules of ETEAM. The banks already affiliated to ETEAM do not have to cover the deficit of their insurance body, this being taken in charge by society as a whole.

Second, the Commission found that it is difficult to see '*how a private undertaking could offer on the market a non-funded pension whereby present contributions fund present benefits. In such a scheme, redistribution is not ancillary to some other activity which could exist independently of it. Rather, the scheme consists entirely of the State-compelled redistribution of resources from those currently employed to those who have retired*' ([13]).

In the light of the above, the Commission concluded that the reform did not exempt or release the banks concerned by the reform from financial charges arising from the normal application of the general system of social security. The Commission considered that a measure by the State to relieve the abnormal or 'special' obligation to cover any deficit of the insurance body does not confer any economic advantage upon the banks concerned by the reform in comparison with undertakings already affiliated to ETEAM.

The Commission concluded that the integration of the banks' insurance bodies within the general social security scheme for the basic supplementary rights simply widened the coverage of intergenerational solidarity and reduced the insurance risk of the integrated fund by enlarging the group of insured persons.

For these reasons, the Commission considered that the transfer of basic supplementary pension rights to ETEAM did not confer any economic advantage upon the undertakings concerned and hence was not aid within the meaning of Article 87(1) EC Treaty.

What if there is no benchmark? A concrete example with the La Poste case

The Commission decision recalls that it has to be determined whether the measures under scrutiny confer an economic advantage on La Poste in that they allow it to avoid costs that would normally have had to be borne from its own financial resources, and have thus prevented market forces from producing their normal effect ([14]).

Conversely, in the wake of the Banks case (see footnote 9), the decision notes that the concept of 'special charge' could apply. The withdrawal of such a special charge by legislation would not grant any advantage to the beneficiary and would therefore not constitute state aid.

While the broad objective of the reform is to create a level playing field between La Poste and its competitors regarding obligatory wage-based social and tax contributions, several possible reference frameworks have been identified by the Commission:

— the situation of La Poste's competitors

La Poste's competitors are private-law companies operating on competitive markets, whereas La Poste has a status similar to that of an industrial and commercial public establishment (termed 'EPIC' in French) ([15]) with a

([12]) See by analogy Article 4(c) of the ECSC Treaty.
([13]) Opinion of Advocate-General Jacobs in Case C-264/01, paragraph 33.

([14]) Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.
([15]) In France a distinction is made in principle between administrative public establishments (EPAs), which perform the traditional tasks of the public administration, and industrial and commercial public establishments (EPICs), which engage in activities of an economic nature. A number of public establishments have not been classified by law as either EPAs or EPICs. Such is the case with La Poste. However, the Court of Cassation, in its ruling of 18 January 2001 (second civil chamber), accepted the principle whereby La Poste is treated as an EPIC — see Commission Recommendation of 4 October 2006 proposing the adoption of appropriate measures regarding the State's unlimited guarantee in favour of La Post (Case E 15/2005).

statutory monopoly [16]. Moreover, La Poste's competitors have employees under private-law contracts while the comparison specifically concerns civil servants working for La Poste.

— the situation of other public undertakings

Among the EPICs, to which La Poste is similar by virtue of its status, no economic operators forming a homogeneous group that could provide a comparison can be identified.

— the pension scheme applicable to state civil servants

State civil servants do not, as a rule, work in market sectors such as those where La Poste operates.

— France Télécom

Having become a limited listed company in 1996, France Télécom is no longer in a legal and factual situation comparable to that of La Poste.

To sum up, no external comparison is available to define a 'normal' contribution for undertakings in a legal and factual situation comparable to that of La Poste in the light of the objective pursued by the measures under review.

As there is no suitable external comparison, the reference framework for the possible existence of an economic advantage has to be the situation of La Poste itself prior to the reform.

Accordingly, the Commission has concluded that the retirement costs borne by La Poste under the 1990 law are normal costs. One of the effects of the reform has been to replace La Poste's contribution with a contribution that fully discharges all its liabilities, thus aligning the pension costs borne by La Poste with those of its competitors. Without the reform, the employer's contribution would, in the years ahead, have continued to rise significantly. Therefore, the Commission has concluded that the reform relieves La Poste of normal charges that it would have had to bear from its own financial resources, conferring on the operator an advantage in the sense of Article 87(1).

Lastly, in response to the doubts expressed in the decision to initiate this procedure, the Commission has also examined whether or not the charges alleviated by the reform correspond overall to 'abnormal' charges or to a 'structural disadvantage' as referred to in the *Combus* [17]case law. The Commission has come to the view that the factual differences between the Combus case and the case at issue are sufficient to justify a different reasoning in each case.

Conclusion

In both cases, the existence of an advantage is established in a first stage through a comparison with other undertakings in a comparable legal and factual situation in terms of the objective pursued by the reform in question or, if this is not possible, through a comparison with the situation of the undertaking itself before the reform.

An external benchmark exists in the Greek banking case and allows the conclusion that no advantage is granted.

No corresponding benchmark could be identified in the La Poste case. So the comparison has to be made between the situations before and after the reform. Because the reform relieves La Poste of costs that would normally have had to be financed from its own financial resources, an advantage is granted to the operator.

The choice of the undertaking itself as a benchmark is a second-best solution and has to be made when market conditions are not normal or when it is not possible to find a comparable undertaking.

(16) Tariffs are fixed according to principles laid down by Directive 97/67/EC. In particular, Article 12 of the Directive stipulates that prices must be geared to costs and that Member States may decide that a uniform tariff should be applied throughout their national territory.

(17) Case T-157-01 *Danske Busvognmænd v Commission* [2004] ECR II-917.

Decision against the Groupement des Cartes Bancaires (CB)

Eduardo MARTÍNEZ RIVERO and Guillaume SCHWALL (1)

1. Overview

In its decision of 17 October 2007 (2), the Commission concluded that the Groupement des Cartes Bancaires (CB) had infringed Article 81 of the Treaty.

The Groupement des Cartes Bancaires (CB) ('the Groupement') manages the 'CB' card payment system in France, which accounts for over 70% of card payments in France. The Groupement has around 150 members and is controlled by the biggest French banks, all represented on the Groupement's board of directors: Crédit Agricole, Crédit Lyonnais, Crédit Mutuel, Crédit Industriel et Commerciel, Société Générale, Crédit du Nord, BNP-Paribas, Natexis — Banques Populaires, the Caisses d'Epargne, the Post Office bank and Crédit Commerciel de France.

The Commission found that the Groupement's top management and the directors-general of the largest French banking groups had agreed a series of fees to be paid by some member banks when issuing cards under certain conditions. The Groupement's board then approved these price measures. A key measure was the 'MERFA' ('Mécanisme Régulateur de la Fonction Acquéreur'), a formula that determines the fee to be paid for each card issued (up to €11) where a bank is not, according to the formula, sufficiently active in concluding contracts with merchants ('acquiring merchants') or installing automated teller machines (ATMs). The other measures were: a membership fee of €12 per card, an additional membership fee, and a 'wake-up' fee ('mécanisme de réveil des dormants') of €12 per card issued over and above the maximum number of cards stipulated by the Groupement.

Despite formally applying equally to all Groupement members, the fee measures were carefully designed to hinder the issuing of cards at a price lower than that of the large banks. The fees targeted 'new entrants' (in fact existing Groupement members that wished to increase card issuing, such as on-line banks and the banking arms of large retailers). By increasing the cost of the cards issued by new entrants, the measures had in practice the effect of keeping the price of payment cards artificially high to the benefit of the major French banks. Consumers were therefore deprived of cheaper cards and a wider range of products.

The measures were notified to the Commission on 10 December 2002 and inspections were carried out in May 2003 at the premises of the Groupement and of ten large banks and their subsidiaries. The inspection documents show that, before formal adoption, the top management of the Groupement and the large banks had adjusted the fees to ensure that they would only affect new entrants, but not the incumbents.

The adoption of the measures was made possible by the distinction made in the Groupement's articles of association between the major banks that are members of its board of directors and the other members. As the board of directors has the power to adopt price measures, only the large banks sitting on the board took part in taking this decision, without consulting the other Groupement members.

During the procedure, the Groupement claimed that the measures were necessary to combat 'free-riding' on the investment made by the main incumbent banks and to encourage new competitors of the major banks to acquire merchants and install ATMs. However, the Commission's investigation revealed that the measures were introduced to restrict competition in the French payment card market and that this has in fact been their effect.

Although the measures entered into force on 1 January 2003, the Groupement's Board of Directors decided on 8 June 2004 'not to implement' them pending a Commission decision on their compatibility with Community law. However, the measures were merely suspended and continued to have a stifling effect on the market until their abrogation following the Commission decision.

The Commission issued two statements of objections in the present case. The first, of 8 July 2004, was addressed to the Groupement and to the large banks on the Groupement's board. The second statement of objections, which replaced the first, was addressed solely to the Groupement. In the second statement of objecions, and in the decision, the Commission considered the fee measures con-

(1) Directorate-General for Competition, unit D-1. Mr Schwall is a former member of DG Competition staff. 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/D1/38606 http://ec.europa.eu/competition/antitrust/cases/index/by_nr_77.html#i38_606.

cerned to be a decision by an association of undertakings taken solely by the Groupement. It decided not to impose a fine on the Groupement since the measures were notified in December 2002.

The decision orders the Groupement to annul the measures concerned with immediate effect and to avoid taking any measures in the future with a similar object or effect.

2. The relevant market

The Commission took the view that the relevant market was the market for issuing ([3]) payment cards in France ([4]). It was not necessary to examine whether the cards issued by the Groupement — known as 'CB' cards — constituted a separate market, as CB cards have an extremely wide acceptance in France and are used to pay more than 78% of the total value of card payment transactions in that country (many CB cards are co-branded with either Visa or MasterCard, which allows the card to be used abroad). Consequently, the restriction of competition caused by the measures in question affects a substantial part of the relevant market, whether or not the market is limited to CB payment cards alone.

3. The fee measures

The MERFA formula is fairly complex. A member of the Groupement must pay the MERFA fee if its share of the Groupement's total acquiring activity (the member's own ATMs and acquired merchants as a proportion of the total number of ATMs and merchants accepting CB cards in France) is less than half of its share of the Groupement's total issuing activity (the number of cards issued by the member as a proportion of the total number of CB cards).

For 'pure' issuers (i.e. Groupement members that issue CB cards without undertaking any acquiring activity, a situation not uncommon among 'new entrants') the MERFA amounts to €11 per card per year.

The other measures are as follows:

— The new membership fee per card is €12 for each new card issued during the first three years of membership.

— There is an additional membership fee of €12 per card if during its fourth, fifth and sixth years of membership a bank issues more than three times the number of cards it had issued at the end of the third year. The fee to be paid is based on one third of the difference between the two figures.

— There is also a 'dormant-members wake-up fee' of €12 per card over and above the number of cards exempt from the fee ([5]).

All in all, the Commission estimated that the fee measures could increase the yearly cardholder fee applied by new entrants (€28.50 on average) by 81% during the first year, by an average of 53% during the first three years and by an average of 48% during years 4 to 6.

4. The anticompetitive object of the measures

According to the Groupement, the purpose of the measures was twofold: (i) to encourage those members of the Groupement that are issuers rather than acquirers to develop their acquiring activities, and (ii) to give financial recognition to the efforts of the 'founding members' (the large banks that are members of the board of directors).

However, the Commission's investigation found that the MERFA does not actually encourage acquiring, as the acquiring market in France is almost entirely in the hands of the 'founding members', and there are very substantial barriers to entry:

— the fixed investment costs are very high;

— to develop acquiring in the manner required to avoid paying the MERFA, a bank would need to maintain a relationship with a large number of small retailers, as the MERFA was precisely designed so that the banks targeted by it could not avoid paying it by acquiring large-volume retailers such as hypermarkets; however, acquiring many small retailers is not feasible for on-line banks and the banking arms of large retailers, because they have no organised network of branches;

— the return on investment required to enter the acquiring market is uncertain, because the most profitable retailers and the most profitable locations for ATMs are already taken (mainly by the large banks).

The MERFA's alleged function of encouraging acquiring is also at odds with other interbank

([3]) Card issuing and merchant acquiring are interdependent activities, each being indispensable to the other and to the functioning of a payment card system; however, this in no way prevents issuing and acquiring from constituting separate markets.

([4]) The Groupement agreed that the relevant geographical market was France.

([5]) The number of cards exempt from the wake-up fee is calculated by a fairly complex mathematical formula.

charges applicable within the Groupement: some of the interchange fees *('commissions interbancaires')* paid on each transaction run counter to the MERFA by penalising acquiring and rewarding card issuing, and some of the other measures notified by the Groupement together with the MERFA — the additional membership fee and the dormant-members wake-up mechanism — penalise banks that issued 'too few' cards in the past.

According to the MERFA formula, banks must pay if their share of total acquiring in the Groupement is too small; but because the targeted banks cannot in practice develop the acquiring that 'counts' for MERFA purposes, they are forced to either:

— issue fewer CB cards (which decreases the competitive pressure on the large banks); or

— pay the MERFA, in which case the additional cost incurred prevents new entrants from charging the lower prices they had envisaged.

Many of the documents obtained during the on-site inspections show that the aim of the measures was to prevent competition from new entrants issuing cards at prices lower than those of the large French banks.

5. The anticompetitive effect of the measures

The measures had an impact both during the period before they were suspended (from 1 January 2003 to 8 June 2004) and after suspension, as they continued to have a stifling effect on the market ([6]). They would also have had effects if the suspension had been lifted.

The effects consisted mainly in reducing the number of cards issued and increasing costs, which prevented new entrants from charging prices as low as they had wished, and as they would have been able to charge in the absence of the measures. In consequence, the large banks on the Groupement's board of directors were exposed to less competitive pressure and card prices in France were maintained at higher levels than would have been the case with undistorted competition.

The Commission surveyed the prices charged and the number of cards issued by the new entrants and by the large French banks. The results confirm that the new entrants were not able to issue cards at the lower prices they had planned to charge (and which the large banks wished to render impossible), and that the new entrants did not issue as many cards as they had planned before the measures were adopted. The results likewise confirm that the large banks did not have to lower their prices in response to any competitive pressure on the part of the new entrants. Furthermore, the French market remained insulated because cross-border entrants were dissuaded from trying to penetrate it.

The additional costs were difficult to avoid, as (i) decisions to issue or acquire had to be taken before the bank could determine the threshold (in terms of ATMs installed or merchants acquired) that would enable it to escape the MERFA, (ii) the installation of ATMs is expensive and the most profitable locations are no longer available, and (iii) acquiring merchants is beyond the reach of new entrants.

6. The measures are not justified under Article 81(3) of the Treaty

6.1 Article 81(3), first condition: efficiency gains

The Groupement claimed that the measures produce two types of efficiency gains: first, the measures help to prevent new entrants from 'free-riding' on the investment made by the other members; second, they respond to the need to stimulate acquiring, which is more beneficial to the system overall (generating more 'positive externalities') than card issuing.

As regards the first argument, the Groupement does not show, however, what the alleged 'free-riding' consists of. In particular, it does not indicate whether the measures were intended to avoid 'free riding' on past investment or the danger of 'free riding' in the future. It also fails to quantify the scale of the problem (it provides figures without being able to clarify the underlying data or the method of calculation, and accepts that the figures include investment that has benefited the banks directly rather than the system as such). Moreover, the Groupement's line of argument lacks any dynamic perspective, ignoring for example that the new entrants also contribute to investment.

The second argument is not valid either. There is no justification for the assumption that acquiring merchants or installing ATMs is more valuable to the CB system than card issuing. The economic

([6]) This is because decisions taken before the measures were suspended (such as decisions to revise issuing plans downwards in order to escape the MERFA or reduce its impact) continued to produce effects after the suspension, and because the targeted banks, left in doubt and exposed to the danger that the Groupement might lift the suspension of the measures, opted as a precaution to continue issuing fewer cards.

studies carried out for the Groupement (concluding that acquiring generates more positive externalities than issuing, and that issuing is saturated while acquiring is not) are questionable (7), and the documents obtained in the course of the inspections show that card issuing is not saturated, while acquiring is already well-developed.

The Groupement has not shown that there is an economic need to encourage acquiring and discourage card issuing, nor has it shown that the MERFA is a mechanism that would meet such a need (8).

Therefore, not only has the Groupement failed to demonstrate the existence of any alleged free-riding, but the measures in any event reduce efficiency: the supply of cards is reduced because the MERFA is an incentive to issue less, not to acquire more.

6.2 Article 81(3), second condition: consumer benefit

The Commission decision shows that the second condition of Article 81(3) is not met either: consumers not only did not receive a fair share of any resulting benefits but, in addition, they directly suffered the anti-competitive effects of the measures in the form of a reduced number of payment cards at more affordable prices.

6.3 Article 81(3), third condition: indispensable to the attainment of the alleged efficiency gains

The third condition of Article 81(3) is also not satisfied. In defence of the measures, the Groupement contends that in France issuing is saturated and that merchant acquiring isn't. However, documents obtained during the on-site inspections prove the contrary, i.e. issuing is not saturated and acquiring is already highly developed. The same conclusion can be drawn from information in the public domain (9).

The Groupement also alleged that the measures are indispensable in order to avoid a 'risk of collapse' of the system, but did not produce any evidence for its claim. Other card payment systems are doing well without recourse to measures such as these.

7. Conclusion

This case highlights that card networks are not allowed to prevent internal competition by unduly adopting fees that maintain card prices at artificially high levels for consumers. In the present case, the large French banks used their privileged position within the Groupement to agree fee measures that would de facto apply to those members that wished to compete with them on price.

(7) (i) The model used by the Groupement is questionable, biased and unreliable, and is not suited to the analysis of a two-sided market; (ii) using different specifications (e.g. using lagged variables in the original regression) the Commission comes to contrary conclusions; and (iii) other payment card systems argue that issuing is as valuable to the system, if not more so, than acquiring.

(8) (i) The Groupement does not show why each member should be expected to conform to the same reference threshold, as required by the formula used to calculate the MERFA; (ii) the reference threshold suits the big banks, but is not necessarily the best for the system; (iii) in practice, the MERFA does not encourage issuers to acquire more merchants, for the reasons outlined above; and (iv) the regulatory function claimed runs counter to the functions of the other measures and of certain components of the interchange fees applied in France.

(9) Such as: (i) the figures in the European Central Bank's *ECB Blue Book 2005* (showing that the number of point-of-sale terminals per inhabitant is much higher in France than in the rest of the Eurozone, and that the average value per transaction is much lower) or (ii) the Groupement's magazine *CB Mag* (showing that the number of payment terminals per card is 161.3% higher in France than the average for 11 European countries).

Commission fines Visa International and Visa Europe for not admitting Morgan Stanley Bank as a member

Eduardo MARTÍNEZ RIVERO and Guillaume SCHWALL (1)

1. Overview

On 3 October 2007 the Commission fined Visa International and Visa Europe ('Visa') €10.2 million for refusing to admit Morgan Stanley Bank (2) (a UK bank) as a member of Visa Europe for more than six years, from March 2000 to September 2006 (3). The Commission took the view that Visa's behaviour constituted a serious infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

The case was initiated following a complaint submitted by Morgan Stanley in April 2000. In 1999, Morgan Stanley incorporated its bank in the UK and in 2000 the Morgan Stanley Bank sought to become a member of the Visa organisation, which Visa refused.

As a reason for refusing the membership of Morgan Stanley Bank, Visa relied on an internal rule whereby it would not accept as a member any applicant deemed by the board of directors to be a competitor of Visa ('the Rule').

At the time of the infringement, the Morgan Stanley group owned the Discover card network in the US (4). However, Discover was not present on the EU market. Until Visa finally admitted Morgan Stanley Bank as a member, the card operations of Morgan Stanley in the EU were confined to issuing MasterCard cards in the UK.

(1) Directorate-General for Competition, unit D-1. Mr Schwall is a former member of DG Competition staff. 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) Morgan Stanley Bank International Limited, formerly Morgan Stanley Dean Witter Bank Limited.

(3) Case COMP/D1/37860 http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_75.html#i37_860.

(4) The Decision relates to the period between April 2000 (the date on which the complaint was made) and September 2006 (the month in which Morgan Stanley Bank International Limited was admitted to the Visa network). On 1 June 2007, Morgan Stanley announced the spin-off of its credit and payments business division, Discover Financial Services. The credit card business assets in Morgan Stanley Bank International Limited were transferred to Goldfish Bank Limited, a newly incorporated company, on 1 June 2007. Morgan Stanley Card Services Limited changed its name to Goldfish Card Services Limited and became a wholly owned subsidiary of Goldfish Bank Limited in early June 2007. Both entities were spun off from Morgan Stanley on 30 June 2007.

In August 2004 the Commission sent a Statement of Objections to Visa, setting out the findings of its investigation. In December 2004 and July 2006 the Commission services informed Visa about certain new facts in the Commission file, and about the manner in which the Commission intended to use those elements.

The Commission's investigation showed that Morgan Stanley was not a competitor of Visa in the EU because it had no payment card network in the EU and — given the high entry barriers to the networks market — there was no realistic possibility that Discover, Morgan Stanley's US card network, would expand to the EU. The investigation also showed that retailers expect banks to offer card acceptance contracts as a package, including both Visa and MasterCard. Therefore, Visa's refusal to admit Morgan Stanley as a member restricted competition not only in the provision of Visa card acceptance services, but also as regards card acceptance of other brands. In the UK, the market for providing merchants with card acceptance capabilities (the so-called 'acquiring' market) is highly concentrated and there is scope for further competition, which Morgan Stanley could have helped bring about.

Visa finally concluded a settlement agreement with Morgan Stanley in September 2006, and admitted it as a Visa member. As a consequence, Morgan Stanley withdrew its complaint with the Commission.

Although the complaint was withdrawn and the infringement ceased, the Commission decided to impose a fine as Morgan Stanley was excluded from the UK acquiring market for six and a half years — including more than two years after the Commission had sent a Statement of Objections to Visa.

In the Decision, the focus is neither on the Rule in isolation nor on the exclusion of Morgan Stanley as such. The Commission's finding of anticompetitive behaviour relates to the Rule as it was applied to Morgan Stanley.

Beyond affecting an individual operator in the market, the importance of the case relates to the facts that (i) the Visa Rule applies throughout the EU; (ii) merchant acquiring is an economically significant activity that remains compartmentalised along national borders and is characterised by weak competition; and (iii) new entrants in the acquiring market are scarce, particularly those with pan-European potential like Morgan Stanley.

2. The relevant market

In the area of payment cards, a difference can be made between:

— a market for network services, in which card networks (such as Visa or MasterCard) provide services to individual financial institutions;

— an 'issuing market' in which card issuers compete with each other to issue cards and provide card-related services to individuals; and

— an 'acquiring market' in which banks provide merchants with the services necessary for the merchant to accept cards.

The Decision focuses on the downstream acquiring market only, where the restrictive effects on competition were appreciable. For the purposes of the Decision, the relevant product market is the market for the provision of credit and deferred debit/charge card acquiring services to merchants.

Cash and cheques are outside the relevant market as the product characteristics of services provided to merchants for the acceptance of payment cards are different from those for the acceptance of cash and cheques.

Debit cards are also outside the relevant market. From a merchant's perspective, accepting credit and deferred debit cards (also called 'charge' cards, where the customer must typically pay the outstanding amount at the end of the month) is significantly more expensive than accepting debit cards. Also, debit cards are not effective substitutes for credit and deferred debit/charge cards. While customers value the credit function of credit cards and expect to be able to pay with credit cards or debit cards indifferently, retailers would not switch from accepting one type of card to the other upon an increase in the respective merchant service charges ([5]); they prefer accepting credit cards in addition to debit cards rather than running the risk of missing a sale.

([5]) Merchant service charges (MSCs) are the fees merchants pay to their acquiring banks for the services provided by the banks.

In this case, it was unnecessary to further determine:

— whether deferred debit/charge cards constitute a market of their own or whether they form one market only together with credit cards. Given that in the United Kingdom the number of deferred debit/charge cards and their transaction volume and value are minimal compared to those of credit cards, any restriction of competition affecting credit cards that was appreciable would remain so in a market comprising both credit and charge cards rather than credit cards only;

— whether the market should be limited to certain credit and deferred debit/charge card brands — such as the Visa and MasterCard brands together, or even the Visa brand only, next to the MasterCard, Amex, Diners Club and JCB brands — because in the context of a narrower market (e.g. for Visa cards) the Rule — as applied to Morgan Stanley — would be all the more restrictive of competition.

Even if the market was broader than the market for the provision of credit and deferred debit/charge card acquiring services and comprised payment card acquiring services also for debit cards, the restriction of competition would still be appreciable in that broader market ([6]).

As regards the relevant geographic market, the Commission took the view that the conditions of competition in the acquiring markets are not yet sufficiently homogeneous between the different EEA Member States to conclude that the market is wider than national. The relevant geographic market was therefore limited to the UK.

3. Lack of realistic possibility of inter-brand competition and exclusion of an efficient potential acquirer

The Decision establishes that Visa's behaviour can be regarded either as a decision of an association of undertakings or as an agreement between undertakings caught by Article 81(1) of the Treaty, as Morgan Stanley was prevented by Visa from competing in the UK credit and deferred debit/charge card acquiring market and such behaviour of Visa had potential anticompetitive effects in that market.

([6]) In the UK, credit and deferred debit/charge cards represent 60% of all payment cards (i.e. 99.3 million out of a total of 166.1 million), 47% of the total value of card payments (i.e. €196 billion out of a total of €417 billion) and 37% of the total volume of card payments (i.e. 2.2 billion out of a total of 5.9 billion). Nearly all retailers that accept debit cards also accept credit cards (RBR Report 2006, UK section, and Commission case file).

More specifically, the Decision demonstrates that

(i) Morgan Stanley was not a competitor of Visa in the EU because it had no payment card network in the EU and it could not realistically enter as a card network in Europe by expanding its Discover system from North America to Europe. This is due to the existence of high entry barriers: network effects are very important in card systems, making it extremely difficult to introduce a successful system unless entry occurs from the start at a very large scale and heavy investments are made in order to reach that necessary minimum scale.

(ii) Exclusion from Visa membership results in Morgan Stanley's exclusion from the UK acquiring market altogether. Beyond the fact that Visa has market power because its transactions represent 60% of the market, the Decision found that retailers expect banks to offer card acceptance contracts as a package including both Visa and MasterCard. Therefore, Visa's refusal to admit Morgan Stanley as a member prevented Morgan Stanley from providing services to merchants not only as regards Visa transactions, but also as regards other payment cards transactions. That is, there is no demand for the supply of only MasterCard (or only Visa) card acquiring in the UK, and Morgan Stanley cannot therefore offer acquiring contracts for MasterCard only as it would not be commercially practicable.

(iii) The exclusion of Morgan Stanley from Visa membership and therefore from the merchant acquiring market in the UK had the result of depriving consumers of an additional efficient supplier of acquiring services. In the UK, the market for providing merchants with card acceptance capabilities (the 'acquiring' market) is highly concentrated and there is scope for further competition.

(iv) Morgan Stanley had the intention to enter the acquiring market (inter alia, it prepared detailed strategic and implementation plans for European merchant acquiring market entry). Within the very narrow circle of potential entrants, Morgan Stanley was one of the few operators to actually have envisaged entry, and had the necessary qualifications to operate efficiently on the market. Consequently, its exclusion had appreciable restrictive effects on competition, as Morgan Stanley's market entry could be reasonably expected to have contributed to more efficient intra-brand competition in the UK, and have positive effects on prices and the quality of acquiring services.

4. The application of the Rule to Morgan Stanley was not necessary for (or directly related to) the proper functioning of the Visa system

The application of the Rule to Morgan Stanley would not be caught by Article 81(1) of the Treaty/Article 53(1) of the EEA Agreement if it was directly related to and necessary (proportionate and non-discriminatory) for the proper functioning of Visa's payment card network. The Decision, after a detailed analysis, concludes that it is not.

First, the Rule was applied by Visa in an incoherent manner. Visa admitted as members Citigroup (that operates the proprietary Diners Club network) and several shareholders of JCB Co. Ltd, a Japanese credit card company.

Second, Visa's claims regarding the need to avoid 'free-riding' were not justified. Visa claimed that foreclosure of Morgan Stanley would not restrict competition as it would be indispensable to prevent free-riding of Morgan Stanley, consisting mainly in the use of Visa confidential information to the advantage of Morgan Stanley's Discover card network. Visa argued that no other less restrictive means — such as the conclusion of confidentiality undertakings by Morgan Stanley vis-à-vis Visa — would be available.

Evidence shows, however, that the information claimed by Visa to be confidential is already accessible to Morgan Stanley (or would have been accessible to it if Morgan Stanley acted under a 'fronting' arrangement (7), to which Visa claims not to object), or is specific to the Visa EU Region and therefore not relevant for Discover in North America. Moreover, the Decision demonstrates that this claim is unfounded as Visa finally admitted Morgan Stanley on 22 September 2006 subject to confidentiality undertakings.

(7) Acquiring banks often outsource certain elements of the acquiring service (usually related to transaction processing) to third-party providers. There are even several cases where banks have effectively withdrawn from the merchant acquiring business and act as a mere interface (or a 'front') between Visa and MasterCard and a third-party provider. In such cases it is the third-party provider who takes responsibility for virtually all aspects of an acquiring service and bears the risk with respect to the merchant's revenue stream. In order to comply with the scheme rules, the merchant contracts are generally tri-partite between the merchant, the third-party provider and the member bank. Such arrangements between a Visa/MasterCard member bank and a non-bank third-party provider are referred to as 'fronting arrangements'.

5. No exemption possible under Article 81(3)

The Commission did not find any indication that the Rule as it was applied to Morgan Stanley generated pro-competitive effects. The negative effects on the offer of acquiring services to merchants, innovation in the relevant market, and on Morgan Stanley itself, are therefore not outweighed by efficiencies.

Moreover, as explained above, there is no risk of free-riding by Morgan Stanley that would discourage existing members from investing in the system and thereby frustrate innovation and efficiencies.

Visa's admission of Morgan Stanley demonstrates that foreclosure of Morgan Stanley was not necessary and that admission was feasible in reality. It shows that there are less restrictive means of preventing a risk of free-riding (which, in addition, is not demonstrated in the case of Morgan Stanley) than outright refusal of membership, such as the conclusion of confidentiality undertakings.

6. The fine

The Commission imposed a fine of €10 200 000 on Visa International Service Association and Visa Europe Limited, for which they are jointly and severally liable. The infringement qualified as serious, in view of its nature ([8]), its actual impact on the market ([9]), and the size of the relevant geographic market ([10]). There were no aggravating or mitigating circumstances.

([8]) This type of infringement of Article 81 does not fall into the category of infringements that are generally regarded as very serious (price cartels and market sharing quotas).

([9]) The Visa brand is the most popular credit and deferred debit/charge card brand in the UK, and by not admitting Morgan Stanley as a member of Visa Europe, Visa prevented Morgan Stanley from acquiring merchants so that they could accept credit and deferred debit/charge cards altogether (not just Visa cards). As explained in the Decision (i) there is scope for further competition in the UK acquiring market; (ii) the number of potential efficient acquirers in the UK is extremely small; (iii) Morgan Stanley is a particularly well qualified potential acquirer in view of its long-standing experience (in merchant acquiring and processing in the US, in the operation of four-party networks through its MasterCard issuing activities in the UK, and in relation to Chip and PIN technology in the UK); and (iv) Morgan Stanley's entry could have had a positive impact on both the price and quality of acquiring services, and could have resulted in more efficient intra-brand competition. Beyond impeding the provision of acquiring services in the UK market by Morgan Stanley, Visa's behaviour impeded the operation of the more efficient and competitive market for merchant acquiring that Morgan Stanley could have helped bring about.

([10]) The relevant geographic market — the UK — is a major market for payment cards.

Commission launches sector inquiry into pharmaceuticals

Monica ALFARO MURCIA, Philipp GASPARON, Sune LARSEN, Harald MISCHE and Bertus VAN BARLINGEN (1)

On 15 January 2008, the Commission initiated an inquiry into the pharmaceutical sector. As a first step, the Commission undertook unannounced inspections at the premises of a number of pharmaceutical companies in the EU. It was supported by officials of the national competition authorities. The Commission inspected producers of innovative medicines as well as producers of generic medicines (2). This was the first time the Commission had launched a sector inquiry with unannounced inspections (3).

This article will briefly explain what a sector inquiry is, why the Commission has decided to open such an inquiry in the area of pharmaceuticals, what the scope of the inquiry is and how it will be conducted.

What is a sector inquiry?

The legal basis for a sector inquiry is Article 17 of Council Regulation (EC) No 1/2003 (4). This provision allows the Commission to open an inquiry into a particular sector of the economy *'[w]here the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market'*. The purpose of the inquiry is to look into such possible restrictions or distortions of competition and their possible causes, and, where appropriate, to suggest ways forward. These findings and recommendations will be set out in a final report. The final report is preceded by a preliminary report, to which actors in the sector concerned and the public at large can react.

The Commission conducts a sector inquiry using the normal investigatory instruments at its disposal: it may send requests for information, carry out inspections, and take statements (Articles 18-20 of Regulation 1/2003). It may also impose procedural fines where companies supply incorrect or misleading information in reply to a request for information, refuse to cooperate with an inspection, or break any seals affixed during the inspection (5).

The Commission uses the information obtained in the inquiry to better understand the sector from the point of view of competition policy. The Commission may then, should there be grounds for doing so, assess whether it needs to open specific investigations in addition to the sector inquiry to ensure respect for competition law or to see whether there is a need for competition advocacy.

The current sector inquiry into pharmaceuticals is not the first sector inquiry the Commission has launched. In recent years, the Commission has already conducted inquiries into sectors such as telecommunications, energy and financial services (6).

Reasons for the sector inquiry into pharmaceuticals

As Commissioner Kroes stated when she announced the initiation of the sector inquiry at a press conference on 16 January 2008: *'Individuals and governments want a strong pharmaceutical sector that delivers better products and value for money. But if innovative products are not being produced, and cheaper generic alternatives to existing products are being delayed, then we need to find out why and, if necessary, take action'* (7).

(1) Directorate-General for Competition, Task force — Pharmaceuticals Sector Inquiry. 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) Innovative medicines are newly discovered medicines for which the inventor enjoys patent protection. Such medicines are sold under their brand name. They compete with other medicines, whether innovative or generic, for the same therapeutic use. Generic medicines are basically copies of medicines for which the period of patent protection has expired. Generic medicines compete with one other and with the original innovative brand medicine. Each medicine, whether innovative or generic, requires a market authorisation before it can be put on the market.

(3) In this sector inquiry, upfront inspections were indispensable to ensure that the Commission had immediate and sufficient access to all relevant, highly sensitive business information. The kind of information the Commission will be examining, such as the underlying material relating to the use of intellectual property rights, litigation and settlement agreements covering Europe, is by its nature information that companies tend to consider highly confidential and which is at risk of being withheld, concealed or destroyed.

(4) OJ L1, 4.1.2003, p. 1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

(5) See Article 23 of Regulation 1/2003, see also the initiation of proceedings towards sanofi — aventis.

(6) See http://ec.europa.eu/competition/antitrust/sector_inquiries.html.

(7) Press release IP/08/49, 16.1.2008.

Ensuring vigorous competition in the pharmaceutical sector is important for several reasons: this sector is very close to the everyday life of Europe's citizens. Most of us will be using medicines at some stage in our lives. We all benefit from having the most modern medicines at our disposal. We also benefit from having value for our money when it comes to medicines for which patent protection has expired. In Europe, the pressure on health budgets, both public and private, is increasing. As Commissioner Kroes indicated, *'medicines cost us all a lot of money — we spend around 200 billion euros each year on pharmaceuticals; that's around 400 euros for every man, woman and child in the Member States of the European Union'* ([8]). The availability of novel medicines and the affordability of existing medicines are therefore key social objectives.

Moreover, the pharmaceutical industry is an important knowledge-based sector in the European industrial landscape. Europe has traditionally been a strong player in pharmaceuticals worldwide. In order for European companies to remain strong global players, vigorous competition must be ensured in Europe. This applies both to innovative and generic companies.

The Commission generally opens sector inquiries when it has indications that competition in the sector concerned may not be working as well as it could. This was also the case for pharmaceuticals. Over the last couple of years, through its own monitoring of the sector as well as through specific cases it has handled, the Commission has become concerned that competition in this sector may not be as intensive as it should be. With respect to innovative medicines, for instance, the Commission has noted that the number of such medicines reaching the market has decreased over time. From 1995-1999 an average of 40 novel products were launched per year. From 2000-2004 the figure was only 28 ([9]). The Commission intends to investigate the reasons for this and in particular whether any commercial practices that may be relevant under competition law could be the cause. The likelihood of generic products coming onto the market after patent expiry should in principle be a strong incentive for further innovation. But where companies owning so-called 'blockbusters' (medicines with an annual turnover of more than 1 billion US dollars) succeed in misusing procedures in favour of their blockbusters, the replacement of these products by newly developed medicines might also be delayed. The same could happen if a company succeeds in preventing competition to its blockbuster through patents that may unduly block product entry, or through possibly vexatious litigation. Such commercial practices are therefore key issues the sector inquiry will examine.

These concerns are not just theoretical, as, for example, the AstraZeneca case ([10]) shows: the Commission fined this company EUR 60 million for infringing Article 82 EC Treaty and Article 54 EEA by misusing public procedures and regulations in a number of EEA countries to exclude generic firms and parallel traders from competing against AstraZeneca's anti-ulcer product Losec.

Regarding generic medicines, the Commission has indications that the entry of such medicines onto the market has in some cases been delayed. Here too, the Commission will investigate whether this is in fact the case and, if so, what the possible causes are.

Scope of the sector inquiry

The sector inquiry concerns medicines for human consumption. In particular, this covers substances claimed to have properties for treating or preventing disease in human beings. These include all prescription medicines for humans. Veterinary medicines are outside the scope of the inquiry.

As already mentioned, the focus of this sector inquiry lies on the behaviour of companies, not on the regulatory or legal systems in place in the EU. The sector inquiry will focus on commercial practices, including patenting or the exercise of patents aiming not so much to protect innovation but to block innovative and/or generic competition, litigation that may be vexatious, and agreements that may be collusive, such as settlement agreements.

However, the commercial behaviour of companies is conditioned by the framework of regulatory and legal systems in place, and makes use of these systems. Not every use made of such systems is necessarily compatible with EU competition rules ([11]). In its inquiry, the Commission will take into consideration the scope for competition that exists within the current regulatory and legal systems.

The inquiry covers the entire territory of the European Union. Non-European companies whose activities affect trade in the European Union are covered by the inquiry, even if they are located outside the European Union.

([8]) Press release SPEECH/08/18, 16.1.2008.

([9]) See European Federation of Pharmaceutical Industries and Associations (EFPIA): The Pharmaceutical Industry in Figures, 2006 edition, page 7, on-line available at http://212.3.246.100/Objects/2/Files/infigures2006.pdf.

([10]) See the Commission's Decision of 15 June 2005, summarised in http://ec.europa.eu/competition/sectors/pharmaceuticals/astrazeneca.pdf. Press release IP/05/737, 15.6.2005.

([11]) See the AstraZeneca case mentioned above.

Conduct of the sector inquiry

In parallel to analysing the information gathered in the inspections in detail, the Commission sent out requests for information to all stakeholders in the sector.

Following the evaluation of all this information, a preliminary report will be published in the autumn of 2008. Reactions to that report from stakeholders in the sector and from the public at large will again be assessed, after which the publication of a final report is envisaged for the spring of 2009.

The Commission's sector inquiry into pharmaceuticals is now well under way. It offers an important opportunity to all actors in the sector and indeed to the public at large to make their views known to the Commission regarding any potential or actual competition problems they are aware of. If you wish to send information relating to this inquiry to the Commission, please do contact DG Competition (comp-sector-pharma@ec.europa.eu), indicating the reference COMP/TF/39.514 in your correspondence.

Recent cartel decisions

Josefine HEDERSTRÖM, Lars ALBATH and Chris MAYOCK (1)

In the period September to December 2007, the Commission adopted five cartel decisions and fined a number of undertakings a total of €1 318 million for their participation in cartels. The five decisions are *Fasteners* (2), *Bitumen Spain* (3), *Professional Videotape* (4), *Flat Glass* (5) and *Chloroprene Rubber* (6). Three of the cases, *Fasteners, Professional Videotape* and *Flat Glass,* were initiated by the Commission ex officio. In the three most recent decisions, *Professional Videotape, Flat Glass* and *Chloroprene Rubber,* the Commission applied for the first time its 2006 Guidelines on fines (7). The Commission has sent a signal that severe penalties are likely to be imposed on repeat offenders, cartel leaders and undertakings that obstruct the Commission's investigation.

Cartel proceedings initiated ex officio

The cartel decisions adopted between September and December 2007 clearly demonstrate that the Commission is committed to detecting and taking action against cartels also on an ex officio basis — without being prompted by an immunity applicant. Thus, in both *Fasteners* and *Professional Videotape* the Commission started the investigations on its own initiative on the basis of information in its possession. In the *Professional Videotape* case, surprise inspections took place in May 2001 at the premises of Sony's, Fuji's and Maxell's European subsidiaries. In the *Fasteners* case inspections were carried out at the premises of several Community producers of hard and soft haberdashery in November 2001.

The *Flat Glass* case demonstrates the benefits of enhanced cooperation between the Commission and the national competition authorities, as the Commission's investigation was triggered by information provided by the competition authorities of several Member States. Surprise inspections were carried out in February and March 2005 at the premises of Asahi's and Guardian's European subsidiaries, as well as at the premises of Pilkington, Saint-Gobain and the European Association of Flat Glass Producers.

In all three cases, the inspections prompted cartel members to subsequently apply for immunity or reduction of fines under the Commission's leniency programme.

Core aspects of the cartels

Products

The decisions covered cartels relating to various types of products, including products in everyday use purchased by a large number of consumers.

The *Fasteners* decision covered four different cartels. These related to various fasteners such as zips, snap buttons and rivets used in the leather and garment industries and also the machines attaching the fasteners.

The *Flat Glass* cartel covered four categories of unprocessed glass: float glass, low-emissivity glass, laminated glass and unprocessed mirror glass for use in buildings.

Chloroprene Rubber is a synthetic rubber capable of elastic deformation under stress and returning to its previous size without permanent deformation. It is mainly used in the rubber industry for the production of hoses, v-belts and power transmission belts, as adhesive in the shoe and furniture industry and as latex for the production of diving equipment, condoms and the inner soles of shoes.

(1) Directorate-General for Competition, Directorate G (Cartels). 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/39.168 *Hard haberdashery: fasteners* (not yet published), adopted on 19 September 2007. Case documents available on http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_168.

(3) Case COMP/38.710 *Bitumen Spain,* adopted on 3 October 2007. Case documents available on http://ec.europa.eu/competition/antitrust/cases/index/by_nr_77.html#i38_710.

(4) Case COMP/38.432 *Professional Videotape,* adopted on 20 November 2007. Case documents: http://ec.europa.eu/competition/antitrust/cases/index/by_nr_76.html#i38_432.

(5) Case COMP/39.165 *Flat Glass* (not yet published), adopted on 28 November 2007. Case documents available on http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_165.

(6) Case COMP/38.629 *Chloroprene rubber* (not yet published), adopted on 5 December 2007. Case documents available on http://ec.europa.eu/competition/antitrust/cases/index/by_nr_77.html#i38_629.

(7) 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.

The cartel in the *Bitumen Spain* decision covered bitumen used for road construction without further processing (penetration bitumen). Bitumen is a by-product obtained during the distillation of oil and is mainly used for the production of asphalt, where it serves as an adhesive to bind stones together.

The *Professional Videotape* cartel related to a sector in decline: videotapes used by TV stations and independent producers of TV programmes and advertising films.

Nature of the infringements

The Commission found the cartel activities in all cases to be very serious infringements of EC Treaty anti-trust rules. There were various arrangements, all of which constituted classic cartel behaviour such as price fixing, coordination of price increases, customer and market allocation, monitoring of implementation and exchange of sensitive commercial information.

Geographic scope and duration

The geographic scope of the infringements in the decisions varied. One cartel *(Bitumen Spain)* covered a single Member State, whereas in *Professional Videotape, Flat Glass* and *Chloroprene Rubber* the cartels covered the entire EEA. EU-wide infringements were found to have taken place for three of the cartels in the *Fasteners* decision. The fourth *Fasteners* cartel was world-wide.

The duration of the cartels also varied. The shortest cartel was the *Flat Glass* cartel (13 months). The cartel with the longest duration was one of the *Fasteners* cartels: between 1977 and 1998 Prym and Coats agreed to share the haberdashery market between themselves (a cartel lasting 21 years).

The fines

The Commission applied the 1998 Guidelines on fines ([8]) to calculate the fines in the *Fasteners* and *Bitumen Spain* decisions. *Professional Videotape* was the first Commission anti-trust decision where the Commission applied the 2006 Guidelines on fines, followed by the *Flat Glass* and *Chloroprene Rubber* decisions. In all cases reductions of fines were granted under the Leniency Notice to those undertakings which cooperated with the Commission in the establishment of the facts.

Under the new method in the 2006 Guidelines, the fines better reflect the overall economic significance of the infringement as well as the share of each company involved. The fines in the *Flat Glass* case (€487 million) mirror the size of the cartelised sector in that case ([9]). Although the infringement period was short (13 months), the fines were at the time of the adoption of the decision the fifth highest the Commission had ever imposed for a single infringement.

In applying both the 1998 and the 2006 Guidelines on fines the Commission penalised particularly reprehensible conduct. The Commission increased the fines for cartel leaders, for undertakings that hampered the Commission's investigation and for repeat offenders.

The decision in *Bitumen Spain* shows that cartel leaders are likely to have the level of their fines increased; the Commission increased the fines by 30% for Repsol and Proas (a subsidiary of Cepsa) for their leading role.

By increasing the fine for Sony by 30% in the *Professional Videotape* case, the Commission is sending a clear message that it does not tolerate companies hampering its investigations and that it will impose severe penalties for obstruction. During the inspection a Sony employee refused to answer oral questions asked by the Commission's inspector, in breach of Sony's obligation to answer. Another Sony employee was found to have shredded documents during the inspection.

The fines for ENI and Bayer were increased by 60% and 50% respectively in *Chloroprene Rubber* because they had already been fined several times for cartel activities in previous Commission decisions. Competition Commissioner Neelie Kroes commented: *'It is particularly disappointing that the rubber industry has still not learned its lessons about avoiding cartels. I find it very difficult to understand how shareholders and board members can tolerate such illegal behaviour.'*

([8]) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ C 9, 14.1.1998, pp. 3–5.

([9]) In the Flat Glass case, the total sales (to independent customers) in the EEA of the products concerned amounted to €1 700 million in 2004. The combined share of the cartel members was 80 percent.

Mergers: Main developments between 1 September and 31 December 2007

Mary LOUGHRAN and John GATTI (1)

The number of notifications received in the four months from September to December was, at 110, considerably lower than the record of 170 set in the previous four-month period. However, the number of decisions adopted set a new, slightly higher, record of 146. Of these, 130 were decisions under Article 6(1)(b). The Commission adopted 82 decisions (or 63% of all unconditional clearances) according to the simplified procedure during the period. The Commission also adopted 12 conditional clearances in phase I (under Article 6(2)). Three cases were cleared unconditionally under Article 8(1) after a phase II investigation. And one other was cleared subject to conditions (Article 8(2)). Finally, the Commission initiated 8 second-phase proceedings in the period (Article 6(1)(c)).

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

SCA/Procter and Gamble European Tissue Business

On 6 September the Commission approved the proposed acquisition of the European tissue business of the US company Procter & Gamble by Sweden's SCA. The Commission's decision was subject to the fulfilment of certain commitments concerning divestment of SCA's *Softis* brand handkerchief/facials business (2).

Both companies are major suppliers of tissue paper products. SCA is a Swedish company active in the personal care sector across Europe. In the consumer tissue sector, SCA supplies toilet paper, household towels and handkerchiefs/facials. SCA's main brands include *Edet, Softis, Velvet* and *Zewa*. Procter & Gamble's European tissue business (P&G ECT) is a division of Procter and Gamble plc (P&G) which supplies toilet paper, household towels and handkerchiefs/facials in Europe. Its main brands are *Bounty, Charmin, Tempo, Bluemia* and *Bess*. In addition to their own brands, SCA and, to a lesser extent, P&G ECT also produce and supply tissue paper products for private labels (i.e. products marketed under the retailers' brands).

The Commission found that the two categories of products (branded and private labels) were sourced separately by retailers, through bilateral negotiations for brands and through tenders for private labels, but were displayed next to each other on supermarket shelves. Therefore, while the Commission found that branded and private-label consumer tissue products constituted separate product markets at the supply level, the competitive interaction between branded products and private labels proved crucial for the assessment of the case at the downstream retail level.

The Commission's market investigation indicated that private labels play an increasingly important role in the tissue sector across the whole of Europe. Compared to branded products, their share of retail sales is consistently around 50% across Europe and this share is still growing.

The main overlaps between the parties' activities occurred on the markets for the production and supply of branded toilet paper, household towels and handkerchiefs/facials supplied to German and Austrian retailers. The Commission found that in the sector for branded toilet paper and household towels the parties were under intense competitive pressure from private labels. Consequently, despite high market shares on these markets, the Commission concluded that the new entity would not be able to exert market power or increase wholesale prices. However, the Commission came to a different conclusion regarding the production and supply of branded handkerchiefs/facials in Austria and Germany. The proposed concentration, as initially notified, would have combined the two major brands on the Austrian and German market for handkerchiefs/facials (P&G's *Tempo* and SCA's *Softis*), leading to extremely high market shares and less competition. As consumers are more likely to buy a particular brand of handkerchief or facial wipe as compared to toilet paper and household towels, private labels would not have exerted a sufficiently strong competitive constraint on the parties' brands.

To remove the competitive concerns identified by the Commission, SCA agreed to divest its handkerchief/facial brand *Softis* in Germany and

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

(2) COMP/M.4533. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m90.html#m_4533.

Austria, along with production facilities, converting lines and sales and marketing personnel, at the option of the candidate purchaser. In addition, with a view to taking into account comments put forward by third parties in the framework of the market test of the remedies, SCA also committed to divest, at the option of the candidate purchaser, the *Softis* handkerchief/facial brand in all other countries where SCA is active.

Yara/Kemira GrowHow

On 21 September the Commission cleared the proposed acquisition of Finnish mineral fertiliser producer Kemira GrowHow by Yara of Norway, also a fertiliser company, subject to commitments ([3]).

Yara International ASA is active in the manufacture of mineral fertilisers as well as the production and supply of certain nitrogen-based chemicals. Until 2004 Yara belonged to Norsk Hydro. Kemira GrowHow is also active in the production and sale of mineral fertilisers as well as chemical products associated with fertiliser manufacturing.

The Commission's examination of the proposed deal focused on the EEA markets for mineral field and water-soluble fertilisers and the distribution of these products in national markets. The decision also assessed the markets for certain chemical by-products. The investigation identified serious competition concerns relating to the fertiliser distribution markets in Denmark and Latvia, the market for liquid carbon dioxide (CO_2) in the UK, the markets for weak nitric acid, AN Solution and aqueous ammonia in north-western Europe and in the Nordic countries and the market for concentrated nitric acid in western Europe.

The commitments offered by the acquirer Yara allayed the Commission's concerns as regards these markets as they would lead to reduced market presence and the creation of alternative sources of supply for customers. The commitments included pulling out of distribution joint ventures for mineral fertilisers, selling a CO_2 liquefaction unit in the UK, and selling certain production facilities at Kemira GrowHow's plant in Tertre, Belgium and Yara's plant in Köping, Sweden, as well as providing access to the necessary process chemicals to maintain and expand the output of the divested facilities.

([3]) Case COMP/M.4730. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m94.html#m_4730.

Fortis/ABN AMRO

On 3 October the Commission cleared the proposed acquisition of certain assets of the Dutch banking group ABN AMRO by the Belgo-Dutch financial services group Fortis. The Commission's decision was granted subject to the upfront divestiture of ABN AMRO's Dutch factoring subsidiary and part of its commercial banking business in the Netherlands ([4]).

Fortis has activities in banking, insurance and related services, such as asset management, leasing and factoring. Fortis' operations are centred, in particular, in Belgium and the Netherlands, with additional presence in other Member States, Asia and the United States. ABN AMRO is an international banking group active worldwide in four principal customer segments: personal banking, private banking, business and commercial clients and corporate and institutional clients. In the EEA, ABN AMRO is predominantly active in the Netherlands.

On 29 May, a consortium formed by RBS, Fortis and Santander announced a bid for ABN AMRO's entire share capital. If the bid were successful, it would lead to the break-up of the ABN AMRO assets among the three banks. The consortium's operation is considered to give rise to three different proposed concentrations. This decision refers to the merger that would result from the acquisition by Fortis of certain ABN AMRO assets. RBS' and Santander's proposed acquisitions of the remaining ABN assets were authorised by the Commission in its decisions of 19 September.

Under the terms of the proposed bid, Fortis would acquire ABN AMRO's Business Unit Netherlands (except former Dutch wholesale clients), Business Unit Private Clients and Business Unit Asset Management. Fortis' activities and the ABN AMRO assets to be acquired mainly overlap in the Netherlands in the markets of commercial banking and factoring, retail banking and payment services and to a lesser degree in leasing, asset management, financial market services, and insurance.

In commercial banking, the proposed merger would combine the first and fourth largest banks in the Dutch market, which is already concentrated. The Commission had concerns that as a result of the transaction corporate customers with a turnover of €2.5 million to €250 million would face less competition between banks.

([4]) COMP/M.4844. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m96.html#m_4844. See also the article on this case on page 27.

To address the Commission's concerns, Fortis committed to divest a corporate banking business, consisting of Hollandsche Bank Unie N.V. (HBU), two corporate client departments, 13 'Advieskantoren' and ABN AMRO's Dutch factoring activities to a large international bank. The divested business is larger than Fortis' corporate banking activities in the Netherlands. Fortis also agreed, under certain conditions, to give the purchaser the option to buy or lease any 'advieskantoor' that Fortis would have otherwise closed within a specified period. Fortis can only acquire control over ABN AMRO's Business Unit Netherlands and Business Unit Private Clients after having closed the sale of the divestment business to a suitable purchaser.

In factoring, the Commission also had serious doubts that corporate customers would have sufficient competitive choices. However, the divestiture of ABN's factoring subsidiary, IFN Finance BV, would remove the overlap caused by the proposed transaction.

Schering-Plough/Organon BioSciences

On 11 October the Commission cleared the proposed acquisition of Organon BS of the Netherlands, a subsidiary of Akzo Nobel active worldwide in human and animal health, by the global pharmaceutical company Schering-Plough Corporation of the US, subject to conditions (5). The Commission found that the proposed transaction as initially notified would have given rise to competition concerns in twelve product areas and more than thirty relevant national markets. To address the Commission's concerns, SP offered to divest the overlapping activities in all the markets raising serious doubts.

Schering-Plough is a global healthcare company. Organon BS is the holding company for the human and animal healthcare activities of Akzo Nobel. It consists of two operating units — Organon International BV, the human pharmaceutical business; and Intervet International BV, the animal health business.

The Commission's investigation revealed that the proposed transaction would not significantly modify the structure of the human health markets concerned and that a number of credible alternative competitors would continue to exercise competitive constraint on the merged entity.

As regards veterinary products, the Commission found that the proposed transaction, as initially notified, could raise competition concerns in a number of national markets in five vaccine areas — swine E. Coli, equine influenza and tetanus, ruminant neonatal diarrhoea, ruminant clostridia, multi-species rabies — and seven pharmaceutical areas, namely endocrines for reproductive use, insulin, antibiotics/sulphonamides, antibiotics/intra-mammary mastitis treatment, euthanasia, parasiticides and anti-inflammatories. In all the markets where the Commission identified competition concerns the transaction would lead to very high combined market shares or even a monopoly situation. In a number of instances the investigation also revealed that the products offered by the parties were the closest substitutes for each other.

To resolve these competitive concerns, Schering-Plough proposed to divest more than twenty formulations and trademarks covering the whole of the EEA. The divestitures consist of the sale of the relevant assets for the manufacture and sale of the products concerned. These assets include goods and inventory, marketing authorisations, trademarks, intellectual property rights and know-how. Following the market testing, the Commission concluded that the businesses would be viable and that their divestiture would resolve all identified competition concerns.

Egmont/Bonnier Danish books

On 15 October the Commission cleared the proposed acquisition of the Danish book publishing company Bonnier Forlagene A/S, belonging to the Swedish media group Bonnier, by Egmont of Denmark, also a media group (6). The Commission's clearance was granted subject to the commitment by the parties to modify the proposed transaction so that Egmont would not acquire the Danish strip cartoon business of Bonnier.

Egmont is a media group active in a variety of areas, including book publishing, especially in Scandinavia. The Bonnier group is active in more than twenty countries with a particular focus on northern Europe. Its Danish subsidiary — Bonnier Forlagene A/S, comprising six publishing houses and a book club chain — is active as a book publisher in Denmark.

The Commission reviewed the competitive effects of the proposed concentration at each level of the economic chain of the book sector in Denmark, that is, the acquisition of publishing rights, the distribution of books, the sale of books to dealers and the sale of books to final consumers. It also

(5) COMP/M.4691. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m93.html#m_4691.

(6) COMP/M.4611. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m92.html#m_4611.

looked at each different book category — general literature (hardback and paperback), children's books, factual prose (including reference works), and strip cartoons.

The Commission's market investigation revealed that the proposed operation would significantly reduce competition in the Danish market for the sale of strip cartoon books to dealers, where Bonnier and Egmont are by far the two leading suppliers. Thus, the Commission considered that the proposed transaction, as initially notified, was likely to weaken competition and therefore raised serious doubts as to its compatibility with the single market.

With a view to removing these concerns, the parties modified the proposed transaction so that Egmont would not acquire the Danish strip cartoon business of Bonnier. The parties also agreed to exclude strip cartoons publications from the scope of the sales agreement.

After market testing these commitments, the Commission concluded that they were suitable to solve the competition concerns raised by the transaction.

Imperial Tobacco/Altadis S.A.

On 18 October the Commission cleared the proposed acquisition of the Franco-Spanish company Altadis by Imperial Tobacco of the UK [7]. The Commission's decision is conditional on the divestment of a number of tobacco brands in certain national markets for roll-your-own tobacco, pipe tobacco and cigars where the Commission identified competition concerns.

Imperial Tobacco Group plc is a manufacturer and distributor of a range of tobacco products including cigarettes, roll-your-own tobacco and cigarette papers, pipe tobacco and factory-made cigars in more than 130 countries worldwide. Its portfolio includes the cigarette brand West, the roll-your-own tobacco brands *Drum, Golden Virginia* and *Van Nelle,* and *Rizla* cigarette papers. Altadis S.A. is active in the manufacture and sale of tobacco products worldwide, including cigarettes and cigars. Its origins are in the former French and Spanish tobacco monopolies, Seita and Tabacalera, and its main cigarette brands include *Gauloises, Fortuna, Ducados* and *Gitanes.* In cigars, Altadis produces both factory-made and hand-made cigars. Altadis has a large market share in hand-made Cuban cigars following its acquisition in 2000 of a 50% interest in Corporación Habanos.

Altadis also provides logistic services for tobacco products and other goods in France, Italy, Morocco, Portugal and Spain. Together with the Italian company Autogrill, Altadis jointly controls Aldeasa S.A., which operates retail outlets primarily in airports.

The Commission concluded that the proposed transaction would not raise concerns in the cigarette market. The Commission's investigation confirmed that the horizontal overlaps between the activities of Altadis and Imperial in the cigarette market are generally limited and that the new entity would continue to face competition from several strong, effective competitors such as Philip Morris International, BAT and Japan Tobacco, which acquired Gallaher earlier this year.

The Commission's investigation did, however, find competition concerns in several markets for other tobacco products where the merged entity would have significant market shares.

These markets are for roll-your-own tobacco in France, Italy, Portugal and Spain; for pipe tobacco in Finland and France; and for cigars in Greece. In each case, Imperial offered to divest one or more brands to address the competition concerns identified by the Commission. The divestment of these brands meant that there would be no increment in market share as a result of the proposed transaction.

The Commission also examined the potential effects of the merger on other tobacco manufacturers in the light of Altadis' very strong position in the wholesale distribution of tobacco products in France, Italy and Spain. The Commission concluded that the merged entity would have neither the ability nor the incentive to restrict its competitors' access to its distribution channels and that the merger would have no negative impact on the final consumer as in any case distribution costs account for a small share of the final retail price of tobacco products.

The Commission also concluded that the proposed transaction would not restrict tobacco competitors' access to Aldeasa's retail outlets as this would not be in the interest of Autogrill, the other partner in the joint venture.

Antalis/MAP

On 24 October the Commission cleared the proposed acquisition of the Dutch paper merchant MAP, belonging to the Finnish M-Real group, by the French paper merchant Antalis. The Commis-

(7) COMP/M.4581. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m91.html#m_4581.

sion's clearance was granted subject to the parties' undertaking to divest the UK paper merchant Premier, currently a subsidiary of MAP ([8]).

Antalis is active in the distribution of fine paper in most EEA countries. MAP is also active in the distribution of paper in many EEA countries. The Commission reviewed the competitive effects of the proposed takeover in each European market in which both Antalis and MAP are currently active. The market investigation revealed that the proposed operation, as initially notified, would significantly reduce competition in the UK paper distribution market, where there are two major players with comparable market shares accounting together for about 75% of the market.

In order to remove these concerns, the parties undertook to divest paper merchant Premier, one of MAP's subsidiaries in the UK, which is equivalent in size to the UK operations of Antalis. The parties also undertook to offer the purchaser of Premier the possibility to enter into a logistic service contract with Antalis UK's logistics arm, gm2, in addition to acquiring Premier's own logistic capabilities.

After market testing these commitments the Commission concluded that they would resolve the competition concerns raised by the proposed transaction.

Owens Corning/Saint Gobain Vitrotex

On 24 October the Commission cleared the proposed acquisition of the glass-fibre reinforcements and composite fabrics businesses ('Vitrotex') of the French Compagnie de Saint-Gobain (Saint Gobain) by Owens Corning of the US. Approval was granted subject to the divestment of two facilities producing certain types of glass-fibre reinforcements for which it had identified competition concerns ([9]).

Owens Corning is a company active worldwide in the production and sale of glass-fibre reinforcements, composite fabrics and building materials. Saint-Gobain, through Vitrotex, is active worldwide in the manufacture and sale of glass-fibre reinforcements and composite fabrics. Glass-fibre reinforcements are intermediate products which, combined with resins, form compounds used in the construction, automotive and electronics sectors. Composite fabrics, made of glass-fibre reinforcements, are used to produce high-strength composite applications such as shipping containers, ballistic armour and wind generator blades.

The Commission examined the competitive effects of the proposed concentration in the various markets for glass-fibre reinforcements in Europe, with special reference to direct and assembled rovings, dry-use chopped strands, wet-use chopped strands, chopped-strand mat and continuous-filament mat markets, as well as the composite fabrics market.

The Commission's market investigation revealed that the proposed operation, as initially notified, would raise competition concerns in Europe on the markets for direct rovings and dry-use chopped strands, where the concentration would create a market leader significantly stronger than the largest competitors, and also on the continuous-filament mat market, where the transaction could lead to the creation of a monopoly.

With a view to removing these concerns, the parties offered to divest two of Owens Corning's glass-fibre reinforcements plants located in Battice, Belgium and in Birkeland, Norway. As a result of these divestitures, the overlap created by the proposed transaction will be removed on the markets where competition concerns had been raised. Following a market test of the proposed commitments, the Commission concluded that they would resolve the competition concerns.

Danone/Numico

On 31 October the Commission approved the proposed acquisition of the Dutch company Numico by the French group Danone. Both companies are major suppliers of baby food and baby milk products. Approval was granted subject to the divestment of Numico's baby milk and baby drink business in France, Danone's baby meals, baby milk, baby snacks and baby drink activities in Belgium, and Danone's baby meal and baby snacks activities in the Netherlands ([10]).

Danone is a worldwide company organised around two core activities, bottled water and fresh dairy products. Numico is a company specialised in the manufacture and distribution of baby food and clinical nutrition.

The Commission examined the competitive effects of the proposed merger in the baby food and baby milk markets. It had serious doubts as to the compatibility of the proposed transaction, as initially notified, as regards the infant formula and follow-

([8]) COMP/M.4753. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m95.html#m_4753.

([9]) COMP/M.4828. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m96.html#m_4828.

([10]) COMP/M.4842. Documents available on http://ec.europa.eu/comm/competition/mergers/cases/index/m96.html#m_4842.

on milks and baby drink markets in France, the baby meal, baby growing-up milks, baby snacks and baby drinks markets in Belgium, and on the baby meal and baby snack markets in the Netherlands.

In France, the main overlap of activities occurred on the market for infant milk, where Danone's and Nestlé's leading positions are disputed by Numico with its brands Nutricia and Milupa. The Commission's market investigation suggested that Numico had played an important role in making the market competitive, in terms of both keeping prices down and introducing innovative products. A similar conclusion was reached for the baby drinks market.

As regards Belgium, the market investigation showed that Danone and Numico were face-to-face competitors on the baby meal market, and the proposed takeover as notified would have significantly weakened competition. Furthermore, Numico is a strong player on the growing-up milk and baby drink markets, and a combination of Numico and Danone would also have harmed competition on these markets. The same conclusion was reached for the market for baby snacks, where Danone's sales (e.g. with the brand *Betterfood*) represent more than half of the total market.

With respect to the Netherlands, the proposed deal as notified would have removed one of the few competitors to Numico on the baby meal market, whereas its effect on the baby snack market would have been similar to that in Belgium.

To address the Commission's serious doubts as to the compatibility of the proposed transaction with the single market, Danone committed among other things to divest the Numico baby milk business in France, consisting of the assignment and licensing of brands, an optional production facility, and the transfer of the necessary know-how and personnel. As regards the Belgian and Dutch markets for which the Commission raised serious doubts, Danone offered a package including the licensing of its brand *Blédina*.

The Commission analysed the undertakings submitted by Danone and, in the light of the comments made by third parties, concluded that they would remedy the serious doubts and so ensure that effective competition was not impeded as a result of the takeover.

Deutsche Bahn/English Welsh & Scottish Railway Holdings

On 7 November the Commission cleared the proposed acquisition of English Welsh & Scottish Railway Holdings (EWS) by Deutsche Bahn (DB). The Commission's decision was subject to DB's undertaking to fulfil EWS' expansion plans and to provide non-discriminatory access to certain EWS training activities and maintenance facilities in France ([11]).

DB is a state-owned German-based railway company engaged, *inter alia,* in rail passenger and freight transport (through its subsidiary 'Railion') in Germany, Italy, the Netherlands and Denmark, as well as in freight forwarding (by all modes of transport), logistics and ancillary services worldwide (*inter alia* through its subsidiary 'Schenker'). EWS is the successor of the freight business of the former UK national rail monopoly. EWS is active in rail freight transport and related services in the UK and recently, through its subsidiary, in France. EWS also provides rail freight transport services through the Channel Tunnel.

Despite the lack of overlap in the parties' rail freight transport activities in any geographic market, the Commission had concerns that the proposed transaction, as initially notified, might result in France in weakening of the competitive constraint exercised by EWS, a new entrant in the French market. This concern was based on the consideration that DB may not have the same incentives to pursue the rail freight transport business in France with the same intensity as EWS would in the absence of the merger.

To address the Commission's concerns, DB committed to fulfil EWS's expansion plans in France in the next five years through investments in key assets (locomotives) and personnel as set out in the EWS Business Plan and to deploy these in France. As an additional guarantee of maintaining competition in this market, DB undertook to provide fair and non-discriminatory access to EWS Driver Training Schools and maintenance facilities in France for all third-party rail operators (except SNCF, the French incumbent), thereby lowering these potential barriers to entry and expansion for companies wishing to enter the French rail freight market.

Kraft/Danone Biscuits

On 9 November the Commission approved the proposed acquisition of the worldwide biscuits, snacks and cereals business of Danone of France by the US-based company Kraft. The Commis-

([11]) COMP/M.4746. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m94.html#m_4746.

sion's decision was granted subject to the divestiture of a range of Spanish biscuit brands, a plant in Spain and a Hungarian chocolate bar brand ([12]).

Kraft is active worldwide in the manufacture and sale of packaged foods and beverages, in particular snacks, beverages, cheese and dairy products, coffee, chocolate confectionary and biscuits. Danone Biscuits is the global biscuits, snacks and cereals business of the French company Danone. The proposed transaction affected only certain Member States where both parties sell biscuits and chocolate confectionary.

As regards biscuits, Danone Biscuits is active in the whole of Europe with its umbrella brand *LU* as well as other international brands. Kraft sells biscuits primarily in Iberia under the *Fontaneda* and *Artiach* brands. The Commission's market investigation revealed that the proposed acquisition, as initially notified, could have significantly reduced competition as regards the Spanish market for sweet biscuits. The Commission found in particular that the merged entity would be the market leader with by far the largest portfolio of must-have brands and would become an unavoidable trading partner for retailers.

Concerning chocolate confectionary, Danone Biscuits' products include only chocolate bars sold under national brands: *Cha-cha* in Belgium, *Tatranky, Horalky* and *Fidorka* in the Czech Republic and Slovakia and *Balaton* in Hungary. In turn, Kraft sells chocolate confectionary in various formats throughout the EEA under a range of international brands: *Milka, Côte d'Or, Toblerone, Suchard* and certain local brands. The original transaction would have created a market leader combining a range of strong brands from both parent companies and would have threatened to impede effective competition in the Hungarian market for chocolate bars.

To address the Commission's serious doubts as to the compatibility of the proposed transaction with the single market, Kraft made the commitment to divest a range of Spanish biscuit brands, including *Artiach, Chiquilin, Filipinos* and *Marbú Dorada* and one of its production plants in Spain. With regard to Hungary, Kraft undertook to divest the *Balaton* brand. After market testing these commitments, the Commission concluded that they would be suitable to remedy the serious doubts.

([12]) COMP/M.4824. Documents available on http://ec.europa.eu/comm/competition/mergers/cases/index/m96.html#m_4824.

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

Sony/BMG

In October the Commission granted regulatory approval to the creation of Sony BMG, a joint venture combining the recorded music businesses of Sony and Bertelsmann, after concluding that it did not have sufficiently strong evidence to oppose the deal ([13]).

In January 2004, the Commission received a notification whereby Sony Corporation and Bertelsmann AG (BMG) would merge their recorded music businesses into a 50/50 joint venture named Sony BMG. The transaction was originally cleared after second-phase investigation in July 2004. This decision was annulled by the Court of First Instance in July 2006. Following the annulment the case was renotified in January 2007.

The transaction combined the companies' activities in the discovery and development of artists and the recording and marketing of their music. It did not include their activities in music publishing or the manufacture and physical distribution of records.

The Commission assessed the merger carefully as it reduces the number of so-called music majors from five to four without, however, giving Sony BMG the number one spot in Europe which continues to be held by Universal. Therefore, the Commission sought to establish whether the deal could create or strengthen a collectively-held dominant position between Sony BMG, Universal, EMI and Warner Music, the other main players in the music industry.

The Commission focused its attention particularly on the markets for recorded music. Analysis of a large amount of price data and third-party submissions in the recorded music markets countries indicated relatively close price parallelism for CDs released by the five majors in some countries as well as features that could facilitate tacit collusion. On balance, however, the Commission had to conclude that the evidence found was not sufficient to satisfactorily demonstrate either that coordinated pricing behaviour had existed in the past or that a reduction from five to four major recording companies would create a collectively-held dominant position in the national markets for recorded music in the future.

([13]) COMP/M.3333. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m66.html#m_3333.

The Commission also examined the merger's impact in the emerging markets for online music licences and for online music distribution, but concluded that the operation would not lead to serious competition problems. It reached the same conclusion in relation to its examination of the vertical relationships between Sony BMG's recorded music and Bertelsmann's downstream TV and radio activities in Germany, France, Belgium, Luxembourg and the Netherlands.

Syniverse/BSG

In December the Commission decided to clear the acquisition by the US technology group Syniverse of the BSG Group's wireless business, providing data and financial clearing services to wireless telecommunication companies around the world. The Commission's investigation had shown that the acquisition would be unlikely to result in competition concerns in the market for the provision of GSM roaming data clearing services ([14]).

Syniverse is a global provider of technology services to wireless telecommunications companies. The BSG Group is a global provider of payment processing, data clearing, and financial settlement and risk management solutions for fixed-line and wireless communication service providers. The proposed transaction relates only to the acquisition of the BSG Group's wireless business, mainly providing data and financial clearing services to mobile network operators (MNOs). The activities of Syniverse and of the BSG Group's wireless business overlap only in the market for GSM roaming data clearing services. With these services, data clearing houses provide for the exchange of roaming data between MNOs, allowing roaming services provided to be billed to end–users.

The proposed transaction reduced the number of competitors active in Europe in the market for clearing services for roaming data from three to two. However, the Commission's in-depth investigation revealed that Syniverse had not exerted strong competitive pressure on BSG's prices; that switching between BSG and Syniverse had been very rare; and that both BSG and Syniverse had faced strong competition from the market leader Mach. It was therefore likely that the combined Syniverse/BSG would be in strong competition with Mach in the future.

Furthermore, other data clearing companies, not yet active in Europe, would have the possibility to provide such services to European MNOs as there were no capacity constraints and several MNOs clearly consider them as credible bidders. In addition, technological developments may give other players, in particular providers of software for the billing of roaming services, the ability and incentive to enter the market for data clearing services. The Commission's market investigation also showed that MNOs would remain sufficiently strong to resist unilateral price increases by the merged entity, in particular by sponsoring the entry of new competitors.

The in-depth market investigation also confirmed that the reduction in the number of currently active data clearing service providers operating in Europe would be unlikely to result in the coordination of competitive behaviour between the remaining service providers. In particular, the dynamic nature of the market and the tendering process, which customers predominantly use for procuring these services, would limit the transparency of the market and thus the possibility of monitoring any coordination of prices or other market conditions. New contracts come up relatively infrequently, thus making retaliation against competitors relatively difficult. Furthermore, new entrants would most likely jeopardise the outcome of any potential coordination of competitive behaviour.

AEE/Lentjes

Also in December the Commission cleared the acquisition of Lentjes GmbH of Germany by Energy & Environment AG & Co KG (AEE), which is part of the Austrian A-Tec group ([15]). Both AEE and Lentjes are active in engineering and supplying a range of energy and fired waste-to-energy plants for incinerating municipal waste, plants based on so-called 'fluidised bed technology' (used for example for burning coal or sludge) and systems for the desulphurisation of the flue gases resulting from the burning process.

The Commission opened an in-depth investigation because it had serious doubts as to the compatibility of the proposed transaction with the single market in relation to grate-fired waste-to-energy plants for incinerating municipal waste. The Commission was also concerned that the merger could lead to supply problems for competitors in the market for plants based on fluidised bed technology, since Lentjes appeared to be one of the few suppliers of a flue gas desulphurisation technology specific to such plants.

After its in-depth investigation the Commission concluded that the transaction would not signifi-

([14]) COMP/M.3555. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m71.html#m_3555.

([15]) COMP/M.4647. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m92.html#m_4647.

cantly impede effective competition in the area of waste-to-energy plants. In particular, a detailed analysis of bids in Europe over the past five years showed that a number of effective competitors would remain in this market and that customers would continue to have a number of options when selecting their suppliers. The investigation also revealed that significant competitive constraint from suppliers tendering for parts of a plant (lots) would continue to exist, because a number of engineering companies are providing services to assist customers in unbundling turnkey projects into lots.

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

Kronospan/Constantia

In September the Commission cleared the acquisition of part of the raw and coated particle board business of Constantia Industries AG of Austria by Kronospan Holding GmbH of Germany, a member of the Kronospan Group. Both companies are active in the manufacture and supply of wood-based products, in particular raw and coated particle board, decorative laminates and components, all of which are used in the furniture industry ([16]).

Raw particle board is used to make furniture, e.g. upholstered furniture, shelves or worktops. Coated particle board is raw particle board that has been coated with impregnated décor paper and is used in higher value-added applications for worktops and other furniture. Decorative laminates consist of several layers of craft and décor papers sealed together and used, for example, for shower cabins and balconies. Components (also called 'post-forming elements') are pieces of raw particle board which have been shaped to the required profile, for example to the form of a window sill, and to which laminate has been glued.

The Commission's analysis of the impact of the proposed operation raised serious concerns that the transaction, as notified, would have significantly impeded effective competition in the market for raw particle board. The Commission's market investigation indicated that customers in Austria, Hungary, Slovakia and Romania would have had limited possibilities to switch suppliers and that the main suppliers did not have significant spare capacity to increase supplies in the affected area. Expanding capacity would require considerable investment and entail a significant lead time. Although some capacity is expected to come on stream in the affected area over the next two years, notably from the new facility of Egger, a competitor, in Romania, and from a new Kronospan facility in Slovakia, this additional capacity would be barely sufficient to meet the increasing demand for raw particle board.

The Commission considered that, in the form originally notified, the transaction would have removed Constantia's raw particle board business, in particular the Austrian company Fundermax, as an important independent competitor in the affected area. To resolve these concerns, the parties modified the proposed transaction so that Kronospan would acquire only two of the three companies originally targeted, namely the German company Sprela and the Hungarian company Falco. Fundermax would continue to be owned by Constantia. Kronospan undertook not to acquire Fundermax for a certain period of time.

The Commission considered that the modification of the transaction and the commitment given by Kronospan were sufficient to allay the serious doubts concerning the concentration's compatibility.

D — Summaries of decisions taken under Article 21

Enel/Acciona/Endesa

The acquisition of joint control of Endesa by Enel and Acciona was notified to the Commission on 31 May and cleared on 5 July ([17]). Under the relevant national law, Enel and Acciona requested the Spanish energy regulator (Comisión Nacional de Energía — CNE) to approve the deal. On 4 July the CNE approved the transaction subject to a number of obligations:

(i) Endesa had to remain the parent company of the group, and it had to maintain its trade mark and its headquarters in Spain;

(ii) Endesa had to be kept adequately financed;

(iii) the committed investments in electricity and gas infrastructure had to be realised and the CNE had to be kept informed of the status of such investments;

(iv) all the regulations relating to the nuclear generation sector had to be respected; a clearly identified unit charged with management of the nuclear assets had to be maintained within Endesa; the CNE had to be kept regularly informed of the management of such assets and possible plans for developing them;

([16]) COMP/M.4525. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m90.html#m_4525.

([17]) COMP/M.4685. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m93.html#m_4685.

(v) a specified amount of coal had to be burnt in Endesa's coal-fired generation assets;

(vi) effective control over Endesa's regulated assets outside mainland Spain had to be maintained within Endesa for five years from the date of acquisition;

(vii) the supply contracts concluded by Endesa had to be honoured;

(viii) the CNE had to be informed of the long- and short-term strategies of Endesa's management in relation to Spain's public interest and security, with special reference to the company's regulated activities;

(ix) the CNE had to be informed of all the strategic decisions taken by Endesa's board of directors in regulated markets. The CNE had to have the right to revoke any board decision if Enel's vote in the board was necessary for the approval of such a decision, in order to avoid 'the additional risks which may derive from the special powers that the Italian State still has in Enel';

(x) the CNE had to have the right to revoke such authorisation and to prevent Enel from exercising its voting rights in Endesa, should Enel fail to respect the above conditions and in particular condition (ix);

(xi) condition (ix) was to remain in effect as long as Enel was publicly controlled.

The Commission considered these conditions to be incompatible with Community law and in particular with Articles 43 and 56 EC. It therefore sent Spain a preliminary assessment in which it expressed the view that Spain had infringed Article 21 of the Merger Regulation by adopting, without prior notification to and approval by the Commission, measures which unduly restricted a concentration of Community dimension (i.e. the Enel/Acciona/Endesa transaction) and which were not necessary for and proportionate to the protection of a legitimate interest and therefore not compatible with Community law.

Enel and Acciona lodged an appeal against some of the conditions of the CNE decision of 4 July with the Spanish Minister for Industry and Tourism. The Minister revoked some of the CNE's conditions ((vii)-(xi)) and modified others ((ii)-(v)). Conditions (i) and (vi) were not challenged and therefore not modified by the Minister. The Commission considered that the remaining conditions as modified by the Minister were still contrary to Community law and ordered Spain by decision of 5 December to withdraw them by not later than 8 January 2008.

Ineos/Kerling: Raising the standard for geographic market definition?

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On 30 January 2008, following an in-depth investigation, the Commission approved the acquisition of Kerling ASA ('Kerling') — the polymer division of the Norwegian company Norsk Hydro — by the UK-based INEOS Group Limited ('Ineos'). Ineos is a leading global manufacturer of petrochemicals, specialty chemicals and oil products. Kerling is mainly active in the production, marketing and sale of polyvinyl chloride ('PVC') and caustic soda, in North-Western Europe.

The deal was notified to the Commission on 19 July 2007 and, after having rejected first phase commitments submitted by the parties, the Commission opened an in-depth investigation on 7 September 2007. No statement of objections has been sent to the notifying party in this case.

This case presents several particularities not only in terms of the scope of the second phase market investigation, which was almost exclusively confined to the geographic market definition, but also in terms of procedure, as it gave rise to the first Commission inspections under the Merger Regulation since 1999. Hence, it is mainly these aspects of the case that are discussed in this article.

I. Products concerned by the transaction

The Commission analysed the impact of the transaction on the markets for the sale and production of commodity S PVC, S PVC compounds, PVC films, caustic soda and several other chemicals which are by-products of PVC production and that were only marginally affected by the transaction.

As the first-phase market investigation did not identify concerns on any of the abovementioned markets except for the commodity S PVC market, the second phase market investigation and therefore this article focus exclusively on issues related to commodity S PVC, which is a type of S PVC mainly used in the production of plastic products such as PVC tubes, window frames and PVC films.

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II. Market for the production and sale of the commodity S PVC

A. *The importance of defining the geographic market*

The parties submitted that, as S PVC is an inert and homogeneous commodity product which is readily and safely transportable, normally shipped in sacks or tankers with transportation costs representing only around 5% of the ex-factory price, the geographic scope of the S PVC market is at least EEA-wide. To support these claims, the parties provided, at a late stage of the first-phase market investigation, some additional evidence on cross-border trade flows within Europe and submitted a price correlation study which, according to them, showed that the prices in different EEA countries move closer together over time, and hence indicate the ability of the product to move freely between countries. However, the correlation analysis was spurious, as it failed to take account of common costs (that is to say, costs incurred by all producers in the business, such as costs of raw material, energy cost, etc.) and thus could not serve as a basis for Commission's argument.

Indeed, the scope of the geographic market was crucial for assessing the present case as the parties' combined strength differed substantially depending on the definition of the geographic market. Whereas on the basis of an EEA-wide market the parties' combined market shares amounted to [20-30]%, on some national markets their combined shares were substantially higher, reaching [60-70]%, [90-100]% and [90-100]% in the UK, Norway and Sweden respectively. Accordingly, the Commission conducted a far-reaching market investigation in order to determine the scope of the geographic market.

The Phase I market investigation had disclosed evidence indicating that markets may be national, at least with respect to the countries geographically isolated from the rest of Europe, that is to say the UK, Norway and Sweden. In particular, the first-phase market investigation suggested that prices, margins, customers' needs and preferences, as well as logistic and transportation costs, may differ substantially amongst various countries, and between these countries and those located in mainland Europe in particular. This led the Commission to examine during Phase II whether, despite the fact that major producers are active in most member states, the conditions of competition in the UK, Norway and Sweden are different from those in continental Europe.

In the UK, in particular, the deal was to create a market player which would be the only local supplier, with a production capacity close to [60-70]%, and a market share of over [60-70]% of the UK demand. During the first phase market investigation a majority of UK customers claimed that the UK market was national in scope and that continental suppliers currently importing into the UK would not be able to substitute themselves to local suppliers in the case of a price increase. This was mainly because, according to the respondents, third party importers would not have sufficient spare capacity and would be unable to respond to the needs of UK customers. In this respect some UK customers expressed a clear preference for local suppliers, as the level of security of supply in terms of lead times, flexibility in ordering additional volumes and the technical assistance that local suppliers could offer would be higher than that offered by continental suppliers. Thus, according to these respondents, distance and the fact of having to cross the Channel, coupled with higher transportation costs, would place continental suppliers at a competitive disadvantage vis-à-vis local producers.

Therefore, the Commission concluded at the end of first phase that the proposed transaction raised serious doubts as to its compatibility with the common market and the EEA Agreement, mainly owing to competition concerns identified on the commodity S PVC market in the United Kingdom. On 17 August 2007 the parties submitted commitment proposals which, in the light of the market test, proved to be insufficient to dispel the serious doubts raised by the Commission. The Commission therefore adopted a decision to open an in-depth investigation on 7 September 2007.

B. *In-depth market investigation*

The main focus of the second phase market investigation was to determine the geographical scope of the market for S PVC.

Although some of the customers located in Norway and Sweden considered the market to be the Nordic Region, the majority considered it to be either North-Western Europe or EEA-wide. A number of these customers have actually been sourcing part of their S PVC requirements from suppliers located in mainland Europe. Moreover, the sales made out of the plants of the only local producer in Norway and Sweden, Kerling, are evenly spread throughout the EEA. All of this evidence supports the view that neither the Nordic Region as a whole nor Sweden and Norway constitute separate markets within the EEA.

With respect to the United Kingdom, whilst all competitors were unanimously claiming that the market for commodity S-PVC is EEA-wide, most UK customers considered the market to be national in scope for the reasons detailed above, and many of them expressed concerns about the effects of the transaction on competition within the UK.

In order to verify the claims expressed by UK customers during the first phase market investigation, and in particular the claim that the UK should be considered as a separate geographic market due to its isolated geographical position affecting the ability of continental suppliers to reliably supply the UK market, the Commission conducted very thorough qualitative and quantitative analyses.

At the end of the first phase it became apparent that reliability and flexibility of supply were major issues in the commodity S PVC market. However, the in-depth market investigation, consisting of detailed questionnaires and numerous interviews with the UK customers, revealed that purchasing patterns and customers' sensibility as regards the reliability and flexibility of supply tend to depend on the annual volume purchased by each customer. This led the Commission to divide the customers into two main categories: small customers and large/medium-sized customers, the latter category being further subdivided into local customers (with production plants located exclusively in the UK) and pan-European customers (with production plants located in various countries throughout Europe).

Small customers indicated that they can and do easily procure the totality of their needs from continental Europe, which is also consistent with the fact that a large majority of these customers consider the market to be EEA-wide. Conversely, medium/large customers tended to have different views and generally considered the geographical scope of the S PVC market as national. In fact, for these customers, reliability and security of supply was stated as being a key concern. They therefore argued that they cannot rely wholly on continental suppliers and need to have at least one local supplier. As the transaction under examination would have led to a "two into one" merger with respect to a potential UK market, this appeared to be problematic.

The Commission conducted a very detailed analysis of the sourcing patterns of these customers and discovered that almost all of them multisource and the majority of them source from at least one continental supplier. Besides, it turned out that some medium/large customers single-source from importers. Furthermore, the historical analysis of UK customers' purchasing patterns revealed that switching between local suppliers and importers is a fairly common practice in the industry as it does not entail any significant costs, since contracts are typically concluded for one year. The market investigation also brought about some contradictory statements from some UK customers, who were claiming that the UK market is national while stating that in the event of a small but significant lasting price increase in the UK they could and would switch an average of 20-30% of their purchasing needs to importers. One UK customer even indicated it could switch up to 60% of its requirements to continental suppliers. This confirmed that, despite the claims of some customers, UK customers undoubtedly arbitrate between UK and non-UK suppliers and that this is a general feature of UK customers' behaviour.

In addition to the analysis of the demand-side features of the market, the Commission examined the supply-side perspective in order to assess the ability of and the incentive for continental suppliers to increase their presence in the UK market in the event of a rise in UK prices. To this end, the Commission collected substantial data from all importers into the UK (pertaining to planned capacity expansions, margins and transportation costs to the UK from each of their production facilities). It found that planned uncommitted capacity expansions would enable continental suppliers to increase significantly the supply to the UK in a context of low growth of demand in the coming years. Moreover, the data collected showed that, while transportation costs are certainly a consideration, they are no barrier to expansion because a small but significant price increase (2%-8% depending on the location of the plant) would make it profitable for continental producers to increase their supply to the UK market. The fact that sales to the UK are a profitable business, and would necessarily become even more profitable if UK prices were to increase, is clearly borne out by the reality that all major European producers are already supplying the UK market and that imports have consistently represented between 30% and 40% of the UK demand over the past five years.

As far as the flexibility of supply argument is concerned, the market investigation revealed that continental producers have the possibility to install storage facilities in the UK which act as a 'virtual production unit' and thus can compensate for inconveniences caused by the distance and the need to cross the Channel. Consequently, continental producers are able to offer a level of reliability and flexibility of supply comparable to that offered by local producers. Moreover, this proved to be a strategy which was feasible (commodity S PVC is stored in containers that can be superposed), low cost and successful in overcoming any handicaps in relation to local producers.

With regard to the pan-European medium/large UK customers who source primarily from local suppliers, it should be noted that they negotiate their contracts at European level. This confers on these customers significant purchasing power in relation to the parties (typically these are the biggest customers of the parties in the EEA) which would make it impossible for the merging parties to increase their prices in the UK without being penalised by a fall in sales in the other countries where these customers are located. As for local customers, these could easily switch a sufficient portion of their demand to continental suppliers, which would make any price increase unprofitable.

Moreover, in order to support a wider–than-national definition of the market, the parties submitted a corrected price correlation study which excluded common costs and which showed that prices are highly correlated between the EEA countries in which the parties are active. The parties also performed stationarity tests, which showed that there is a stable long-term relationship between prices, and that they tend to obey the 'law of one price'.

Lastly, and taking account of the fact that the qualitative analysis seemed to produce some contradictory results, the Commission felt it necessary to conduct an extensive quantitative analysis on the basis of the parties' and competitors' sales data. This exercise appeared to be necessary in this case and was aimed to confirm that the geographical scope of the commodity S PVC market is wider than national. The results of the exercise are the subject of another article in this issue and therefore are not covered here.

Therefore, the conclusion of the market investigation was that, given that the majority of UK customers do already source (at least to some extent) from continental suppliers, that the transportation costs are not a barrier to the expansion of already substantial imports into the UK and that the inconveniences due to distance can easily be overcome through storage, the geographical market is wider in scope than national. The Commission did not find it necessary to conclude whether the market is, North Western Europe, Western Europe or the EEA, as ultimately the competitive assessment remains unchanged.

III. Merger inspections

Another interesting aspect is the fact that this case gave rise to the first Commission inspections under the Merger Regulation since 1999. During the second phase investigation, the Commission obtained information that the merging companies might be implementing the transaction in breach of the suspension obligation laid down by Article 7 of Merger Regulation. The allegations pertained to the fact that the acquiring party arguably intervened in the management of the target (which was its competitor at the time) through appointment of individuals and giving of instructions. Moreover, there were allegations that the two companies were sharing sensitive commercial information which might, in addition, have constituted an infringement of Article 81.

The Commission therefore conducted unannounced inspections at three locations in the UK, but did not discover any evidence of the alleged violations. On the contrary, the majority of documents collected during the inspections were exculpatory and indicated that the parties were aware of their obligations and had put in place systematic rules to avoid sensitive commercial information being exchanged prior to the Commission's clearance. The Commission concluded on this basis that the parties had complied fully with the suspension obligation.

IV. Conclusion

This case is an example of an in-depth analysis of the geographic scope of product markets. Also, it shows that the Commission is committed to vigorously monitoring compliance with all provisions of the Merger Regulation.

Ineos/Kerling merger: an example of quantitative analysis in support of a clearance decision

Andrea AMELIO, Miguel DE LA MANO and Manuel GODINHO DE MATOS ([1])

I. Introduction

On July 17, 2007, the British company Ineos Group Limited (hereinafter 'Ineos') notified to the Commission its proposed acquisition of the Norwegian company Kerling ASA (hereinafter 'Kerling'). Both companies were active, amongst others, in the market of Standard PVC (hereinafter 'S-PVC'). At the end of phase I, the evidence uncovered in the context of its market investigation did not allow the Commission to establish to the adequate standard of proof that the merger would not significantly impede effective competition in at least one candidate market.

The main issue was the assessment of the relevant geographic market. Relevant antitrust markets need to be defined with reference to the most important sources of competition for a firm or set of firms ([2]). Defining the relevant market in this way allows the subsequent detailed competitive analysis to focus on the key elements of competition and how competition might be affected by the behavior of the merging parties in the market. In this case, the merging parties are the only domestic producers in the United Kingdom. They would have a combined market share of 66% in 2006 (based on volume), the remainder being imported, mainly from suppliers based in Continental Europe. As a preliminary step in identifying the competitive constraints faced by the merging parties it was considered useful to determine whether the UK, constitutes an antitrust market for S-PVC or alternatively, whether it is part of a broader Western European market. A comprehensive account of the Commission's findings and assessment in this case is given in a complementary article in this issue ([3]). In contrast, this commentary focuses on the use of descriptive statistics and econometric evidence in forming a view on market definition in the context of the phase II investigation ([4]).

In this article we first describe a number of techniques identified by the Chief Economist Team (CET) useful for assessing the relevant geographic market, and in particular for implementing the SSNIP ([5]) test. The SSNIP test shows whether it would be profitable for a hypothetical monopolist to increase prices permanently in the candidate market. In this case, the candidate market is the UK. The merging parties would enjoy a dominant position in the UK market following the merger. The SSNIP test also provides an approximation to the price effects of the merger under the UK market hypothesis. In addition the SSNIP will provide information on the elasticity of supply of continental importers into the UK.

In the next section we briefly comment on the role of quantitative analysis in merger assessments. This case exemplifies the complementary nature of quantitative and qualitative evidence in making an overall assessment of a merger. It is apparent from this case that quantitative data, to the extent it helps to form a better understanding of the functioning of the affected markets allows the Commission to minimise the risk of error, including the wrongful prohibition of a neutral or pro-competitive mergers. We hope that parties to efficiency-enhancing mergers will feel further encouraged to provide relevant and accurate quantitative data to substantiate their case.

The main issue and the quantitative analysis

In the assessment of market definition the Commission had conflicting f information. On one hand, the parties claimed that the UK S-PVC market was part of a broader European S-PVC

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([2]) Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372, 09.12.1997, p. 5

([3]) See article *'INEOS/Kerling: Raising the standard for geographic market definition?'* published in this issue.

([4]) Full details can be found in the annexes to the Commission Decision of 30/1/2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4734 — Ineos/Kerling). http://ec.europa.eu/competition/mergers/cases/index/m94.html#m_4734.

([5]) The acronym SSNIP stands for Small but Significant and Non-transitory Increase in Price. This test for market definition is described conceptually in the Commission Notice on Market definition (add reference) market, on the basis of a substantial level of imports from Western Europe (over 30% of UK demand). On the other hand, a number of UK customers argued in favour of a national S-PVC market, on the grounds that it would be difficult to rely on importers for substantial and reliable supplies.

The existence of imports to the UK is a necessary condition for a broader relevant geographic market, but not a sufficient one. The presence of flows between countries does not necessarily imply the existence of a sufficient competitive constraint on the domestic production, and certainly not the ability to defeat a SSNIP by a potential monopolist ([6]).

In order to test the existence of a UK national market in this specific context, the CET proposed two alternative and complementary techniques to implement the SSNIP test. First one can estimate whether a SSNIP by the hypothetical monopoly in the UK S-PVC market created by the merger would be profitable by means of a Critical Loss Analysis (CLA) ([7]). The second way to test the existence of a UK national market is to look at the elasticity of supply of imports with respect to the prices charged by UK producers. The higher the elasticity of supply, the more a given price increase will lead to increased imports into UK, and the more likely that such a price increase will be defeated. This was done through a 'natural experiments analysis'.

During the second phase of the merger investigation, the CET collected the data needed and implemented these analyses. The following paragraphs illustrate the dataset and explain in detail the two methodologies.

1. The data

The data collected consisted of monthly data over 2002-2006, on the parties' UK S-PVC market transactions (including imports and exports), and data on imports into UK by other S-PVC producers, as well as data on variables which were expected to affect demand for S-PVC in the UK (demand shifters) and on variables expected to affect the cost of producing S-PVC by the parties and by competitors (supply shifters). This data was collected from the parties, from competitors and from publicly available sources, such as Eurostat. The dataset passed through a detailed consistency check, which allowed the Commission to identify a number of mistakes in the dataset and to secure explanations from the parties on outlier observations.

It was also ascertained that the transaction data received did not reflect the real economic trade-offs being made by the buyers, and might bias the analysis. Indeed this accounting based data, which are often the type of (price and quantity) transaction data delivered to the Commission, may not reflect the real economic trade-offs being made by the buyers due to asynchronous recording of quantity returns, discounts or rebates in accountancy systems. The discrepancies between the accountancy-based dataset and a dataset reflecting economic trade-offs were also addressed by the parties, so that the analysis could be done on data reflecting the actual economic transactions.

2. The critical loss analysis

The Critical Loss Analysis (CLA) builds directly on the definition of an antitrust market contained in the Notice on Market Definition, that is: a market is the smallest group of producers that, if they behaved as a single hypothetical profit-maximizing firm, would impose at least a small but significant and non-transitory increase in price (SSNIP) ([8]).

In the context of this decision, the logic of the test is to identify the group of producers in UK (the hypothetical geographic market) that would be able to exercise market power if they could coordinate their pricing and output behavior ([9]) (hypothetical monopoly). If the hypothetical monopoly could profitably exercise market power by rising prices by 5-10% (or reducing output accordingly), then the antitrust relevant geographic market would be the UK ([10]). If not, the market is broader. The profitability test is constructed by comparing the critical loss and the actual loss estimated on

([6]) In particular, the existence of imports into the UK could even constitute a strong enough competitive constraint in the pre-merger market structure, but it could well not be a strong enough competitive constraint in the post-merger structure.

([7]) Note that there are some caveats with respect this type of analysis. See Katz and Shapiro (2003), O'Brien and Wickelgren (2003) and Langenfeld and Wenqing (2001) for more details. However, in this merger review all the possible caveats were addressed.

([8]) The standard hypothetical monopolist test starts by narrowly defining each product produced by each merging firm, asks whether a hypothetical monopolist could profitably impose a SSNIP, and in the event of a positive reply progressively broadens the market by adding the nearest substitute products/regions up to the point that such a SSNIP would not be profitable.

([9]) In the US applying this test the terms of sale of all other products are held constant (the European Notice on Market definition is not specific on this point)

([10]) From a practical point of view, note that in this decision, the CLA was particularly appealing, given that its implementation required the parties to provide most data and only a small amount of data from third parties.

the basis of the elasticity. The price raise is profitable for the hypothetical monopoly if the actual loss is lower than the critical one.

Definition and estimation of the critical loss

The critical loss is a profitability threshold in terms of sales reduction. It indicates how much the hypothetical monopolist's sales would have to fall in order to make the hypothetical price increase unprofitable. A given price increase has two opposite effects on the hypothetical monopolist's profits. It has a negative effect on profits because sales will reduce as some consumers substitute to rival firms' products in response to the increase in price. On the contrary, it has a positive effect on profits as the hypothetical monopolist now earns higher margins on all of the remaining sales. The critical loss is the percentage reduction in quantity such that these two effects just balance. For the given price increase, a further reduction in quantity would be unprofitable.

The estimation of the critical loss depends only on the margin of the merged entity and on the hypothesized price increase. The basic formula is the following (11):

$$\frac{\Delta q}{q} = \frac{\Delta p / p}{\Delta p / p + cm}$$

where $\Delta p / p$ is equal to the hypothesized price increase and cm is equal to the contribution margin of the producers in the group. The contribution margin is defined as the difference between the original price and the marginal cost computed as a percentage of the original price.

Two estimates of the marginal cost were used and this leads to range of critical loss for each price increase. The critical loss ranged from 61 to 108 Kt and from 107 to 170 Kt, respectively for 5% and 10% price increases.

Definition and estimation of the actual loss

The actual loss is the real reduction in quantity that the hypothetical monopoly would face when undertaking a price increase. The actual loss depends intrinsically on the market and on estimating the demand elasticity being faced by the hypothetical monopolist (the elasticity of its partial residual demand) (12). This is done through econometric techniques. The purpose of the partial residual demand estimation is to describe the relationship (in terms of elasticities) between each firm's own price and their rivals' quantities. By computing the elasticities, the method allows to the isolation of the price discipline effect (or competitive constraint) that each firm is exerting on the others. This is the most critical part of the analysis as it relies on the dataset having sufficient 'informational content' to allow for the estimation of results with a satisfactory level of accuracy.

In the context of this merger, we estimated the partial residual demand elasticity of the hypothetical monopoly (merging parties) in UK with respect to the competitive pressure exerted by the rival's quantity imports, using instrumental variables regression (13). The baseline specification used was (14):

$$\begin{aligned} p_{it} \quad = \quad & \alpha + \eta Trend + \beta_i q_{it} + \sum_{j \neq i} \beta_j q_{jt} + \sum_{j \neq i} \beta_j q_{jt} + \sum_{k=1}^{K} \delta_k UKdemandshifters_{kt} + \\ & \sum_{l=1}^{L} \gamma_l Industry\cos tshifters_{lt} + \sum_{k=1}^{K} \delta_k UKdemandshifters_{kt} + \sum_{h=1}^{H} \delta_h Dummies_{ht} \quad i = 1,2 \end{aligned}$$

where i= 1, 2 are the two merging parties, and variables are in logarithms.

The above specification allows the estimation of the individual elasticities for each of the merging parties (β_1 and β_2). These elasticities contain the information of the price discipline that each of the two merging parties and the importers' exert on each other. The estimate of the hypothetical monopoly residual demand elasticity is thus $\beta_1 + \beta_2$, as the merging parties would act cooperatively to coordinate thevolume of material to be supplied. The actual loss is estimated by directly combining the estimates of the hypothetical monopoly elasticity and the price increase under consideration.

Results

The estimates based on the specification above were generally not very significant. Other specifications were attempted, but the results were not stable enough to guarantee the quality of the

(11) For the purpose of the article, the most popular form of critical loss formula, the so called breakeven critical loss, has been given. However, one must be aware that there are other ways of calculating the critical loss based on different assumptions (See Werden- 1998). In the calculation of the critical loss, small adjustments to the formula should be made to account for supply or demand interdependencies such as when two or more products necessarily result from a single production process.

(12) Werden and Froeb (1993) also point out that in homogeneous product markets, as the one under consideration, the elasticity of the partial residual demand conveys all the information that is needed to define an antitrust market, as defined through the hypothetical monopolist (SSNIP) test.

(13) See, for instance, Kennedy (2003) for a non-technical description of the instrumental variables regression method and Greene (2007) for a more technical explanation.

(14) The analysis and the specification follows from Baker and Bresnahan (1985) analysis. Whereas they focus on differentiated goods our specification reflects the fact that S-PVC can be considered a commodity good.

estimates. The low power of the instruments used was the main cause of the unsatisfactory results. Therefore this econometric estimation was not reliable enough to be used the sole basis for conducting the profitability test.

However, this need not prevent the utilization of the information contained in the critical loss estimated above. In fact, proxies for partial residual demand elasticity can be obtained by using the results from surveys or other qualitative evidence, such as planned uncommitted capacity expansions, demand forecasts or the costs of switching. A qualitative assessment of the capacity and demand evolution forecasts showed that there was uncommitted capacity comparable to the amount of the critical loss. Moreover, a qualitative assessment on switching patterns showed sufficient degree of switching for relevant quantity of S-PVC. This provided evidence in support of an S-PVC market broader than the UK.

3. *Plant outages and natural experiments*

Plant outages may offer competitors opportunities to increase their sales and:or obtain higher margins (by extracting a premium paid by customers) on their additional sales, assuming they have the ability to expand output or otherwise reallocate sales to the affected customers. An analysis of the evolution of volumes, prices and margins over the outage period can therefore provide additional evidence on the scope of the geographic market. Situations of this type offer the conditions for 'natural experiments analysis' which permits the calculation of the rivals' elasticity of supply.

Specifically in this case, Ineos' plant in Barry (UK) had an unexpected partial shutdown in June 2004. Given the strong production linkages between the two plants, this also affected the level of production at other Ineos' UK plant, in Runcorn. As a result, this outage substantially affected the volume of S-PVC produced by Ineos in the UK (a loss of 10% of the 2002-2006 average yearly sales) for a period of five months during which this plant was producing at approximately 50% of its maximum technical capacity, as opposed to 90% under normal conditions. This outage is reflected in the transaction data and constitutes a very interesting experimental base for analyzing competitors' reactions to a sudden drop in the parties' supply of S-PVC in and into the UK.

The analysis showed that the volumes lost by Ineos were not completely captured by Kerling, as customers looking for alternative sources of supply turned to imports. In fact, more of these sales were captured by the importers than by Kerling. Moreover, Kerling's margins did not rise over this period, which is a clear indication that Kerling was constrained in its price reaction to Ineos' supply drop by the importers. The combination of these two elements suggested that not only Kerling but also importers were in a position to swiftly react to any attempts by Ineos to constrain output so as to increase prices. This provided further evidence that both Ineos and Kerling are constrained by importers, even in the event of an output shortage, which suggests that the market is indeed wider than the UK.

Insights from this case

The econometric results were not conclusive and thus not decisive for the outcome of this case. However, the exercise revealed important evidence concerning the functioning of the market. For example, the parties claimed that S-PVC prices are driven primarily by ethylene prices as would be expected if the market is competitive. To substantiate this, the merging parties argued that there is a strong correlation between the prices of ethylene (the most significant cost component) and S-PVC. It is also for this reason that our econometric results are not robust. This also implies, and it is worth pointing out, that there is no econometric evidence disproving the claims of the merging parties.

Most importantly, each step in the process of conducting a well-designed econometric exercise sheds light on facts and evidence crucial for the overall assessment of the merger. For example, our first analyses of the data by the means of simple descriptive statistics and basic econometrics generated invaluable insights on the relative strength of the merging parties and their competitors, the evolution over time of customer preferences, the ability of the market to self-correct in the presence of exogenous shocks and other important elements that inform the competitive assessment. Indeed, the work necessary to produce and validate a dataset is often a valuable source of information and is worth undertaking, quite irrespective of whether the last and most sophisticated step in the empirical analysis (running the regression specification) delivers conclusive and robust results.

The natural experiment in this case also illustrates the importance of having an extensive and complete dataset concerning the key parameters of competition such as sales volumes, transaction prices, margins, costs, etc. A significant increase in imports following Ineos' outage would suggest that the geographical market is broader than the UK, while no response would suggest the contrary. This conclusion can be reached only once the dataset has been built and validated, and the

Commission can be confident that a descriptive analysis of the relevant parameters would provide an accurate picture of the market.

A final and important lesson from this case is that a close cooperation between the Commission services and the merging parties in generating the most accurate and extensive data set will generally allow the Commission to make a more informed decision to the advantage of parties involved in a neutral or pro-competitive merger. Indeed, in this case, an in-depth investigation, solidly grounded on factual evidence allowed the Commission to avoid making the likely mistake of accepting unnecessary remedies in phase I. Remedies, which would have been costly for the merging parties to implement and might have disrupted the functioning of the market

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ECJ upholds Commission decision in Dutch building materials case CVK

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On 18 December 2007, the European Court of Justice (ECJ) dismissed an appeal lodged by the Dutch firm Cementbouw against the Court of First Instance's (CFI) judgment of 23 February 2006 in Case T-282/02 *Cementbouw v Commission,* by which the CFI had upheld a Commission decision of 2002 in Case COMP/M.2650 — Haniel/Cementbouw/JV (CVK) (2). In rejecting the appeal, the ECJ followed the opinion of Advocate General J. Kokott.

The Commission's case concerned the acquisition of joint control by the German Haniel group ('Haniel') and the Dutch Cementbouw Handel & Industrie B.V. ('Cementbouw') of the Dutch producer of sand-lime products, CVK *(Coöperative Verkoop- en Produktievereniging van Kalkzandsteenproducenten),* and its member companies. The operation was carried out in 1999 but only notified to the Commission in 2002 after the Commission learned about the transaction during its examination of a later merger (3) in 2001. The sector concerned is that of wall-building materials in the Netherlands.

The Commission, after opening a Phase II investigation and issuing a statement of objections on the basis that CVK had acquired a dominant position on the Dutch market for wall-building materials for load-bearing walls, approved the notified operation retroactively under the condition that CVK be dissolved within a given period of time.

Although the facts of this case are very specific, the judgments of the ECJ and the CFI, analysed together, contain some important guidance with regard to:

- the concept of concentration, in particular joint control and multiple (interrelated) transactions;
- the concept of dominance, with special reference to the presumptive value of market structure and differentiated product markets;
- remedies, in particular the issue of proportionality.

For the purpose of exposition, this article will first present the CFI judgment of 2006, which related to all three subject matters mentioned. The ECJ judgment discusses only the remedies aspect, as well as the question of jurisdiction insofar as this is related to the remedies.

1. The judgment of the Court of First Instance

Cementbouw appealed against the Commission Decision to the Court of First Instance. Cementbouw challenged the Commission's decision on three grounds, relating to (i) the Commission's jurisdiction, (ii) the Commission's substantive analysis of the case and (iii) the proportionality of the remedies.

Before turning to these pleas it is worth noting that the Commission did not challenge the admissibility of the appeal on the ground that it was directed against a conditional clearance decision. The CFI did not discuss this issue *ex officio* either (nor did the ECJ). Therefore the judgments do not give guidance as to whether in the Court's view conditional clearance decisions may always be challenged by the parties, or whether it considered Cementbouw's appeal as admissible due to the specific circumstances of the present case (in particular the far-reaching scope of the commitments that were offered under protest).

(i) Jurisdiction

As to jurisdiction, the key question was whether a set of agreements entered into by Haniel, Cementbouw and CVK on 9 August 1999 constituted a *single* concentration (as the Commission maintained) or not (the opinion of Cementbouw). If

(1) Directorate-General for Competition, units F-4, B-1 and Chief Economist Team respectively. The authors would like to thank the other members of the case team, in particular Nadja Duykers, Adriaan Brouwer and Henk van Bronkhorst, as well as Albert Nijenhuis, Eric Gippini-Fournier and Anthony Whelan from the Legal Service. 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 18 December 2007 in Case C-202/06P *Cementbouw v Commission.* The case was reviewed under Council Regulation (EEC) No 4064/89. Under this Regulation, the relevant standard of review was whether the merger would create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it (Article 2).

(3) Case COMP/M.2495 — *Haniel/Fels.*

it were one concentration, it would fall under the Commission's jurisdiction, otherwise the agreements would have fallen under the jurisdiction of the Netherlands Competition Authority (*Nederlandse Mededingingsautoriteit,* 'NMa').

Prior to 1999, CVK was a joint selling cooperative comprising all (eleven) sand-lime brick producers in the Netherlands. These eleven producers ('the CVK members') were individually controlled by either Haniel, Cementbouw or a third company, the German company RAG.

The first of the transactions signed on 9 August 1999 related to the acquisition by CVK of control over the member companies by means of a pooling agreement (without the financial shareholdings of Haniel, Cementbouw or RAG in the member companies being changed by this transaction). This transaction was notified to the NMa in 1998 on an *ex ante* basis and was subsequently cleared by the NMa. However, in the view of the Commission the proposed transaction was never implemented as such. Instead, it was linked to a second transaction also signed on 9 August 1999: the sale by RAG of its shareholdings in the CVK member companies to Haniel and Cementbouw ('the RAG transaction'). As a result of this second transaction, Haniel and Cementbouw obtained indirectly via their respective shareholdings in the member companies of CVK an equal share of the voting rights in CVK and thereby joint control over CVK. In short, the two transactions resulted in the acquisition of joint control by Haniel and Cementbouw over (i) CVK and (ii) its member companies. According to the Commission, these two transactions were economically interdependent and should be viewed as a single concentration notifiable under the EC Merger Regulation.

Cementbouw challenged the Commission's jurisdiction, arguing that:

- the RAG transaction did not, in itself, lead to a change in control of CVK;
- the pooling agreement and the RAG transaction should not have been considered as a single concentration; and
- the pooling agreement, taken on its own, had already been authorised by the NMa (because it did not have a Community dimension).

Change of control in CVK

The CFI rejected Cementbouw's argument that the RAG transaction did not bring about a change of control in CVK by, first, stating that Cementbouw had not shown that CVK was already jointly controlled by all three of its ultimate shareholders before the RAG transaction, whereas it became jointly controlled by Haniel and Cementbouw following that transaction.

Second, following the RAG transaction, both Haniel and Cementbouw held equal shares in CVK's capital and voting rights and, hence, were in principle able to block the strategic decisions of the joint venture. The CFI rejected Cementbouw's view that the resulting control was ruled out by the contractual arrangement concerning the composition of CVK's decision-making bodies: '*The fact that representatives of the parent companies are not entitled to sit on CVK's management board or that they are able to represent only a minority within its supervisory board does not alter the fact that it is the members of CVK that decide on the composition of the decision-making bodies and, through the intermediary of those members, their two shareholders*' [4]. The CFI also dismissed Cementbouw's argument that under the applicable Dutch company law the management and supervisory board are under an obligation to carry out their tasks in the sole interest of the company.

Furthermore, the CFI did not consider that Cementbouw could rely on legitimate expectations that the Commission would not deviate from the view taken by the NMa in informal correspondence with the parties that the RAG transaction did not constitute a change of control, since the NMa was not the competent body to give any assurance as to how the EC Merger Regulation was to be interpreted by the Commission.

Single concentration

With regard to the question whether the conclusion of the pooling agreement and the RAG transaction are to be considered a single concentration, Cementbouw first argued that under Article 3(1) of Regulation No 4064/89 the Commission has no power to treat a number of transactions as one concentration. The CFI replied that the definition of a concentration in Article 3(1)(b) of Regulation 4064/89 '*implies that it makes no difference whether the direct or indirect acquisition of control was acquired in one, two or more stages by means of one, two or more transactions, provided that the end result constitutes a single concentration*' [5]. The CFI concluded that '*a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out*

(4) Paragraph 73 of the judgment in Case T-282/02 *Cementbouw v Commission* ('the CFI judgment').
(5) Paragraph 104 of the CFI judgment.

without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings' (6).

As regards the circumstances of the case at issue, the CFI relied on (i) the fact that both sets of transactions were concluded on the same day, (ii) Cementbouw's failure to give a plausible explanation why the conclusion of the pooling agreement by Haniel, Cementbouw and RAG was *postponed* until the day that RAG sold its shares to Haniel and Cementbouw and (iii) the fact that Haniel had confirmed at the oral hearing that it had only been willing to conclude both transactions together to conclude that the Commission was right in stating that the two transactions were interdependent. The CFI dismissed the argument that the parties had carried out their transactions following the guidance given by the NMa by stating that the NMa was not competent to give assurances as to the application of the EC Merger Regulation.

Interference with the NMa decision

Cementbouw argued that the Commission was not competent to examine the acquisition of control by CVK over its member companies as that transaction had already been authorised by the NMa. The CFI rejected this argument by pointing out that the NMa's authorisation of the first transaction did not allow the parties to carry out the concentration concluded on 9 August 1999 which, since it involved also the acquisition of control over CVK by Haniel and Cementbouw, had a Community dimension. Once more the CFI dismissed the existence of any legitimate expectations derived from the NMa's decision since that authority was only competent to examine a transaction falling into its competence under the rules of Dutch law, in spite of the similarity of the relevant provisions of Dutch competition law and Regulation 4064/89.

(ii) Substantive analysis

On the substance, Cementbouw pleaded (i) that CVK did not have a dominant position, and (ii) that in any event there was no causal link between the concentration and the creation of a dominant position.

Existence of a dominant position

The Commission had held in its decision that CVK's dominant position in the Dutch market for wall-building materials for load-bearing walls related to a number of factors including the high market share of CVK (over 50%) and the small market shares of its competitors (all below 5%), the fact that it was the only company to produce sand-lime products (the most important wall-building material in the Netherlands), the limited competitive constraint exercised by other products, the existence of barriers to entry and the absence of countervailing buyer power.

Cementbouw argued that CVK did not have a dominant position. It claimed that a number of materials, in particular concrete cast *in situ*, compete strongly with those produced by CVK, that barriers to entry are low, that building materials wholesalers (CVK's customers) have buyer power, and that CVK is also constrained by the neighbouring market for wall-building materials for non-load-bearing walls.

The CFI, referring to the *Hoffmann-La Roche* (7) and *Endemol* (8) cases, stated that the fact that CVK had a much higher market share than that of its largest competitor *'constitutes strong evidence that CVK has a dominant position on the relevant market'* (9). Therefore, it was up to Cementbouw *'to show that the Commission had made a manifest error of assessment of the other five factors analysed'* (10), and this on the basis of *'specific and consistent evidence'* (11).

Based on that premise, the CFI analysed the arguments brought forward by Cementbouw.

With regard to the argument based on the competitive pressure by the sector of concrete cast *in situ* (the second most important wall-building material after sand-lime products, but for which the Commission had left open whether or not it was to be included in the relevant product market), the CFI pointed out that the strength of the competitive constraint on CVK exerted by a sector as a whole is linked, in part, to the strength of the individual companies active in that sector. The CFI observed in this respect that the companies producing concrete all held small market positions relative to CVK.

Furthermore, the CFI followed the Commission in its analysis that the market in question is a differentiated product market. According to the CFI, *'the absence of significant competitive pressure from the in situ concrete sector may also, in part, be inferred from the differentiated nature of the products on the relevant market … The differentiated nature of the products means that each product is*

(6) Paragraph 109 of the CFI judgment.

(7) Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

(8) Case T-221/95 *Endemol v Commission* [1999] ECR II-1299.

(9) Paragraph 202 of the CFI judgment.

(10) Paragraph 203 of the CFI judgment.

(11) Paragraph 281 of the CFI judgment.

not a perfect substitute for the other and that, consequently, an increase in the price of one of them does not necessarily have the effect that the undertaking which has increased the price will lose market share to its competitors which produce the other product, as would be the case for perfectly substitutable products. The fact that in situ concrete is not perfectly substitutable for sand-lime bricks … makes it possible to relativise the competitive pressure which that material and its producers exert on CVK' ([12]).

In relation to entry barriers Cementbouw essentially argued that entry was easy because investment costs were low. The CFI however accepted the Commission's reasoning that the entry barrier is constituted by the lack of profitability of market entry rather than by the mere level of entry costs ([13]), and that in the present case the existence of considerable excess capacities (mainly on the part of CVK) made market entry unprofitable and therefore unlikely.

With regard to Cementbouw's argument that building materials wholesalers exercise considerable buyer power on CVK, the CFI followed the Commission's arguments that, first, whilst it is true that wholesalers altogether account for [60-80]% of CVK's sales, not a single customer accounts for a substantial part of CVK's turnover, and, second, ready-mixed concrete, unlike sand-lime products, is not sold through wholesalers and therefore cannot be regarded a significant source of countervailing buyer power.

Cementbouw further submitted that CVK sells its sand-lime products also for non-load-bearing walls and that its weaker market position on this neighbouring market significantly constrains its pricing behaviour in the market for load-bearing walls. The CFI dismissed this argument by stating that since CVK sold up to 80% of its production into the market for load-bearing walls, it is likely that it gears its prices primarily to the conditions of competition on that market. The CFI did not, however, discuss the Commission's further argument that CVK was able to price discriminate between the two markets.

Causality

The Commission had stated in the contested decision that CVK's dominant position was a result of the concentration, since prior to the operation CVK was not a fully-fledged company but only a joint sales organisation of its members.

Cementbouw argued that any dominant position was not caused by the merger, i.e. the sale of RAG's shares to Haniel and Cementbouw did not change the strength of CVK on the relevant market, and CVK acted as a single economic entity on the relevant market even before the pooling agreement (i.e. when it was still a pure joint sales organisation).

The CFI confirmed the Commission's reasoning that the fact that CVK now controls the production activities of its member companies and decides in a centralised way on all strategic business developments such as production capacity, investment, R&D, purchasing, logistics and marketing strengthens its position on the market and its ability to pursue a single, profit-maximising policy, resulting in the emergence of a dominant position. The CFI furthermore noted that the Commission had gathered some concrete evidence that post-merger CVK was able to act more independently from its competitors and customers than previously (such as pricing against general market trends, refusal by individual member companies of CVK to negotiate prices with customers), which Cementbouw had failed to rebut. However, the CFI pointed out that *'although the Commission is entitled to take such evidence into account in a situation, such as in the present case, where the concentration has already been completed when the contested decision is adopted, such evidence is not by definition strictly necessary'* (14).

(iii) The commitments

The Commission had authorised the notified operation after the parties had committed to dissolve CVK completely by the end of 2004. The parties had only offered these commitments ('the second set of commitments') after the Commission had rejected a first set of commitments, consisting in an arrangement to end joint control of Haniel and Cementbouw over CVK by selling off the shares acquired earlier from RAG to a third party (thereby again enabling variable voting majorities within the company).

Cementbouw argued that the Commission was wrong to reject the first set of commitments and to insist on the dismantling of CVK itself. The Commission responded that since the concentration consisted of both the pooling agreement whereby CVK acquired control of its member (producer) companies and the simultaneous acquisition of

([12]) Paragraph 213 of the CFI judgment.

([13]) According to paragraph 219 of the CFI judgment, entry barriers *'may consist in elements of various natures, in particular economic, commercial or financial elements, which are likely to expose potential competitors … to risks and costs sufficiently high to deter them from entering the market'.*

([14]) Paragraph 282 of the CFI judgment.

joint control of CVK by Haniel and Cementbouw, reversal of the latter step would not have been sufficient to restore effective competition.

The CFI stated that the commitments offered by the parties must enable the Commission to conclude that the concentration at issue would not create or strengthen a dominant position within the meaning of Article 2(2) of Regulation 4064/89. *'Thus, in order to be accepted by the Commission …, the parties' commitments must not only be proportionate to the competition problem identified by the Commission but must eliminate it entirely; and that objective was clearly not achieved in the present case by the first draft commitments proposed by the notifying parties'* ([15]), since they aimed only at ending joint control of CVK by Haniel and Cementbouw but not the dominant position of CVK created by the operation.

The CFI went on pointing out that although the final set of commitments (dissolution of CVK) *'goes further than restoring the situation preceding the concentration, since, upon expiry of that period, CVK will have ceased to exist even in its previous form of a sales counter, the fact none the less remains that the notifying parties are not required to confine themselves to proposing commitments aimed strictly at restoring the competitive situation existing before the concentration in order to allow the Commission to declare that transaction compatible with the common market. Under Article 8(2) of Regulation No 4064/89, the Commission is authorised to accept all commitments by the parties which allow it to adopt a decision declaring the concentration compatible with the common market'* ([16]).

If such commitments are offered, the Commission must clear the transaction based on these commitments. It does not have any discretion either to prohibit the concentration or to authorise it subject to conditions other than the commitments offered, even if those conditions were strictly limited to restoring the ex ante situation, because the EC Merger Regulation *'makes no provision for the Commission to make its declaration that a concentration is compatible with the common market subject to conditions which it has imposed unilaterally, independently of the commitments given by the notifying parties'* ([17]).

Therefore, and in spite of the fact that *'upon reading the statement of objections and the applicant's response, it must be acknowledged that the Commission may have exercised a certain influence on the terms of the commitments proposed by the parties'* ([18]), the CFI dismissed the applicant's plea that the Commission, in authorising the merger subject to the second set of commitments, had violated the principle of proportionality.

2. The judgment of the Court of Justice

Cementbouw lodged an appeal to the Court of Justice, in which it challenged the CFI judgment only with regard to the subject of the remedies.

First, Cementbouw argued that the first set of commitments had the result that the notified concentration ceased to exist, and that only a concentration without a Community dimension remained. The CFI had stated in this respect that the Commission's jurisdiction over the entire transaction (including the conclusion of the CVK pooling agreement and the acquisition of joint control by Haniel and Cementbouw over CVK) had not ended when the parties offered their first set of commitments to give up joint control but leaving the pooling agreement in place. The Court adhered to this view, noting that *'the competence of the Commission to make findings in relation to a concentration must be established, as regards the whole of the proceedings, at a fixed time. Having regard to the importance of the obligation of notification in the system of control put in place by the Community legislature, that time must necessarily be closely related to the notification of the concentration'* ([19]).

It is interesting to note in this context that the ECJ avoided taking a position on the precise point in time at which the Commission's jurisdiction must be established. The Advocate General had proposed that in this respect the time at which the obligation to notify the operation under the Merger Regulation arises (conclusion of the binding agreement or the public takeover bid, the so-called 'triggering event') should be considered decisive ([20]).

Accordingly, as the parties had not completely abandoned the concentration, the Court held that the Commission was not required to re-examine its competence during the procedure.

Second, Cementbouw challenged the CFI judgment by arguing that the CFI, in holding that the Commission was entitled to refuse the first set of commitments, had infringed the principle of proportionality. The Court noted in this regard that decisions taken by the Commission in proceedings for the control of concentrations *'must satisfy*

([15]) Paragraph 307 of the CFI judgment.
([16]) Paragraph 308 of the CFI judgment.
([17]) Paragraph 311 of the CFI judgment.
([18]) Paragraph 314 of the CFI judgment.
([19]) Paragraph 43 of the judgment in Case C-202/06P *Cementbouw v Commission* ('the ECJ judgment').
([20]) Paragraph 46 of Advocate General Kokott's opinion in Case C-202/06P *Cementbouw v Commission.*

the requirements of the principle of proportionality, which is one of the general principles of Community law' (21). However, the Court added that when reviewing the proportionality of conditions or obligations which the Commission may, by virtue of Article 8(2) of Regulation No 4064/89, impose on the parties to a concentration *'it is necessary … to be satisfied that those conditions and those obligations are proportionate to and would entirely eliminate the competition problem that has been identified'* (22).

In this respect, too, it is interesting to compare the ECJ's judgment with the opinion of Advocate General Kokott. Like the Court, Mrs Kokott had taken the Commission's margin of discretion into account in reaching her conclusion that in the present case the remedies were proportionate, but also noted that as a general rule voluntary commitments by the parties may be assumed to be proportionate (23).

As a result, the Court held that the CFI did not commit an error of law in holding that the Commission was not required to accept the first draft commitments since it considered that they were insufficient to resolve the competition problem it had identified.

3. Conclusion and outlook

The judgments by the Court of First Instance and the Court of Justice have confirmed the Commission's approach in the present case in all its central aspects. Furthermore, they give some important guidance on a number of points.

The most important operational conclusions to be drawn from the judgments in the present case on *jurisdiction* may be summarised as follows:

- Control of a company is obtained by the power to block strategic decisions, including the appointment of the company's management or board. The exercise of control by the person(s) or undertaking(s) who have the power to appoint the management or board members is not ruled out by the mere fact that under the applicable company law those management or board members are under an obligation to carry out their duties in the sole interest of the company, or that by law, by-laws or contract they may not be employees or other representatives of the company's shareholders.
- The Commission must assess, on a case-by-case basis, whether several transactions constitute a single concentration because they are economically interdependent in such a way that one of the transactions would not have been carried out without the other(s).

With regard to the *substantive assessment:*

- A market structure where one company has a market share beyond 50% and all remaining competitors have very small market shares may in itself be evidence of the existence of a dominant position. In such a case, the presumption of dominance can only be rebutted by specific and consistent evidence to the contrary.
- The definition of the relevant market is a tool for the purpose of assessing the competitive constraint that different products or services exercise *vis-à-vis* each other. Therefore, a relevant product market may comprise several products or services that are more or less close substitutes to each other (differentiated product market). Within such a market, the competitive constraint exercised on a particular product may differ between various competing products.

Last but not least, the following conclusions in respect of the Commission's *remedies policy* may be drawn:

- The submission of commitments during the procedure cannot have the effect of removing the Commission's jurisdiction in the particular case (unless the commitments result in the complete abandonment of the concentration).
- In order for the parties to obtain a conditional clearance decision, they must offer commitments that entirely solve the competition problem identified by the Commission. If for that purpose the parties choose to offer commitments that go beyond restoring the *ex ante* situation, the Commission can, based on its margin of discretion regarding the substantive analysis of mergers, accept such commitments without necessarily violating the principle of proportionality.

Finally, it may be worth noting that in spite of Cementbouw's appeals before both the CFI and ECJ, the parties implemented the commitments they had offered. Following the Commission's decision in 2002, CVK was dissolved into two competing groups, owned by Haniel and Cementbouw, respectively. The first now operates as *Xella Nederland* and sells sand-lime products under the name *SILKA*. Cementbouw's sand-lime operations were subsequently taken over by the Irish company CRH. It operates under the name *Calduran Kalkzandsteen*.

(21) Paragraph 52 of the ECJ judgment.
(22) Paragraph 55 of the ECJ judgment.
(23) Paragraph 69 of Advocate General Kokott's opinion in Case C-202/06P *Cementbouw v Commission*.

STATE AID

Misuse of restructuring aid in the steel sector – or some remarks on the monitoring of Polish and Czech steel restructuring from the point of view of State aid control

Max LIENEMEYER and Agata MAZURKIEWICZ-GORGOL (1)

Cases of improper implementation of a restructuring plan after restructuring aid has been approved by the Commission were recently addressed by the Commission. In two cases the Commission adopted negative decisions for misuse of aid, ordering recovery of unduly paid aid. The cases occurred in the context of the restructuring of the Polish and Czech steel sector sectors as outlined below (point 1). These examples of misuse must be distinguished from cases where the Commission has accepted a change of the restructuring plan (point 2) and the reasoning of the decisions illustrates that a finding of misuse is not always straightforward (point 3). On this basis some observations can be made which might be of importance for future restructuring cases (point 4).

1. The restructuring of the steel sector in Poland and the Czech Republic

The EC allowed Poland and the Czech Republic, through protocols to the Accession Treaty (2), to support — in the context of their accession — companies included in their national steel restructuring programmes (NRP) with State aid. This exceptional approval was necessary as restructuring aid to the steel sector is banned in the EU (3). However, new entrants are usually given a one-off chance to restructure their steel industry with State aid. The protocols allow for a maximum of State aid (e.g. €850 million for Poland), but also set several conditions. The restructuring must lead to viability of the benefiting companies in 2006, the restructuring plans must be implemented in full and a reduction of production capacity has to be achieved.

The Commission monitored the restructuring process with the support of an independent consultant. In the end, the restructuring was completed successfully and most of the existing beneficiary companies were able to abide by the main conditions set out in the protocols concerning viability, capacity reductions and the maximum amount of aid, while three out of eight companies in Poland became insolvent. It should be noted that all the companies that achieved viability had amended their individual business plans during the restructuring period.

2. Amendment of restructuring plans

The Commission encouraged the companies to adapt their plans during the course of the restructuring process if this was necessary to restore viability. In the end, all the companies submitted updated plans for their steel mills. Most of these plans have been approved by the Commission.

For example, the individual business plan (IBP) for *Mittal Steel Poland,* the biggest aid recipient in this country, was approved by the Commission in July 2005 (4). Modifications concerned a change of investments without however changing the overall restructuring purpose, costs and timing.

The critical issue was one investment which turned from modernisation into replacement, so that the Commission had to seek assurance by way of a commitment that the replaced capacity would be dismantled.

Also, in the *Mittal Steel Ostrava* (MSO) case, which involved the biggest Czech steel producer, the Commission approved the change of the IBP in September 2006 (5). Here, the Commission accepted the non-implementation of certain investments contained in the original IBP. This IBP allowed for about €200 million of State

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

(2) Cf. Protocol No. 8 to the Accession Treaty *on the restructuring of the Polish steel industry* and Protocol No. 2 to the Accession Treaty *on the restructuring of the Czech steel industy,* OJ 2003 L 236, pages 948 and 942. For details see Lienemeyer (2005), 'State aid for restructuring the steel industry in the new Member States', in: European Commission, Competition Newsletter, 2005/1, page 94.

(3) *Communication from the Commission on Rescue and restructuring aid and closure aid for the steel sector* OJ 2002 C 70, page 22.

(4) Case N 186/2005, OJ C 12 of 18.01.2006, p. 2, published at http://ec.europa.eu/competition/state_aid/register/ii/doc/N-186-2005-WLWL-en-20.07.2005.pdf.

(5) Case N 350a/2006 OJ C 280 of 18.11.2006, p. 4, published at http://ec.europa.eu/competition/state_aid/register/ii/doc/N-350a-2006-WLWL-en-13.09.2006.pdf.
Other decisions concern the Czech steel producer VPFM, i.e. N 600/2004, N 350b/2006, see http://ec.europa.eu/competition/state_aid/register/ii/doc/N-350b-2006-WLWL-en-08.06.2007.pdf.

aid. The Commission noted that MSO was able to achieve viability with only 68 % of its originally planned investments. Therefore, MSO was required to reimburse the amount of State aid received with respect to those investments which turned out not to be necessary for its restructuring (€30 million of aid, whereas the amount of omitted investments was multiplied by a ratio of the overall restructuring costs against the State aid). However, as the company had received less State aid than originally envisaged, and this shortfall corresponded to the aid attributable to the investments not realised, the Commission found that no recovery would be necessary and approved the change of plan.

3. Misuse of aid

In some cases the Commission could not accept a change of the restructuring plan since it found a misuse of aid.

3.1 The case of Technologie Buczek

In its decision of 23 October 2007 (6), the Commission found that *Technologie Buczek* (TB) had not implemented the measures in the restructuring plan properly and in the end filed for insolvency in 2006. Therefore the Commission ordered recovery of around €1 million of State aid, which TB had received under its 2002 IBP for restructuring purposes (7).

The Commission concluded that TB had misused its previously obtained restructuring aid, even though some measures were originally implemented according to the plan. To this end the Commission pointed out that *'even if certain measures were considered as compatible restructuring aid in the context of a comprehensive restructuring project ensuring the restoration of viability, the failure to implement the entire restructuring plan successfully and to restore viability implies in principle that any part of the restructuring project failed and that any measures that have been granted for this purpose have lost their object.'* (8) The Commission thus emphasised that partial implementation of the restructuring plan cannot make sense, as long as it does not lead to the restoration of viability.

However, some aid actually provided for R&D purposes was nevertheless found compatible. This followed from the interpretation that Protocol No 8 does not in principle exclude the compatibility of measures which are in line with other frameworks (9). Here, the R&D subsidies were given under a programme which had been accepted by the Commission as existing aid and included in Annex IV(3)(2) of the Accession Treaty.

The recovery was based on Protocol No 8, which states in point 18 that, if a company does not implement its IBP properly as indicated in the protocol, the aid received for this has to be reimbursed. The Commission had established a practice which allowed it to request the reimbursement of illegal aid under Protocol No 8 in the context of Article 88 EC even if aid was granted before accession (10).

3.2 The case of Arcelor Huta Warszawa

In its decision of 11 December 2007, the Commission approved the modified IBP of *Arcelor Huta Warszawa* (11). However, some State aid originally provided seemed not to have been used for its intended purpose and the Commission ordered its recovery.

Arcelor Huta Warszawa (AHW), formerly *Huta Lucchini Warszawa* (HLW), had produced an IBP in 2001 in order to overcome its difficulties. The core of the plan was an investment programme of about €40 million, with an emphasis on modernisation of the company's hot rolling mills. These investments and some necessary short-term financial restructuring measures were endangered by the fact that the company was unable, for administrative reasons, to carry out an asset restructuring which was intended to generate required funds. Poland therefore granted HLW a guarantee for a bridging loan of €75 million to finance the investments and to pay some short-term debts.

Of this amount, approved in the NRP, the company obtained about half. Most of it was used by HLW for repaying a long-term loan instead of carrying out the investments. Nevertheless, as the Commission's consultant in charge

(6) Case C 23/2006, published at http://ec.europa.eu/competition/state_aid/register/ii/doc/C-23-2006-WLWL-en-23.10.2007.pdf.

(7) Moreover, the Commission concluded that the Polish authorities had granted TB Group additional unlawful aid by tolerating continuous non-repayment of public debt leading to accumulation of significant liabilities toward public bodies.

(8) See decision point 110.

(9) See Commission Decision of 5.7.2005 in case C 20/2004 *Huta Czestochowa,* OJ L 366, 21.12.2006, p. 1. Whether this is still the case under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty, (OJ C 244, 1.10.2004, p.2) is in view of point 20 doubtful.

(10) See Commission Decision of 5.7.2005 in case C 20/2004 *Huta Czestochowa,* OJ L 366, 21.12.2006, p. 1.

(11) Case C 51/056 published at http://ec.europa.eu/competition/state_aid/register/ii/doc/C-51-2006-WLWL-en-11.12.2007.pdf.

of monitoring the Polish and Czech steel restructuring confirmed, the company still restored viability at the end of 2006.

The monitoring indicated that the aid was used for purposes not foreseen in the restructuring plan. Instead of being used strictly to restore the company's viability (as required by the EC State aid rules), the funds were used for expenditure which a company in difficulty is normally not able to make. The Commission failed to see how the measures, i.e. repayment of the long-term debt, which was not due until after the end of the restructuring period, should help the company to restore viability. From an *ex ante* point of view, the company, by omitting investments originally assumed to be necessary for the restoration of viability and using aid for other purposes, endangered the viability restoration. The fact that viability was in the end restored might indicate either that the assumption regarding the necessity of investments was not correct (i.e. the financial gap, for coverage of which the aid was intended, might have never existed) or that better market conditions led to a situation where aid was no longer necessary. In any case, the aid thus gave the company additional liquidity leading to undue distortion of competition. Therefore, the Commission concluded that the aid had been misused given that there were no grounds for finding compatibility of the measure for which the aid was used.

The fact that in the AHW case certain investments turned out not to be necessary, might indicate an analogy with the MSO case, where the Commission approved the non-implementation of certain investments contained in the original IBP. However, in the AHW case the non-implementation of investments was accompanied by usage of the aid for purposes not covered by the restructuring plan. As the Commission found that the aid was used in an incompatible manner, it decided that the aid needed to be repaid. This decision would not have been influenced by any subsequent commitment on the part of AHW to make all the investments originally envisaged in the plan, because this could not 'heal' the earlier misuse ([12]).

However, in this case the Commission recovered merely the aid actually misused and not the entire restructuring aid granted. In this respect the findings are different from the Buczek decision, where the Commission objected to the compatibility of the aid because the restructuring plan was not implemented in full and the company did not become viable. The difference is that AHW managed to restore viability and TB did not. In a case where viability is restored, it can be argued that the implementation of some of the measures was sufficient to achieve the goal of the restructuring aid and therefore aid for these measures, if looked at in isolation, might still be considered compatible. This is not so where viability is not restored if this is combined with partial non-implementation of the plan.

For the recovery of the aid the Commission did not calculate the aid element at the rate of 100 % of the guarantee for the loan (as would normally be considered in the case of a company in difficulties). It instead took account of the fact that aid was granted at a time when the company was still able to obtain some financing from the markets and agreed to calculate the interest rate subsidy which the company obtained by replacing the existing loan ([13]).

Finally, given the reimbursement of the misused aid and the fact that the updated plan notified by the company had a positive effect on the company's restoration of viability and did not require any new aid, the Commission accepted the change of plan by AHW.

4. Conclusion

The present cases illustrate four important points:

First, the restoration of viability *ex post* alone in a restructuring case is not sufficient to make the use of State aid compatible. What counts is whether the restructuring plan would be apt to restore viability and whether it is then properly implemented. In fact, although this was not mentioned in the above decisions, it seems safe to assume that if the company sticks to its restructuring plan, it will be difficult to recover any aid even if in the end viability was not restored.

Second, finding a misuse of restructuring aid requires not only that the restructuring plan is not implemented but also that the aid cannot be found compatible otherwise. In fact, aid not implemented according to the plan can still be held compatible as restructuring aid, if it is used in a manner that helps to restore viability and if it was not earmarked for a specific task. Such use should then

([12]) Indeed, an analysis of the necessity of the original investments and their belated commitment becomes relevant only if the aid would not have been spent or would have been spent in a compatible manner, as was the issue in the MSO case.

([13]) The interest rate subsidy was calculated as the difference between the actual interest rate and the reference rate plus at least 400 basis points, because the company, although being in difficulty, still had some security to offer. As the loan was in euro, the reference rate for the euro zone, and not for Poland, was used. The interest rate subsidy was thus 4.57 % per annum, which was equivalent to a misused amount of around €1.5 million.

ideally be the subject of an amendment decision in respect of the original restructuring aid. (This also 'saves' the company later if it does not restore viability, as then the first point applies). Moreover, it can also be compatible under any other provision of Article 87 EC, including other horizontal frameworks, as long as they do not exclude companies in difficulty from their scope.

Third, if a plan is only partly implemented, the restoration of viability is crucial, as it provides the presumption that not all aid has been improperly used. Consequently, if a plan is not properly implemented and viability is not restored, a presumption exists that non-implementation of all the measures impeded the process of restoring viability and every aid measure has lost its objective and can thus not be held compatible but should be recovered.

Fourth, the dividing line between amendment of a plan and misuse of aid, which can lead to recovery, is not always evident. It is accepted that the Commission can exempt a company from making some investments, if this does not affect the viability prognosis at the time when a change of plan is requested and if the State aid provided to implement these investments is reimbursed. It does not, however, seem possible that the Commission can accept the use of aid outside the restructuring plan as it seems to redirect resources away from what was envisaged to restore viability. In such a situation the Member State would need to demonstrate that the redirection supported the restoration of viability (which is from a point of view *ex ante* in contradiction to the restructuring plan), otherwise recovery needs to be ordered.

Finally, it should be pointed out that steel restructuring is not a typical restructuring case. In fact, the restructuring of the steel industry in Poland and the Czech Republic was accompanied by intensive monitoring. This put more pressure on the companies to indicate to the Commission at an early stage a change of plan, which was in almost all cases accepted and ensured that the companies properly implemented their plan as well as executed the necessary investments. These efforts, combined with the positive market trends, ensured that the steel restructuring in Poland and the Czech Republic was an overall success.

Italy gets all clear for R&D tax credits

Almorò RUBIN DE CERVIN (1)

In September 2007 Italy notified the Commission of a tax credit for expenditure on research and development (R&D) activities of up to a maximum of €15 million offering (i) 10% credit for R&D expenditure incurred in-house and (ii) 15% credit for expenditure related to contract research with not-for-profit organisations (2). The Commission found in December that the tax credit is a 'general measure' and, as such, does not constitute State aid. The Commission assessed the scheme in the light of the Notice on fiscal aid (3). Paragraph 13 of the Notice states that: 'Provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid: … measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R&D), the environment, training, employment).'

The 2006 Communication on R&D tax incentives (4) confirms this assessment and specifies that tax incentives are to be considered selective if their potential beneficiaries are restricted in terms of size, location or sector.

The first specific factor taken into account by the Commission when it assessed Italy's R&D tax credit was that the credit is granted to all enterprises, irrespective of their size or sector. Second, the measure places no restrictions on the location of the eligible activities and contracts, thus creating no discrimination within the EU. In third place, no discretion is left to the public administration of the State: the criteria to be applied are objective and defined *ex ante* in the implementing regulation. Finally, there is no limit on the overall budget to be spent by the State on the scheme.

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

(2) Case N 507 / 2007 — *Credito d'imposta R&S*.

(3) Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, pages 3-9.

(4) Communication 'Towards a more effective use of tax incentives in favour of R&D', COM (2006) 728, adopted on 22 November 2006, the same day as the R&D&I Framework.

Citynet Amsterdam: an application of the market economy investor principle in the electronic communications sector

Norbert GAÁL, Lambros PAPADIAS and Alexander RIEDL (1)

1. Introduction

Broadband networks are considered to be the key infrastructure of the knowledge economy. Access to broadband services has become vital for businesses and citizens to share information, communicate and work instantly with anyone, anywhere in the world. The availability of broadband is reshaping sectors such as media, entertainment or retail banking. Thanks to the investments and business drive of private operators and a successful regulatory framework, broadband services are available today to most European citizens. However, it is not only private operators that invest in broadband networks: public authorities engage in support schemes and measures to widen broadband coverage and bring more affordable services to citizens. Their involvement has raised a number of questions, especially with regard to the application of the State aid rules.

Under the EU State aid rules, investments by public authorities in companies carrying out economic activities can be considered not to involve State aid if the investments are made on terms that a private investor operating under market conditions would have accepted. This is known as the 'market economy investor principle' — 'MEIP' — or 'private investor principle'(2). However, this is rarely the case for investment in broadband networks, since public authorities generally take action precisely because the market fails to deliver the desired services (3). Nevertheless, it may still be the case that a public investment in a broadband project is capable of securing revenues that are sufficient to repay its costs within a reasonable timeframe and provide a rate of return in line with the market remuneration for projects of similar risk (4).

In a recent case in the electronic communications sector concerning the roll-out of a high-speed broadband fibre access network in the Dutch city of Amsterdam (5), the Commission shed some light on the application of the MEIP in this sector. The Citynet Amsterdam project was the first broadband measure assessed under the State aid rules for which the national authorities argued that the public funds provided did not constitute State aid because the investment was pursued on market terms. This article provides a short overview of the case and elucidates a number of general policy considerations.

2. The 'Citynet Amsterdam' project

The case concerned the construction of a 'Fibre-to-the-Home' broadband access network (6) connecting 37 000 households in Amsterdam (7), which are already served by several competing broadband networks.

The Amsterdam municipality invested in the passive layer of the network (8) along with two private investors and five housing corporations.

(1) Directorate-General for Competition, unit C-4 and Task Force on Pharmaceuticals Sector Inquiry. 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 also Hans W. Friederiszick and Michael Tröge: Applying the Market Economy Investor Principle to State Owned Companies — Lessons Learned from the German Landesbanken Cases, Competition Policy Newsletter 2006, Number 1 — Spring.

(3) For instance, network industries are typically characterised by high fixed costs. As a result, it is generally more profitable to roll out broadband networks where potential demand is higher and more concentrated. Therefore, in certain areas, operators may have no commercial incentive to invest in broadband services: the high additional costs are not matched by additional revenues. In such cases, State aid might be justified under certain conditions in order to provide broadband access to all citizens at affordable prices.

(4) See also Monika Hencsey, Olivia Reymond, Alexander Riedl, Sandro Santamato and Jan Gerrit Westerhof: State aid rules and public funding of broadband, Competition Policy Newsletter 2005, Number 1 — Spring.

(5) 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,* not yet published.

(6) 'Fibre to the Home' is a form of fibre-optic communication network in which an optical fibre runs up to the customers' home. Fibre networks — when compared with existing copper-based broadband networks (such as ADSL or cable) — provide much higher speeds and symmetrical services and are expected to pave the way for the mass-market application of numerous internet-based services such as IPTV, video on demand and telemedicine.

(7) The notified project comprises approximately 10% of all households in the city of Amsterdam.

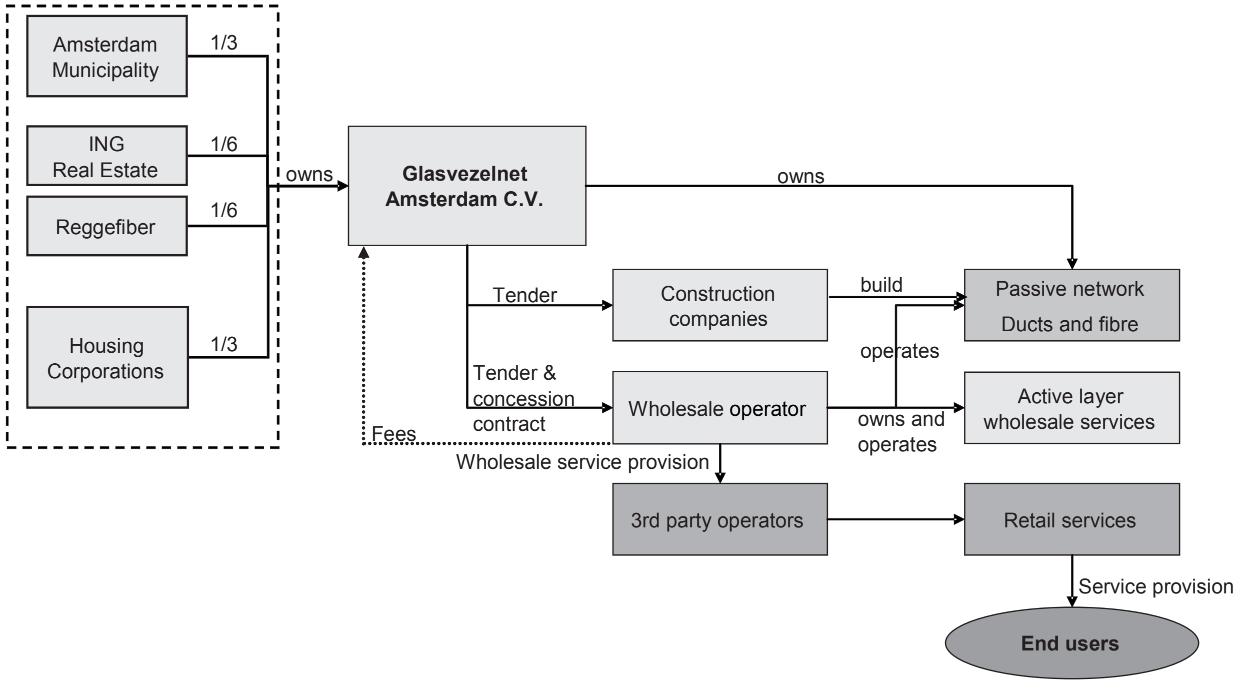
(8) The passive layer includes ducts, fibre and street cabinets. The active layer includes the management, control and maintenance systems necessary to operate the network, such as switches, routers or splitters.

The passive infrastructure is owned and managed by Glasvezelnet Amsterdam cv ('GNA'). The Amsterdam municipality owns one third of GNA's shares, ING Real Estate and Reggefiber (two private investors) together own another third, while five housing corporations hold the remaining third. The total equity investment in the project amounted to €18 million.

The wholesale commercial operator of the new fibre network was selected through a tender procedure and provides open, non-discriminatory access to retail commercial operators that offer TV, broadband and telephony services on the new fibre network.

The project setup is depicted in the figure below.

Figure 1 — Overview of the project



3. State aid assessment

The criteria of the market economy investor principle

Contrary to previous broadband cases ([9]) where the State aid compatibility assessment was the central issue, the main question in this case was whether State aid was present at all, i.e. whether or not the investment by the municipality of Amsterdam would be acceptable to a private investor under normal market conditions and therefore in line with the MEIP.

Four main criteria can be deduced from the Commission's approach in previous decisions and the Court's case law in assessing whether a private investor would participate in a given project under the same terms and conditions as the public authorities ([10]):

- *First,* it has to be determined whether the participating investors are market investors and whether the investments by the private investors have real economic significance. Such significance should be assessed in absolute terms (in relation to the total investment) and in relative terms (in relation to the financial strength of the private investor concerned).

([9]) See for instance Cases N 475/2007 *National Broadband Scheme Ireland,* Commission decision of 25.9.2007; N 473/2007 *Broadband connections for Alto Adige,* Commission decision of 11.10.2007; N 570/2007 *Broadband in rural areas of Baden-Württemberg,* Commission decision of 23.10.2007 or C 35/2005 *Broadband development Appingedam,* Commission decision of 19.7.2006. All decisions are available at the following website: http://ec.europa.eu/comm/competition/state_aid/register/ii/.

([10]) See for instance judgment of the Court of 8 May 2003 in Joined Cases C-328/99 and C-399/00 *Italian Republic and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035 ('Seleco judgment'), paragraphs 37-38; Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV v Commission* [1985] ECR 809, paragraph 17; Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector, OJ C 350, 10.12.1994, p. 5, points 25 and 26; Commission Decision of 2 August 2004 (2006/621/EC) *on the State aid implemented by France for France Télécom,* OJ L 257, 20.9.2006, pp. 11-67; Communication of the Commission to the Member States 93/C 307/03 *on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector,* OJ C 307, 13.11.1993, p. 3, paragraph 2.

- *Second,* it has to be assessed whether the investment by all parties concerned take place at the same time.
- *Third,* it has to be ascertained whether the terms and conditions of the investment are identical for all shareholders.
- *Fourth,* in cases where the State, other investors or the beneficiary have other relationships outside this investment (for example through a side-letter, providing for a guarantee by the State), there may be grounds for doubting whether such equivalence in the mere investment terms suffices ([11]).

The Commission's assessment

Operations of public authorities in the liberalised electronic communications sector have to be analysed carefully because of the potential distortion caused by State aid. This is especially relevant for metropolitan areas where private operators are offering services over several platforms at generally affordable prices due to competition. Given the Dutch authorities' failure to provide all the documents necessary for the Commission to assess the measure fully and the submissions of two complainants raising serious doubts about the project, the Commission opened an in-depth investigation in December 2006 and gave all interested parties an opportunity to submit their observations ([12]).

As a result of the investigation, the Commission came to the conclusion that the participation and involvement of the Amsterdam municipality in the project was akin to that of a market investor. In its assessment, the Commission paid particular attention to the following elements:

- *First,* two private companies active in the sector ([13]) participated in the project with significant investments and on equal terms with the municipality. Furthermore, the shareholding structure of GNA ensured that no single shareholder could exert sole control over the company.
- *Second,* although the Amsterdam municipality carried out certain limited pre-investment activities before the formal setup of GNA, this was not enough to call into question the fulfilment of the timing criterion given that there was agreement among all shareholders that the municipality of Amsterdam would have to be reimbursed later on for these pre-investments.
- *Third,* all shareholders in GNA had invested under the same terms and conditions. In particular, in the event of underperforming business all investing parties would have to bear any losses proportionally to their stake in the venture.
- *Fourth,* the investigation did not reveal any other relationships between the private shareholders and the municipality which could have called into question the application of the MEIP.

Together with the detailed analysis of the business plan, which was also accepted by the private investors, these elements provided sufficient evidence for the Commission to conclude that the investment of the public funds was in line with the MEIP and therefore did not constitute State aid. The Commission approved the project under the EC State aid rules on 11 December 2007.

4. Preliminary policy considerations

The Commission has so far assessed about 35 public support measures for broadband services and networks under the State aid rules. In 'black areas' characterised by adequate broadband coverage over several competing broadband infrastructures (cable, ADSL, etc.), such as Amsterdam, the justification for State aid is doubtful as there is a high risk that State involvement crowds out existing and future private investments ([14]). However, in the case of Amsterdam, the municipality participated in the project like a private investor and on equal terms with two private investors and no State aid was present.

There is a clear, contextual difference between the Commission's earlier negative decision in the Appingedam case ([15]) and the Amsterdam decision. Although both projects were initiated in the

([11]) In other words, the terms and conditions can be identical in one agreement but, at the same time, other agreements can lay down additional clauses with different rights and obligations.

([12]) Opening decision of 20 December 2006 in Case C 53/2006 (ex N 262/2005) *Citynet Amsterdam — investment by the city of Amsterdam in a fibre-to-the home (FttH) network,* OJ C 134, 16.6.2007, p. 9.

([13]) ING RE is a subsidiary of ING, a financial services (banking and insurance) conglomerate active, among other things, in communication infrastructure investments, while Reggefiber is engaged in several fibre network projects in the Netherlands.

([14]) In its decisions on public support for broadband projects, the Commission distinguishes between 'white', 'grey' and 'black' areas when carrying out the compatibility assessment in the presence of aid. The Commission has on several occasions classed as compatible aid public support in areas where adequate broadband services are unavailable or available in a limited way (so-called 'white' or 'grey' areas) on the ground that the aid has no or only a limited distortive effect. See also footnote 9.

([15]) C 35/2005 *Broadband development Appingedam,* Commission decision of 19.7.2006, which was the Commission's first negative decision as regards public funding of broadband projects.

so-called 'black area', and both projects concerned the deployment of fibre networks, the settings of the two projects were different. Unlike Amsterdam, the Appingedam municipality did not argue that its investment was in line with market terms and that there were no private investors involved in the network infrastructure. The Commission found that the project in Appingedam involved State aid and was incompatible with the common market as several market operators were already providing broadband services. In comparison, in Amsterdam, the Commission found that the municipality participated in the project like a market investor. Accordingly, this meant that there was no State aid involved in the Amsterdam project and that there was no need for the Commission to carry out a compatibility assessment.

It is important to stress that the Commission took care to underline that it is not sufficient for public authorities to engage in projects merely by claiming that they are acting like a private investor. The conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively, for instance by means of significant participation of private investors and the existence of a sound business plan. In addition, as stated in the Amsterdam decision, the private parties would have to assume the commercial risk linked to the investment under the same terms and conditions as the public investor.

As public support for broadband schemes moves from support for basic broadband in rural areas towards support for 'next-generation networks' in areas where broadband services are already provided by several operators, the Commission will continue to verify that public involvement addresses first and foremost genuine market failures and does not crowd out private investment.

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103 Index of cases covered in this issue of the Competition Policy Newsletter

Notices and news in brief

This spring European Competition and Consumer Day took place in Ljubljana (Slovenia) on 21-22 May 2008 under the Slovenian EU Presidency.

Information on this event is available on the Slovene Competition Protection Office web page: http://www.uvk.gov.si/si/european_competition_and_consumer_day_21_22_may_2008/

Directorate-General for Competition — Organigramme (1 June 2008)

Director-General	***Philip LOWE***	02 29 65040/02 29 54562
Deputy Director-General Operations	***Lowri EVANS***	02 29 65029
Deputy Director-General Mergers and Antitrust	***Nadia CALVIÑO***	02 29 55067
Deputy Director-General State Aids	***Herbert UNGERER***	02 29 68623
Chief Economist	*Damien NEVEN*	02 29 87312
Audit adviser	*Rosalind BUFTON*	02 29 64116
Assistants to the Director-General	*Inge BERNAERTS*	02 29 51888
	Tomas DEISENHOFER	02 29 85081
Task Force 'Ethics, security and procedures'	*Kris DEKEYSER*	02 29 54206
01. Communications policy and institutional relations	*Tatjana VERRIER*	02 29 92535
02. Antitrust and merger case support	*Guillaume LORIOT*	02 29 84988
03. State aid case support	*Nicola PESARESI*	02 29 92906
04. Strategy and delivery	*Joos STRAGIER*	02 29 52482
DIRECTORATE A **Policy and Strategy**	***Carles ESTEVA MOSSO acting***	02 29 69721
Adviser: Consumer Liaison Officer	*Juan RIVIERE Y MARTI*	02 29 51146
2. Antitrust and mergers policy and scrutiny	*Claude RAKOVSKY*	02 29 55389
3. State aids policy and scrutiny	*Alain ALEXIS*	02 29 55303
4. Evaluation	*Dietrich KLEEMANN*	02 29 65301
5. European Competition Network	*Ales MUSIL*	02 29 92204
6. International Relations	*Dominique VAN DER WEE*	02 29 60216
7. Consumer Liaison	*Zsuzsanna JAMBOR*	02 29 87436
DIRECTORATE B **Markets and cases I – Energy and environment**	***Eric VAN GINDERACHTER acting***	02 29 54427
1. Antitrust — energy, environment	*Céline GAUER*	02 29 63919
2. State aids	*Eric VAN GINDERACHTER*	02 29 54427
3. Mergers	*Dan SJOBLOM*	02 29 67964
DIRECTORATE C **Markets and cases II – Information, communication and media**	***Cecilio MADERO VILLAREJO***	02 29 60949
1. Antitrust — telecoms	*Joachim LUECKING*	02 29 66545
2. Antitrust — media	*Gerald MIERSCH acting*	02 29 96504
3. Antitrust — IT, internet and consumer electronics	*Per HELLSTROEM*	02 29 66935
4. State aids	*Wouter PIEKE*	02 29 59824/02 29 67267
5. Mergers	*Carles ESTEVA MOSSO*	02 29 69721
DIRECTORATE D **Markets and cases III – Financial services and health-related markets**	***Irmfried SCHWIMANN acting***	02 29 67002
Task Force Pharmaceuticals Sector Inquiry	*Dominik SCHNICHELS*	02 29 66937
1. Antitrust – Financial services	*Irmfried SCHWIMANN*	02 29 67002
3. State aids	*Blanca RODRIGUEZ GALINDO*	02 29 52920
4. Mergers	*Johannes LUEBKING*	02 29 59851

DIRECTORATE E		
Markets and cases IV – Basic industries, manufacturing and agriculture	***Paul CSISZAR***	02 29 84669
1. Antitrust — Consumer goods, agriculture and food	*Yves DEVELLENNES*	02 29 51590/02 29 52814
2. Antitrust – Basic industries, chemicals and other manufacturing	*Paolo CESARINI*	02 29 51286/02 29 66495
3. State aids – Industrial restructuring	*Karl SOUKUP*	02 29 67442
4. Mergers	*Maria REHBINDER*	02 29 90007
DIRECTORATE F		
Markets and cases V — Transport, post and other services	***Olivier GUERSENT acting***	02 29 65414
1. Antitrust — Transport and post	*Linsey Mc CALLUM*	02 29 90122
2. Antitrust — Other services	*Georg DE BRONETT*	02 29 59268
3. State aids	*Joaquin FERNANDEZ MARTIN*	02 29 51041
4. Mergers	*Olivier GUERSENT*	02 29 65414
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Cartels	***Kirtikumar MEHTA***	02 29 57389
1. Cartels I	*Paul MALRIC-SMITH*	02 29 59675
2. Cartels II	*Dirk VAN ERPS*	02 29 66080
3. Cartels III	*Jarek POREJSKI*	02 29 87440
3. Cartels IV	*Ewoud SAKKERS*	02 29 66352
4. Cartels V	*Malgorzata JOUVE-MAKOWSKA*	02 29 92407
DIRECTORATE H		
State aid – Cohesion, R&D&I and enforcement	***Humbert DRABBE***	02 29 50060/02 29 52701
1. Regional aid	*Robert HANKIN*	02 29 59773/02 29 68315
2. R&D, innovation and risk capital	*Jorma PIHLATIE*	02 29 53607/02 29 69193
3. State aid network and transparency	*Wolfgang MEDERER*	02 29 53584/02 29 65424
4. Enforcement and procedural reform	*Barbara BRANDTNER*	02 29 51563
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Registry and Resources	***Isabelle BENOLIEL***	02 29 56199/02 29 60198
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2. Resources	*Michel MAGNIER*	02 29 56199/02 29 57107
3. Information technology	*Manuel PEREZ ESPIN*	02 29 61691

Reporting directly to the Commissioner

Hearing officer	*Michael ALBERS*	02 29 61874
Hearing officer	*Karen WILLIAMS*	02 29 65575

New documentation

European Commission Directorate-General Competition

This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition website at http://ec.europa.eu/competition/speeches/

Speeches by the Commissioner, 1 September 2007 — 31 December 2007

19 December: **Commission Prohibits MasterCard's intra-EEA Multilateral Interchange Fees - Introductory remarks at press conference** — Neelie Kroes — Brussels (European Commission)

3 December: **Key challenges and trends for Europe's retail payment systems** — Neelie Kroes — Brussels (EUROFI Conference, European Parliament)

28 November: **Flat Glass Cartel and Guidelines on Non-Horizontal Mergers - introductory remarks at press conference** — Neelie Kroes — Brussels (European Commission)

19 November: **Assessment of and perspectives for competition policy in Europe** — Neelie Kroes — Barcelona, Spain (Celebration of the 50th anniversary of the Treaty of Rome)

15 November: **Helping Europeans get the best deal: a sound competition policy for well-functioning markets** — Neelie Kroes — Lisbon (2nd Lisbon Conference on Competition Law and Economics)

9 November: **Making consumers' right to damages a reality: the case for collective redress mechanisms in antitrust claims** — Neelie Kroes — Lisbon (Conference on collective redress for European consumers)

8 November: **A renewed commitment to competition policy in Europe** — Neelie Kroes — Brussels (Conference on the Place of Competition Law in the Future Community Legal Order)

8 November: **European state aid reform: what's in it for SMEs** — Neelie Kroes — Brussels (conference on SME Policy Dialogue co-organised by the EPP-DE and UEAPME)

22 October: **Introductory remarks on Microsoft's compliance with March 2004 antitrust decision** — Neelie Kroes — Brussels (European Commission)

11 October: **Global Europe – competing and cooperating** — Neelie Kroes — Frankfurt, Germany (Women in European Business" conference)

8 October: **The Law and Economics of State aid control — a Commission Perspective** — Neelie Kroes — Berlin, Germany (Joint EStALI/ESMT Conference, "The Law and Economics of European State Aid Control")

3 October: **Introductory remarks on Spanish bitumen cartel, Visa/Morgan Stanley and Sony/BMG joint venture** — Neelie Kroes — Brussels (European Commission)

1 October: **Building a competitive European energy market** — Neelie Kroes — Madrid (Madrid Energy conference)

28 September: **Improving competition in European energy markets through effective unbundling** — Neelie Kroes — New York, USA (Fordham Corporate Law Institute's Annual Seminar 2007)

19 September: **More competitive energy markets: building on the findings of the sector inquiry to shape the right policy solutions** — Neelie Kroes — Brussels (European Energy Institute

17 September: **Introductory remarks on CFI ruling on Microsoft's abuse of dominant market position** — Neelie Kroes — Brussels (European Commission)

15 September: **Delivering Better Markets and Better Choices** — Neelie Kroes — London (European Consumer and Competition Day)

5 September: **Speech at University of International Business and Economics** — Neelie Kroes — Beijing, China

Speeches by Directorate-General staff, 1 September 2007 — 31 December 2007

13 December: P**rohibition of the abuse of a dominant Positio**n —Blanca Rodriguez Galindo — Beijing, China (International Symposium on Anti Monopoly Enforcement)

13 December: **Investigation procedures and techniques in monopoly cases** — Torben Toft — Beijing, China (International Symposium on Anti Monopoly Enforcement)

15 November: **Economics in state aid: soon as routine as dentistry?** — Lowri Evans — Lisbon (II Lisbon Conference on Competition Law and Economics)

15 November: **State aid reform: a process of Lisbonisation** — Lowri Evans — Lisbon (II Lisbon Conference on Competition Law and Economics)

8 October: **The new Energy Package and the Perspectives for Competition — Unbundling: the Hurdles still to be Overcome** — Herbert Ungerer — Brussels (Major Energy Users Council)

Community Publications on Competition

New publications

Setting of fines for cartels in ICN jurisdictions.

This report has been prepared by the International Competition Network (ICN) Cartels working group for the 7th annual ICN conference that took place in Kyoto in April 2008.

The report covers the fine-setting practices of twenty-two ICN member agencies. It is aimed in particular for jurisdictions revising their legislation or guidelines on fines, or introducing fines for cartels for the first time.

The report is available in electronic format and print on the EU Bookshop: http://bookshop.europa.eu/uri?target=EUB:NOTICE:KD3008288:EN:HTML

It is also available in electronic format on the ICN 7th annual conference website http://www.icn-kyoto.org/documents/index.html

(ISBN: 978-92-79-08397-6, 47 pages).

Press releases and memos
1 September 2007 — 31 December 2007

All texts are available from the Commission's press release database RAPID at: http://europa.eu/rapid/ Enter the reference (e.g. IP/06/14) in the 'reference' input box on the research form to retrieve the text of a press release. Languages available vary for different press releases.

General

IP/07/1964 — 19/12/2007 — Herbert Ungerer appointed Deputy Director-General for state aid policy

Antitrust

MEMO/07/622 — 21/12/2007 — Antitrust: Commission confirms sending Statement of Objections to alleged participants in a air freight cartel

IP/07/1959 — 19/12/2007 — Antitrust: Commission prohibits MasterCard's intra-EEA Multilateral Interchange Fees

MEMO/07/590 — 19/12/2007 — Antitrust: Commission prohibits MasterCard's intra-EEA Multilateral Interchange Fees – frequently asked questions

IP/07/1952 — 18/12/2007 — Competition: Malta opens petroleum products market to competition; infringement procedure closed

CJE/07/89 — 11/12/2007 — Responsibility for breach of the competition rules can be passed on from one economic entity to the one that succeeds it, if both answer to the same public authority

IP/07/1855 — 05/12/2007 — Antitrust: Commission fines producers of chloroprene rubber € 243.2 million for market sharing and price fixing in the EEA

MEMO/07/544 — 05/12/2007 — Competition: Commission action against cartels – Questions and answers

MEMO/07/534 — 30/11/2007 — Antitrust: Commission carries out inspections in the fresh exotic fruits sector

IP/07/1781 — 28/11/2007 — Antitrust: Commission fines flat glass producers € 486.9 million for price fixing cartel

MEMO/07/520 — 28/11/2007 — Competition: Commission action against cartels – Questions and answers

IP/07/1725 — 20/11/2007 — Antitrust: Commission fines professional videotape producers over €74 million for price fixing cartel

MEMO/07/473 — 20/11/2007 — Competition: Commission action against cartels – Questions and answers

IP/07/1678 — 13/11/2007 — Commission acts to reduce telecoms regulation by 50% to focus on broadband competition

MEMO/07/457 — 13/11/2007 — EU Telecoms: the Article 7 procedure, the role of the Commission and the impact of the EU Telecoms Reform — Frequently Asked Questions

MEMO/07/453 — 08/11/2007 — Antitrust: Commission carries out inspections in the cathode ray tubes sector

IP/07/1608 — 26/10/2007 — Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels

MEMO/07/433 — 26/10/2007 — Antitrust: Commission calls for comments on a draft legislative package to introduce settlement procedure for cartels – frequently asked questions

IP/07/1567 — 22/10/2007 — Antitrust: Commission ensures compliance with 2004 Decision against Microsoft

MEMO/07/420 — 22/10/2007 — Antitrust: Commission ensures Microsoft's compliance with the 2004 Decision - frequently asked questions

IP/07/1558 — 19/10/2007 — Antitrust: Commission market tests commitments from eight members of SkyTeam concerning their alliance cooperation

IP/07/1544 — 18/10/2007 — Competition: Commission threatens Malta with Court action over import monopoly for petroleum products

IP/07/1522 — 17/10/2007 — Anti-trust: Groupement des Cartes Bancaires restricts competition by hindering the issuance of cards at competitive prices

MEMO/07/413 — 17/10/2007 — Antitrust: decision addressed to "Groupement des Cartes Bancaires" - Frequently asked questions

IP/07/1487 — 11/10/2007 — Antitrust: Commission opens Belgian gas market to competition

MEMO/07/407 — 11/10/2007 — Antitrust: Commission increases competition in the Belgian gas market – frequently asked questions

MEMO/07/406 — 11/10/2007 — Antitrust: Commission carries out inspections in the international freight forwarding sector

IP/07/1438 — 03/10/2007 — Antitrust: Commission fines bitumen suppliers € 183 million for market sharing and price coordination in Spain

IP/07/1436 — 03/10/2007 — Antitrust: Commission fines Visa €10.2 million for refusing to admit Morgan Stanley as a member

MEMO/07/393 — 03/10/2007 — Competition: Commission action against cartels – Questions and answers

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