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EUROPEAN COMMISSION

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The Commission revises its Guidelines for setting fines in antitrust cases (1)

Hubert de BROCA, Directorate-General for Competition, unit A-1

On 28 June 2006, the Commission adopted its new Guidelines on the method of setting fines imposed on undertakings which infringe Articles 81 and/or 82 EC (2). These Guidelines (hereafter the "2006 Guidelines") refine the existing ones adopted in 1998 (hereafter the "1998 Guidelines"). In part, they update the text in order to reflect the Commission's most recent practice as well as the state of play of the case-law on a number of issues. But they also introduce a couple of significant changes. The present article highlights the main elements of the 2006 Guidelines.

A. General remarks

1. Objectives

The 1998 and 2006 Guidelines obviously share common general objectives. The key purpose of Fining Guidelines is to set out publicly the methodology which the Commission will apply in its future decisions imposing fines and therefore to enhance transparency. By doing so, the Commission simultaneously ensures the consistency of its fining policy and provides undertakings with some degree of legal certainty. As the Court of Justice (ECJ) and the Court of First Instance (CFI) held on various occasions, such guidelines form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see for instance case C-189/02 P, *Dansk Rørindustri A/S a.o. v Commission,* ECR [2005] p. I-5425, paragraph 209). Moreover, both Guidelines set out a methodology which ensures that fines have a sufficiently deterrent effect. Indeed, by nature, fines are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of Community competition law in future (see for instance case C-289/04 P, *Showa Denko v Commission,* ECR [2006] not yet reported, paragraph 16).

The 2006 Guidelines intend to correct notably some drawbacks of the existing methodology. True, the CFI and the ECJ repeatedly confirmed the legality of the 1998 Guidelines. In so doing, the Courts rejected a large number of pleas which parties had — in vain — tried to raise against the previous Guidelines. It however appeared that, in practice, some aspects of the 1998 Guidelines deserved to be improved. First, the classification of infringements as "minor", "serious" and "very serious" appeared to be an initial and largely unnecessary step, in particular with regard to abuses of dominant positions (only "clear-cut" abuses were referred to in the 1998 Guidelines as possible "very serious" infringements) and cartels (although, on the basis of the most recent case-law, it had become quite clear that every cartel should be classified as very serious by its very nature — see notably case T-49/02 and T-51/02, *Brasserie nationale SA a.o. v Commission,* ECR [2005] not yet reported, paragraph 178). Moreover, the category of minor infringements appeared almost useless in practice. Second, and more importantly, the duration of the infringement had a marginal impact on the level of the basic amount of the fine, since each additional year of infringement could only lead to a maximum 10% increase of the starting amount; the 2006 Guidelines multiply by 10 the impact of duration on the level of fine, as will be seen below.

Finally, by using a clearer reference to each undertaking's "value of sales", the 2006 Guidelines intend to reflect, even approximately and imperfectly, the economic importance of the infringement as a whole as well as the relative weight of each undertaking participating in the infringement. The 1998 Guidelines, based on a lump sum system, have often been criticized on that particular aspect, even though this criticism was largely misplaced. In fact, a number of tools corrected the obvious drawbacks of a pure lump sum system. For instance, the Commission fixed starting amounts below the 20 million euros threshold mentioned in the 1998 Guidelines for very serious infringements taking place on small markets; it also differentiated between undertakings on the basis of their respective size in the market concerned (the so-called "groupings") (3). If anything, the 1998 Guidelines rather reflected the insufficient level of

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author.
(2) OJ C 210, 1.9.2006, p. 2. See IP/06/857 of 28.6.2006

(3) See *Competition Policy Newsletter, 2003,* Number 2, « La politique de la Commission en matière d'amendes antitrust: récents développements, perspectives d'avenir », François Arbault.

fines imposed on "large" infringements or on large players, something which the 2006 Guidelines will probably correct.

2. Entry into force

The 2006 Guidelines apply to every case for which a statement of objections is notified after the 1st September 2006, which is the date of publication of the Guidelines in the Official Journal. As of this date, statements of objections will therefore contain a specific reference to the 2006 Guidelines. Incidentally, since point 38 of the Guidelines refers to "a" statement of objections, the 2006 Guidelines will apply in every case where a supplementary statement is notified after the 1st September 2006, even if the first statement was notified before that date.

In *Dansk Rørindustri A/S a.o. v Commission,* cited above, the ECJ held that the Commission is entitled to modify its methodology on fines and to apply such new methodology to infringements committed in the past without infringing the principles of legitimate expectation and non-retroactivity, provided that the methodology appears "reasonably foreseeable", which is plainly the case here.

Indeed, the assessment of (and obviously the reference to) the gravity of the infringement was reasonably foreseeable, since they directly derive from Regulation No 1/2003. In fact, two of the four criteria listed in point 22 of the 2006 Guidelines are even identical to those contained in the 1998 Guidelines. The reference to the "value of sales" (as compared to the lump sum applied in the 1998 Guidelines) was also foreseeable. First, such a reference was often used before the adoption of the 1998 Guidelines ([4]); in a number of cases before the Courts, applicants even expressed their "preference" for such a methodology as compared to the one described in the 1998 Guidelines (see for instance *Dansk Rørindustri A/S a.o. v Commission,* cited above, at paragraphs 156 and 157). Moreover, even under the lump sum system of 1998, the sales of each undertaking were already used for the purpose of the so-called "groupings". Finally, the fact that fines will from now on plainly reflect the duration of each undertaking's participation in an infringement cannot be a surprise to anyone. In fact, duration is one of the only two criteria referred to in Article 23 of Regulation No 1/2003, as it has been one of the only two criteria mentioned in Article 15 of Regulation No 17 for more than 40 years. The duration of infringements was obviously already reflected in the 1998 Guidelines, even though its impact on the level of fines was less. Incidentally, one can add that the 2006 Guidelines appear similar (including with regard to the impact of duration) to the methodologies applied by some of the national competition authorities within the EU ([5]).

B. The setting of fines

The 2006 Guidelines set out a two-step methodology. The Commission will first define the basic amount of the fine, based on the gravity and duration of the infringement. Where applicable, it will then take account of possible adjustment factors. To put it simply, the first step rather corresponds to the assessment of the infringement as a whole, while the second rather reflects all possible elements which are specific to each undertaking ([6]).

1. The basic amount

The main changes in the fining method concern the setting of the basic amount of the fine. The latter will (or may, depending on the case) be the sum of two components: first, an amount which varies depending on the value of sales and on the duration of the infringement; second an amount (which has already become known as "the entry fee") irrespective of the duration. Since both amounts are based on the "value of sales" of each undertaking, this notion will be assessed first.

a. The value of sales

In fixing the basic amount of the fine, the Commission will have regard to "the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA". According to point 14 of the Guidelines, where the infringement of an association relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members. This mirrors the wording of Article 23(2), last paragraph, of Regulation No 1/2003. The value of sales will be assessed before VAT and other taxes directly related to the sales.

In general, the scope of products whose sales are relevant will derive from the very purpose of the infringement. Indirect sales may cover the situation where parties reach a price agreement on

([4]) Considering the often long duration of antitrust infringements such as cartels, it is even likely that, in a number of cases, the first years of infringement will have taken place at a time when the reference to the "value of sales" was the criterion applied by the Commission (i.e. before 1998).

([5]) See the methodologies applied in the UK and the Netherlands, for instance, respectively available at http://www.oft.gov.uk and http://www.nmanet.nl

([6]) This distinction should however not be exaggerated. Duration (which is part of step 1) will be assessed for each undertaking. On the other hand, some adjustment factors (which are part of step 2) may be valid for all parties to the infringement.

a given product, where the price of that product then serves as a basis for the price of lower or higher quality products. It may also be relevant when assessing the value of sales in some abuse cases, such as tying, or in parallel trade cases.

The relevant sales are those achieved in the territory where the infringement took place. As the case may be, it can therefore be either the whole EEA or one or more Member States. Point 18 of the 2006 Guidelines concerns the setting of fines in case of infringements whose geographic scope extends beyond the territory of the EEA. In such cases, the sales in the EEA may not adequately reflect the importance of each undertaking in the overall infringement. The 2006 Guidelines codify the Commission's past practice, which has been confirmed by the Court for worldwide market sharing arrangements (see joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon a.o. v Commission,* ECR [2004] II-1181, paragraphs 196 to 204) and for worldwide price-fixing cartels (see joined cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon a.o. v Commission,* ECR [2005] not yet reported, paragraphs 180 to 189). In brief, in such cases, the Commission may apply the worldwide market shares of each player to the total EEA sales.

The Commission will consider the sales during the last full business year of participation in the infringement (point 13). Such a year will be presumed to be sufficiently representative of each undertaking's sales. By nature, it is inherent to the normal business life that sales fluctuate from one year to the other. It is accordingly inherent to the system that each of these fluctuations should not be reflected in the value of sales. As the preamble makes clear, the value of sales only provides a proxy of the appropriate amount of the fine. Where sales during the last year are clearly not representative (the undertaking sold all or a substantial part of its relevant business or, conversely, acquired the business of one of its competitors, or the geographic scope of the infringement significantly changed during the lifetime of the infringement), then alternative references may be used, as point 13 suggests (see the word "normally").

The figures used will normally be those provided by the undertaking itself. Whenever possible, the figures appearing in official [audited, where applicable] accounts will be used. The Commission should however be in a position to check the reliability and completeness of figures provided by the parties. Where figures appear to be incomplete or unreliable, the Commission will assess the value of sales of the relevant undertaking. To that end, it may use the partial figures it has obtained or any other relevant information (for instance: data collected during inspections or general market information which may be available in business press).

b. The variable amount

The variable amount corresponds to a given percentage of the value of sales, multiplied by the number of years of participation in the infringement. It therefore implies two steps: the fixing of the percentage and the determination of duration for each undertaking.

The percentage may be set at a level from 0 to 30% of the value of sales. This rather wide range of possible percentages appeared necessary mainly for the following two reasons: (1) unlike the 1998 Guidelines, the 2006 Guidelines do not contain categories of infringements (minor, serious or very serious infringements). Since there is no classification anymore, the methodology applies to every possible infringement; there was therefore a need to have a sufficient range of percentages available to cover every possible type of infringement; (2) the Guidelines now set a maximum basic amount. In order to ensure that this maximum level would nevertheless leave sufficient room of manoeuvre for the Commission, the Guidelines had to include a wide range of percentages of the value of sales.

The choice of a given percentage depends upon the gravity of the infringement. To that end, point 22 lists — in a non limitative way — four examples of factors that may be taken into account. The first two (nature and geographic scope of the infringement) are similar to those mentioned in the 1998 Guidelines and are already subject to a substantial line of case-law. In practice, the nature of the infringement will certainly remain one of the key factors, as point 23 illustrates with regard to cartels. The other two factors (whether or not the infringement has been implemented and the combined market share of the parties) are new. It may be noted that the 2006 Guidelines do not refer to the "actual impact, where this can be measured", as the 1998 Guidelines used to do. In practice, however, the Commission gathered evidence of the implementation of the infringement and was rarely in a position to measure the actual impact; in addition, since cartels (which represent the majority of cases where fines are imposed) are traditionally infringements by object, it appeared to make more sense to solely refer to the implementation — or not — of the infringement.

With regard to cartels, point 23 presumes that these are infringements such as to justify the application of a percentage of sales which will "generally be set at the higher end of the scale" (point 23 insists on the fact that cartels should be heavily fined "as a matter of policy" because they are "by their very nature" particularly harmful infringements).

Since the assessment of gravity is based on an examination of the overall infringement, the same percentage will apply to all the parties involved in the same infringement. Elements specific to each company enter into account at the level of the "adjustment factors" (see below).

The amount resulting from the percentage of the value of sales will then be multiplied by the number of years of participation in the infringement (duration is assessed undertaking by undertaking). Duration therefore becomes a key factor in the 2006 Guidelines, since each and every year of participation will be fully reflected in the basic amount of the fine. Contrary to the Commission's practice under the 1998 Guidelines, periods of less than six months will be counted as half years, and periods longer than six months but shorter than a year will be counted as a full year. This illustrates the Commission's wish that duration should play as big a role as possible (as underlined in point 5 of the preamble). Moreover, in practical terms, for infringements of less than six months for which no entry fee applies, the fine would otherwise be equal to 0.

In principle, each undertaking will therefore support a basic amount which is tailored to its particular situation. Point 26 of the Guidelines however contains two qualifications in this regard. First, the Commission may set an identical basic amount for two undertakings, even though they only have similar, and not identical, values of sales. Indeed, where the sales on the market of two or more undertakings are similar, even though they are not identical, the difference between their respective likely weight in the infringement and the respective impact of their behaviour on the market is probably not such that it deserves to result in different amounts of fines. Second, rounded figures will be used for the basic amount.

c. The entry fee

The entry fee is one of the "novelties" of the 2006 Guidelines. It is a "one shot" exercise. It applies once, whatever the duration of the infringement, and, contrary to the variable amount of the fine (see point 24 of the Guidelines), is not multiplied by the number of years of participation in the infringement. The main purpose of the entry fee is to deter undertakings from even entering into an illegal behaviour (to try and see…). This entry fee is expressed as a percentage of the value of sales and can vary from 15 to 25%. This range of percentages will allow reflecting the more or less serious nature of the infringement also at the level of the entry fee.

As the actual level of the entry fee depends very much on general criteria (similar to those listed for the assessment of the variable amount), the same level of entry fee will apply to all participants in a given case.

The 2006 Guidelines draw a distinction between cartels (for which an entry fee "will" be applied) and other types of infringements (for which an entry fee "may" be applied). In the latter case, an entry fee may be particularly justified where the infringement appears rather obvious (consistent line of previous decisions) or where the infringement, despite its very short duration, produced or was likely to produce significant effects.

In other words, undertakings participating in a three-month cartel may have to support a basic amount representing up to 40% of their yearly value of sales ([7]). Undertakings participating in a cartel during 5 years and eleven months may face a basic amount of more than two years of their respective relevant turnover ([8]). The final level of the fine may be lower or higher than this, depending on the adjustment factors.

2. The adjustment factors

No major changes have been made to the possible adjustment factors compared to the 1998 Guidelines. The 2006 Guidelines mainly draw the consequences of the case-law and reflect the developments of the Commission's practice in the last few years.

a. Aggravating factors

Among the non-exhaustive list of factors which the Commission may take into account as aggravating circumstances, the 2006 Guidelines refer to the role of leader and/or instigator as well as possible measures of coercion and/or retaliatory measures. They also provide for the possibility of increasing the fine imposed on undertakings that have refused to cooperate with, or obstructed, the Commission in carrying out its investigations (see for instance case C-308/04 P, *SGL v Commission*, ECR [2006], not yet reported, paragraph 169).

But the main change regards the situation of repeat offenders. The Commission's practice so far is to increase the fine by 50% where the undertaking has been found by the Commission to have been pre-

([7]) Up to 25% for the entry fee, and up to 15% (i.e. up to 30% multiplied by 0.5) for the variable amount.

([8]) Up to 25% for the entry fee, and up to 180% (i.e. up to 30% multiplied by 6) for the variable amount.

viously involved in one or more similar infringements. The 2006 Guidelines give clear indications as to the Commission's future policy on this matter. The existing approach is indeed modified in three ways. First, the Commission will take into account not only its own previous decisions, but also those of National Competition Authorities applying Articles 81 or 82; this is in line with the modernisation of EU antitrust rules which entered into force in May 2004. Second, the increase of the fine may now be up to 100%; in so doing, the Commission highlights that repeat offences are regarded as a very serious aggravating circumstance which is such as to justify a "significant" increase of the fine, as the CFI admitted in case T-38/02, *Groupe Danone v Commission* (ECR [2005] not yet reported, paragraph 348). Third, each prior infringement will now justify an increase of the fine. In other words, contrary to the past, the Commission's policy against repeat offenders will sanction even more the "multi-recidivists".

b. Mitigating factors

The examples of mitigating factors in the 2006 Guidelines make clear — stating the obvious — that it belongs to the undertaking claiming the application of mitigating circumstances to provide evidence that such circumstances are met. Among possible mitigating factors, the Guidelines refer to the following non-exhaustive elements.

First, the Commission may have regard to the termination of the infringement as soon as the Commission intervenes. The 2006 Guidelines however specify that — in line with the Commission's current practice, confirmed by the CFI in *Tokai Carbon a.o. v Commission* (2005), cited above, paragraph 292 — such mitigating factor will not apply to secret agreements. This would otherwise be counterproductive, since undertakings could always enter into secret arrangements knowing that they would in any event get the benefit of a mitigating circumstance if they stop their conduct once discovered. Second, infringements by negligence (which, along with intentional violations, is one of the two types of infringements covered by Article 23(2) of Regulation No 1/2003) may justify the granting of a reduction. Practice however shows that the type of conducts which are fined by the Commission rarely appear to be "infringements by negligence". Such a mitigating circumstance should therefore play a marginal role in future — as it did under the 1998 Guidelines. Third, the substantially limited role of an undertaking may mitigate that undertaking's liability. However, in line with the Commission's current practice, in order to benefit from such a mitigating factor, the undertaking will have to show that, during the period in which it was a party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market. The 2006 Guidelines further indicate that the mere fact that an undertaking participates to an infringement for a shorter period of time than other infringers will not be regarded as a mitigating factor; in fact, that circumstance will already be fully reflected in the basic amount of the fine, which is notably based on the duration of each undertaking's participation in the infringement. Fourth, the mitigating circumstance of "effective cooperation outside the leniency notice and beyond the legal obligation to do so" mainly targets non cartel cases. As the wording of the Guidelines makes clear, not all cooperation will deserve a reward however. Fifth, the fact that the illegal conduct of the undertaking has been authorised or encouraged by public authorities or by legislation may also be taken into account in order to decrease the level of the fine.

c. Special increase for deterrence

(i) Multiplier

The practice of applying a so-called "multiplier" has been developed under the 1998 Guidelines and approved by the Courts on a number of occasions (notably on the day after the adoption of the 2006 Guidelines, in *Showa Denko v Commission,* cited above, paragraphs 15 to 18 and 28 to 30. See also the developments in case T-15/02, *BASF v Commission,* ECR [2006] not yet reported, paragraphs 205 to 263). This reflects the constant line of case-law where the Court considered that the overall size of the undertaking can be among the list of elements to be looked at when setting the level of fines (see Cases 100/80 to 103/80, *Musique Diffusion Française a.o. v Commission,* ECR [1983] 1825, paragraph 120). The possibility of fixing a multiplier is now more explicitly stated in point 30 of the 2006 Guidelines. The rationale is that a fine imposed on large multi-product undertakings should be increased in order to deter such companies from entering into an infringement. The deterrence of a fine without a multiplier may otherwise be too low compared to the overall ability to pay of the undertaking as a whole. This rationale remains valid under the 2006 Guidelines, since the basic amount notably depends upon the sales to which the infringement relates and therefore ignores the overall size of the company (something which the multiplier has always been supposed to correct, at least in part).

Under the 1998 Guidelines, the assessment of the multiplier was part of the assessment of gravity. Under the 2006 Guidelines, it will take place at a later stage of the reasoning on fines, as part of the "adjustment factors". The reason for this change has nothing to do with substance and is simply linked to the logic of the Guidelines. Section 1 concerns the assessment of the infringement, while Section 2 rather deals with factors that are specific to each undertaking. Since the application of the multiplier relates to the size of each undertaking, it has been considered more appropriate to assess it under Section 2 of the Guidelines rather than under Section 1. In any event, as the CFI rightly observed in *BASF v Commission,* cited above, at paragraph 243, the end result is the same, whatever the order of the calculation.

(ii) Improper gains

The possibility to increase the fine in order to exceed the gains improperly made as a result of the infringement already existed under the 1998 Guidelines, although it was listed as a possible aggravating circumstance. The purpose of this provision is not to force the Commission to enter into such an estimate of the gains or even to suggest that the Commission should systematically try to make such an estimate, but rather to avoid a situation where the fine, set in accordance with the Guidelines, would not even correspond to the gains achieved by the parties. In such a scenario, the Commission would otherwise knowingly set the fine at a level which is obviously under-deterrent.

d. Maximum fine and Leniency Notice

The application of the 10% ceiling for fines, which directly derives from Article 23 of Regulation No 1/2003, as well as that of the leniency notices are obviously not affected by the 2006 Guidelines. The latter simply codify the Commission's practice according to which any reduction granted on the basis of the Leniency Notice will be applied after the 10% ceiling. In so doing, the Commission makes sure that cooperation under the Leniency notice will always be rewarded, even for undertakings whose fine exceeds the 10% ceiling.

e. Inability to pay

A specific subsection of the 2006 Guidelines is dedicated to the inability to pay, which was only briefly mentioned in point 5(b) of the 1998 Guidelines. In line with the Commission's practice, when setting fines, the inability to pay will only be taken into account exceptionally. Indeed, according to settled case-law, the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions (see for instance *SGL v Commission,* cited above, paragraph 105). Point 35 of the Guidelines provides some formal and substantial indications as to how and when a reduction for inability to pay could be granted. As to the form, it states that it obviously belongs to the undertaking concerned to request the taking into account of such a situation. Such a request can furthermore only be made on the basis of objective evidence. On substance, the 2006 Guidelines set a rather high standard, in line with the case-law. The undertaking will have to show that the imposition of a fine "would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value".

3. *Final remarks*

The 2006 Guidelines present the methodology which the Commission will in principle apply in future. There are however situations where the Commission may depart from this methodology. Points 36 and 37 cover such situations. First, the Commission remains free to set symbolic fines (as it did in a limited number of cases between 1998 and 2006); where such will be the case, the Commission will explain its reasoning in the decision. Second, the Commission may apply a different methodology for setting fines or apply higher percentages than the one mentioned in point 21 of the 2006 Guidelines in order to take account of "the particularities of a given case or the need to achieve deterrence in a particular case." Such may be the case, for instance, where no turnover figures are available at all.

Although it is obviously not possible to anticipate in the abstract what the level of fines will be in future (notably because the application of the Guidelines logically implies a number of variables), its main features provide tools to ensure adequate deterrence, in particular on large players who have taken part to an infringement for a number of years on significant markets. After more than 50 years of application of EU antitrust rules, the likelihood of having to bear high fines should not come as a surprise to any such EU antitrust law offender.

Time to deregulate — Commission consultation on a new EU framework for electronic communications [1]

Inge BERNAERTS, Directorate-General for Competition, unit C-1

On 29 June 2006, the Commission published its preliminary views on the future of telecoms regulation in the EU. Although evolutionary rather than revolutionary, the proposals mark an important further step in the transition of this sector from monopoly to competition. They prepare the ground for partially deregulating the sector, leaving large parts of the industry to be governed by competition law only. At the same time, where regulation remains necessary, the Commission calls for more harmonization and more effective enforcement. Suggestions are also made to make administrative procedures less burdensome.

The package published in June contains various documents [2]: (i) a Commission Communication that reports on the functioning of the current regulatory framework, in force since 2003, and that identifies areas for change; (ii) a Commission Staff Working Document in which concrete amendments to the framework are proposed, together with (iii) an Impact Assessment Report on those proposals; and finally (iv) a Commission Staff Working Document containing a draft revised Commission Recommendation on relevant product and service markets susceptible to ex ante regulation (the **draft revised Recommendation).**

This article will focus on the draft revised Recommendation and on the amendments that the Commission proposes to the Framework Directive [3].

A. The draft revised Recommendation — reducing the scope of regulation

The purpose of the Recommendation on relevant product and service markets is to identify those markets within the electronic communications sector that, on the basis of their characteristics such as barriers to entry, should be considered for ex ante regulation. In February 2003, the Commission adopted an initial Recommendation listing 18 product and services markets — 7 retail markets and 11 wholesale markets — as potential candidates for regulation [4]. Whether such markets are regulated in practice in a given Member State depends on whether one or more operators are found dominant on these markets. The assessment of dominance is to be carried out by the national regulatory authorities (NRAs), subject to consultation of the Commission under the so-called Article 7 mechanism [5].

In order to keep abreast with rapidly changing technological and market conditions, the Recommendation on relevant product and service markets is subject to regular review. The draft text published on 29 June 2006 revises the Recommendation for the first time.

When reviewing the Recommendation, the Commission has for various reasons opted to take the existing list of 18 markets as a starting point. First, this list has proven its merits. It has structured the vast market analysis exercise undertaken by the NRAs and has brought a certain degree of harmonization in the regulatory approach across the EU. To a very large extent NRAs adhere to the market definitions laid down in the Recommendation [6] and the industry generally recognizes its value [7].

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

(2) The texts are available at http://ec.europa.eu/information_society/policy/ecomm/tomorrow/roadmap/index_en.htm

(3) Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.04.2002. Other parts of the review, such as proposed changes to spectrum management, universal services and data protection, are not dealt with herein.

(4) Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible for *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 114, 8.5.2003, p. 45.

(5) For an overview of the market review and Article 7 consultation mechanism see KRUEGER and DI MAURO, "The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications", Competition Policy Newsletter, 2003 — number 3, p.33-36.

(6) Commission Communication on Market Reviews under the EU Regulatory Framework — Consolidating the internal market for electronic communications, COM(2006) 28 final, of 6 February 2006. This trend continued in the notifications received after the adoption of the Communication.

(7) As is shown by the stakeholders' responses to the Commission's call for input on the review of the EU regulatory framework for electronic communications and services including review of the Recommendation on relevant markets launched on 25 November 2005.

Secondly, the Commission seeks to ensure regulatory continuity. Many NRAs are in the middle of ongoing market analysis procedures and a major overhaul to the market definitions could jeopardise the ongoing work. The industry has become accustomed, not without pain, to the detailed data collection by NRAs along the structure of the existing Recommendation and continuity will facilitate indispensable further rounds of data collection.

SMS termination — the only broadening of regulation

With the starting point set, the question arises whether new markets need to be added to the existing list. Have market developments and technological evolutions given rise to new bottlenecks in the industry which, if unregulated, would frustrate competition in a persistent manner? The Commission has so far no indications that this would be the case, with one possible exception: SMS termination.

When the initial Recommendation was adopted in 2003, SMS was of far less economic importance than today. Moreover, there was at least an initial question mark as to whether termination of SMS would manifest the same market failure and allocative inefficiencies as voice call termination (for example distortions of competition between fixed and mobile services were less of a concern for SMS since few text messages originated on fixed telephones). Today, SMS represents a substantial part of mobile services and experience has shown that market failures in termination could be similar for both SMS and voice calls ([8]).

Significant reduction of retail regulation

In view of the generally intensified degree of competition in the electronic communications sector, a more prominent question is which markets can be removed from the Recommendation. The 2003 Recommendation already set the aim to reduce ex ante sector-specific regulation progressively as competition in the market develops and this principle is now further implemented in the draft revised Recommendation. The general philosophy remains that, where possible, regulation should be limited to the wholesale level. By intervening at wholesale level only, as much of the value chain as possible is open to normal competitive processes.

In the draft revised Recommendation, the Commission proposes to deregulate the retail calls markets and the retail market for low capacity leased lines (so-called minimum set of leased lines). As regards the retail calls markets (national and international calls for residential and non-residential customers respectively), the Commission observes across the EU new market entry and a tendency towards effective competition on the basis of the wholesale regulation in place (mainly carrier (pre-)selection possibly accompanied by wholesale line rental and bitstream access enabling competing voice-over-broadband services). Alternative operators express concerns that, in the absence of retail regulation, incumbents may be in a position to remonopolise the retail calls markets through price squeezes and anticompetitive bundling, but the Commission is of the view that ex post enforcement of competition law in combination with effective wholesale regulation will be sufficient to tackle such behaviour should it occur.

Barriers to entry are much higher for the retail access market, where market entry through local loop unbundling requires time and important sunk investments. Incumbents across the EU continue to have very high market shares and competition law does not always offer the right instruments to tackle market failures (for example, it may be difficult to enforce wholesale line rental in the absence of an abuse; also it is questionable whether competition law could deal effectively with excessive pricing in this market). The retail access market is therefore proposed to be maintained as a market susceptible to ex ante regulation. On the basis of its practical experience under the Article 7 consultation mechanism, the Commission proposes to merge the retail access markets for residential and non-residential customers, respectively, into a single retail access market. It appeared that the contractual terms of access do not significantly and systematically differ between both customer groups and that the distinction between both types of services is difficult to make in practice.

The Commission also proposes to deregulate the retail leased line market. It considers that market failures arising on the retail leased lines market — for example difficulties that alternative operators are faced with to mirror the ubiquity of the incumbent's network — should be solved through appropriate wholesale regulation. (Regulated) access to wholesale terminating and trunk segments of leased lines should remove barriers to entry and expansion and should ensure competitive supply on the retail market.

Opening the door for deregulating transit services and trunk leased lines

In addition to deregulating most retail services, the revised draft Recommendation opens the door for removing regulation from certain wholesale markets. The Commission observes that competing infrastructures emerge at core network level, i.e.

([8]) See e.g. the market analysis and notification by the French NRA, Arcep, Case FR/2006/0413.

between the major cities in a given country. The presence of such alternative infrastructures may constrain the incumbent's behaviour as regards the supply of dedicated capacity (trunk leased lines) and call conveyance services (transit) in its core network. On a European scale, the Commission considers that the development of alternative infrastructures remains for the time being often limited to the "thickest" routes (i.e. the routes with most traffic) so that the trunk leased lines and transit markets overall still continue to be susceptible to ex ante regulation and hence should remain included in the revised draft Recommendation. In the Explanatory Memorandum that accompanies the draft revised Recommendation, the Commission indicates, however, explicitly under which circumstances NRAs in individual Member States can exclude these markets from regulation (9).

Assessing the need to regulate mobile origination and broadcasting transmission

The Commission is particularly interested in stakeholders' views on two more wholesale markets, the mobile access and call origination market and the market for broadcasting transmission services.

The competitive situation on the market for mobile access and call origination varies substantially across the EU. In certain Member States, mobile network operators compete for providing national roaming services and for hosting mobile virtual network operators (MVNOs) on their network. In other Member States, this is not the case. Experience under the Article 7 consultation mechanism has shown that in a number of Member States mobile network operators, which are individually or collectively dominant at wholesale level, refuse to grant access to their network in order to protect market share and rents at retail level (10). In such countries regulatory intervention appeared necessary to avoid consumer harm (11).

Under those circumstances, where the market tends towards effective competition in some Member States but not in others, removing the relevant market from the Recommendation may lead to under-regulation and cause consumer harm in certain countries. NRAs could of course, on an individual basis taking specific national circumstances into account, still find that the three criteria-test (12) is met, but this would impose on the NRAs an additional burden of proof compared to the current Recommendation. On the other hand, maintaining the market in the Recommendation for what appears to be a minority of Member States (13) may impose an unnecessary administrative burden on the other NRAs, which would still be required periodically to reanalyse the market and notify their findings to the Commission — even though this may be on the basis of a simplified procedure (see below).

The market for broadcasting transmission services raises issues of its own. So far, all NRAs that have notified their analysis of this market have proposed to regulate at least part of the market. The regulated platform differs however from terrestrial transmission platforms in most Member States to cable networks in others. Existing non-economic regulation also varies greatly across the EU, with certain national legislations containing mast and site sharing provisions and must carry obligations sometimes leaving virtually no scope for commercially negotiated transmission agreements. With its particular call for input on this market, the Commission hopes to obtain a clearer view on the remaining need for ex ante regulation based on an economic analysis of the broadcasting transmission market, in addition to the regulation that often exists on other grounds (must carry, mast and site sharing,…). Also, the Commission will try to understand better to what extent upcoming digitalisation of platforms and increasing competition between platforms at retail level may remove the need for ex ante regulation in this market.

(9) It should be noted that so far 8 NRAs (out of 19 having notified this market under the Article 7 consultation mechanism) have concluded that the market for trunk segments of leased lines was effectively competitive and 3 NRAs (out of 21) have concluded that the market for transit services was effectively competitive (excluding Germany in which parts of both markets are found effectively competitive).

(10) See notifications from Cyprus, Ireland, Malta, Spain and Slovenia. The Irish NRA has however withdrawn its SMP designation in the course of national court procedures.

(11) In other countries (France, Luxemburg, Poland, Slovakia) the threat of regulation seems to have encouraged network operators to enter into wholesale agreements on commercially negotiated terms.

(12) The three criteria test determines whether markets are susceptible to *ex ante* regulation. The three criteria are: (1) the existence of high entry barriers; (2) the absence of market conditions tending towards effective competition; and (3) the inability of competition law alone to remedy the exploitation of market power. For the markets included in the Recommendation, the Commission has concluded at EU level that the three criteria test is met and individual NRAs do not need to redo the test. For markets that are not included in the Recommendation, however, NRAs need to demonstrate that the three criteria test is satisfied if they want to regulate such markets.

(13) 12 out of 17 NRAs so far have found this market effectively competitive; 2 further notifications in which the market was found not to be effectively competitive (in France and Poland respectively) have been withdrawn pending further market analysis.

Conclusion

With the proposal to deregulate at least 5 markets, and with a clear opening created for NRAs to deregulate wholesale trunk leased lines and transit services where alternative infrastructures have been rolled out, the draft revised Recommendation substantially reduces the scope of ex ante regulation. The behaviour of operators on those markets will in the future be governed by ex post enforcement of competition law only, which will no doubt give rise to an increased number of complaints, investigations and decisions from the national and European antitrust authorities ([14]).

B. Proposed amendments to the Framework Directive — striving for more harmonisation and more effectiveness

When asked about the functioning of the existing regulatory framework, many respondents highlighted two deficiencies: (i) the large divergences in regulation across Europe and (ii) the administrative burden involved in the market analysis and notification procedures ([15]).

Proposals to enhance harmonisation

Stakeholders generally applaud the basic principles of the existing regulatory framework. The framework managed to harmonize to a large extent the regulatory *approach:* regulation is now based on a thorough economic analysis of markets based on competition law principles (with the markets that are susceptible to ex ante regulation being identified centrally by the Commission). However, when overseeing the regulatory landscape in the EU today, it is found that regulatory *end results* continue to diverge too much from one Member State to the other.

In this respect, it should be underlined that part of the differences observed in regulation imposed across Member States is acceptable and even to be welcomed, for these differences reflect the diverging degrees of competition that are an economic reality. For example, wholesale line rental may be an appropriate remedy in some Member States, but not in others, depending on the degree of competition observed in the retail access and calls markets in each country. Differentiated remedies may also be justified for historical reasons ([16]) or against the background of distinct network topologies. It is one of the merits of the existing regulatory framework that regulation can be tailored according to the specific competitive circumstances identified in a given market. The flexibility to take national circumstances into account should be maintained if one wants to avoid overregulation.

However, other differences observed in regulation across the EU are unrelated to diverging market circumstances. They mask ineffective regulation in certain Member States that unnecessarily shields operators against competition and causes consumer harm. Examples are failures in some Member States to bring mobile termination rates down to the level of an efficient operator within a reasonable timeframe or failures to implement proper price regulation for local loop unbundling and wholesale broadband access services.

From a European perspective, there are "soft-interventions" and "hard-interventions" imaginable to avoid the latter type of diverging regulation. Soft-intervention may include the adoption of best practices, with a requirement for individual NRAs to justify why in specific cases they deviate from the recommended approach. But who is best place to develop such best practices? Now that most NRAs have decided how to regulate their own national product markets, it may become increasingly difficult for the European Regulators Group ***(ERG)*** to reach a consensus on best practices as each NRA may tend to defend its own approach. The Commission therefore may need to provide its own additional guidance on formulating appropriate and proportionate remedies based on the lessons learned from reviewing more than 500 notifications under the Article 7 consultation mechanism so far. International benchmarking of certain parameters (e.g. tariffs, broadband penetration, local loop unbundling rates…), such as certain exercises carried out both by the Commission ([17]) and the ERG ([18]) in the past, may also help to assess in which product markets and Member States further harmonisation efforts are required.

"Hard-interventions" may include an extension of the Commission's veto power to remedies. Under the current regulatory framework, the Commission can prohibit NRAs from adopting notified measures if it objects to the market definition or

([14]) Already in the past 2 years, the electronic communications sector has been the one where the Commission has received most notifications of draft decisions by national competition authorities under Article 11(4) of Council Regulation (EC) No 1/2003.
([15]) See the responses to the call for input launched in October 2005.
([16]) For example price regulation for fixed termination provided by alternative operators may be necessary in some Member States where historically such tariffs have been high and asymmetric, but in other Member States lighter remedies such as transparency and non-discrimination obligations may be sufficient.
([17]) See the annual Implementation Reports.
([18]) E.g. on mobile termination rates and on broadband.

the NRA's assessment of dominance, but not if it disagrees with the regulatory remedies proposed. An extension of the Commission's veto power to remedies would enable the Commission to prevent remedies that are manifestly ineffective from taking effect. Until now, the Commission has developed a practice of making comments where it considers remedies proposed to be ineffective (i.e. too stringent or too lenient in view of the market failure identified) or where it finds that the NRA has not sufficiently motivated its choice of remedies. The regulatory framework requires NRAs to take the utmost account of such comments when adopting the definitive measures. This has in most cases lead NRAs to amend their proposed remedies ([19]) or to elaborate on their justification. In other cases, however, the Commission's comments letters failed to have the desired effect and the definitively adopted measures remained ineffective ([20]). Such situations could, according to the Commission's proposals, be remedied by extending the Commission's veto power to remedies ([21]).

Tackling delays in effective enforcement

The differences in the regulatory landscape in the EU today are also due to late implementation of the regulatory framework in many Member States. We have seen a significant catch up in the number of Article 7 notifications over the past months, but several NRAs still need to finalize their first round of market reviews ([22]). Once the amendments to the regulatory framework will enter into force (2009-2010), however, it is fair to assume that regulation based on market analysis and reviewed by the Commission will be in force on all product markets in the Recommendation (as then applicable) in all Member States. The crucial time factor by then will be to ensure that NRAs keep on reviewing the relevant product markets in their country and the remedies imposed at regular paste. Therefore, it may be envisaged to provide for a maximum interval between two consecutive rounds of market reviews in the revised framework.

Another factor that has undermined the effectiveness of regulation in some Member States and has contributed to the diversity in the regulatory situation across the EU is related to the appeal mechanism. In some Member States, it appears that NRA decisions are routinely suspended while they are being appealed on substance. This creates an incentive for undertakings systematically to use the appeal process as a delaying tactic and may prevent regulatory measures from taking effect for several years. Therefore, the Commission proposes to lay down in the revised framework harmonised legal criteria that national courts must use in deciding whether to suspend NRA decisions on appeal. NRA decisions should be suspended only where irreparable harm to the appellant can be shown.

Reducing the administrative burden

A second point of criticism that the Commission tries to address with its proposals is the administrative burden of the current system. The systematic and periodical market analysis procedure that the regulatory framework prescribes is indeed cumbersome. It requires NRAs to engage in extensive data collection and to make a complete assessment of the competitive situation in each market. Subsequently, NRAs must write down their findings and the remedies that they propose in a document that they must submit to national and European consultation. Only thereafter can they adopt, amend or withdraw regulation.

However, a regular market analysis is essential to the regulatory framework. Without the requirement periodically to test the continued need for ex ante regulation on the basis of a detailed market investigation, there would be a risk of regulatory sclerosis whereby regulation would persist despite evolving market conditions. Regulation is too intrusive in the operators' business and the functioning of the economy to accept it without periodical evaluation. On the other hand, technology may move on and market definitions may become outdated but the competition problems may remain the same. Ensuring that regulation remains effective in such situations also requires regular reviews. The Commission therefore proposes to maintain also in the period beyond 2009-2010 the obligation for NRAs periodically to ana-

([19]) Some examples of significant changes to the regulatory measures are the national follow-up to the Commission's comments letter concerning mobile termination in Austria (case AT/2005/256) and Luxemburg (case LU/2005/321). See also the Commission's comments letter concerning wholesale broadcasting transmission in Lithuania (cases LT/2006/346 and LT/2006/468).

([20]) E.g. the Commission's comments letter concerning the exclusion of certain types of calls from the regulation of mobile termination in Finland (cases FI/2003/31 and FI/2006/403).

([21]) For a critical assessment of the Commission's proposal to extend its veto power to remedies, see Hogan & Hartson and Analysis, "Preparing the next steps in regulation of electronic communications", Final Report for the European Commission available at (http://ec.europa.eu/information_society/policy/ecomm/info_centre/documentation/studies_ext_consult/index_en.htm)

([22]) In particular, a significant amount of first round notifications are expected still from the NRAs in Belgium, Estonia and Latvia. The German NRA has notified most of its market analyses but is still to implement a number of remedies, leaving a number of markets in Germany, including wholesale broadband access, de facto unregulated for the time being.

lyse the markets included in the Recommendation. One could even consider explicitly stipulating in the framework a maximum interval between two consecutive market reviews in order to avoid that the review rhythm slows down once regulation is in place.

In order to consolidate further the internal market, the systematic market analysis must continue to be accompanied by a systematic notification to the Commission and other NRAs. Compared to the time and work involved in the data collection, market analysis and national consultation, the European consultation involves a limited additional burden. For the European consultation, many NRAs use in practice largely the same document as for the national consultation which they update to integrate the results of the national consultation. Through the responses to the Commission's call for input transpires moreover that a vast majority of operators strongly support the Article 7 consultation mechanism to be maintained in order to consolidate the internal market and ensure a uniform regulatory standard in all Member States.

This being said, where possible the market analysis and notification procedures should be simplified. The Commission proposes in particular to reduce the amount of information required for certain types of notifications, such as (i) notifications of markets which previously have been found competitive (for example trunk leased lines and transit services in a number of Member States and mobile access and call origination in a number of Member States if that market is maintained in the revised Recommendation) and (2) notifications which relate only to minor changes of remedies imposed ([23]). For those cases a simplified procedure would be introduced, with a short standardised notification form ([24]). It should be discussed whether it is appropriate to extend the simplified procedure also to other categories of cases such as cases where dominance has been found in the past and where very little market developments are expected in the medium term so that regulation is for the time being to be continued (for example fixed and mobile termination markets and the market for local loop unbundling). It should be avoided, however, that NRAs are encouraged routinely to continue regulation simply to benefit from the simplified procedure.

Conclusion

The significant shortening of the Recommendation that is currently proposed (from 18 markets to at most 12 and possibly only 9 ([25]) markets) will in itself substantially reduce the administrative burden involved in the systematic market analysis and notification procedures. In addition NRAs, operators and the Commission will in the future no doubt benefit from their experience in the first round of market analysis and notifications and will for certain cases be able to benefit from the simplified procedure that the Commission proposes to introduce. The administrative burden that remains will still be significant but is unavoidable if one wants to avoid regulatory sclerosis in a sector which evolves rapidly and which is crucial to the economy and the development of a knowledge based society in Europe.

Further harmonisation of regulation can reduce costs for operators that are active in various Member States and facilitate the development of pan-European services. The pursuit of harmonisation must be continued through soft-interventions (best practices, benchmarks,….) and possibly hard-interventions (Commission veto power for remedies) but it should be kept in mind that differentiated regulation may be a sign of regulatory maturity, where differentiation is justified by varying market circumstances, and therefore is not bad *per se*.

C. Next steps

The draft revised Recommendation and the Commission's report on the functioning of the regulatory framework and proposed amendments have been subject to public consultation until 27 October 2006. The Commission is currently analysing the stakeholders' reactions and plans definitively to adopt the revised Recommendation in the first half of 2007. The Recommendation will enter into force immediately. As regards the proposed changes to the framework, the Commission will at the same time table proposals to the Council and the Parliament to amend the existing Directives. If adopted in 2008, the amended Directives can enter into force and be implemented in the Member States by 2009-2010.

([23]) The Commission has in the past received a number of such notifications, for example from the UK regulator, where details of cost accounting and transparency obligations were changed.

([24]) In an initial phase, the Commission proposes to introduce the simplified procedure through an amendment of the procedural Recommendation (Commission Recommendation C(2003 2647 of 23 July 2003). In the longer term, it is proposed to gather all procedural elements together into a single Regulation.

([25]) If also the wholesale mobile access and call origination, wholesale international roaming and wholesale broadcasting transmission services markets were to be removed.

Public funding for broadband networks — recent developments

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1. Introduction

Many public initiatives are taking place at national, regional or even local level to advance the development of fast Internet access and the widespread deployment of broadband infrastructures. Although such initiatives are in line with the Commission's overall policy of making broadband crucial to European growth and quality of life in the years ahead, public intervention inevitably raises the question of the conditions under which public funding for broadband (2) can be deemed to be compatible with the EC State aid rules (3).

Broadband services and networks are evolving fast, moving Europe towards the "knowledge-based society". Likewise, State funding is now shifting from basic broadband infrastructure to "next generation" broadband networks capable of delivering multimedia services over fibre networks. Over the past two years, the Commission has assessed several projects involving public support for broadband and has so far issued 22 decisions, concerning projects in 10 countries. In two cases, no aid was present (4), while in 19 cases, the Commission decided not to raise objections as the aid was deemed compatible under Article 87(3)(c) EC Treaty (5). The Commission opened a formal investigation and adopted a negative final decision only in one case regarding State support for a fibre access network in the Dutch town of Appingedam (6).

White, grey and black areas: the starting point

The main motivation for State intervention in broadband is to bridge the "digital divide" between more affluent areas and remote regions without appropriate broadband offers. Most of the projects assessed by the Commission concerned *white areas,* which are rural and scarcely populated zones, where no broadband services or only expensive leased line or satellite services could be offered. State support for broadband in these regions is generally deemed compatible if certain proportionality conditions are respected. State intervention in *grey areas,* where basic broadband services are already provided, requires a more detailed assessment by the Commission. In *black areas,* characterised by the availability of different broadband services over at least two competing infrastructures (such as telephone and cable TV networks), the justification for State intervention is doubtful as there is a high risk that State intervention may crowd out existing and future investments by market players.

The above distinction between *white, grey* and *black areas,* derived from coverage considerations, can be taken as the starting point to explain the reasons for State intervention and also the impact of the State aid on competition in a specific region or market. That said, each case will still need to be assessed on its own merits, taking into account the specific market context (availability and take-up of broadband, available infrastructure, degree of competition, etc.) and the proportionality of the public intervention.

This article illustrates the Commission's approach by briefly describing the assessment for three recent broadband cases, highlighting the most relevant parts of the analysis. The compatibility assessment in all three cases is based on a "balancing test" in line with the "refined economic approach" set out in the State aid action plan. Although the Commission's assessment has evolved compared to

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors. The authors wish to thank Obhi Chatterjee for his valuable comments.

(2) Broadband services can be delivered using various combinations of communications network technologies ("platforms"). Technologies can feature either fixed or radio based transmission infrastructure, and they can substitute or complement each other according to the individual situation. Current mass-market broadband services in the EU-15 have generally download speeds starting from 512Kbit/s/ — 1Mbit/s. For business users, much higher speeds are generally needed.

(3) See also "State aid rules and public funding of broadband", by Monika Hencsey, Olivia Reymond, Alexander Riedl, Sandro Santamato and Jan Gerrit Westerhof, Competition Policy Newsletter, Spring 2005.

(4) The decision in case N382/2004, "Haut débit en Limousin — DORSAL" (F) of 3.5.2005 has been appealed by UPC France in the Court of First Instance, case T-367/05.

(5) Decisions available at http://ec.europa.eu/competition/state_aid/decisions/

(6) Case C35/2005 "Broadband development in Appingedam", opening decision OJ C 321, 16.12.2005, p. 7 and final decision of 19.7.2006 (not yet published).

earlier “broadband” cases, the basic tests in any assessment under Article 87 (3) (c) EC have not changed. First, State intervention should be well justified, either in terms of pursuing an accepted objective of social or economic cohesion or as a remedy for a well-defined market failure. Second, State intervention must be proportionate to the objective pursued and finally, the measure must have a positive effect overall on welfare and competition.

2. Description of Recent Cases

Broadband in underserved Territories of Greece ([7])

This case concerned the implementation of a comprehensive national broadband policy aiming to remedy both the supply and the demand side shortcomings of the Greek broadband market.

The country is characterised by many rural and mountainous regions and numerous islands with a very low population density compared to the EU average. As a result, providers of broadband services had focused their activities mainly on the Athens and Thessalonika metropolitan areas and capitals of prefectures where economic activity is concentrated. As a result, broadband networks cover only a very small part of the Greek territory. Moreover, the penetration rate for retail broadband access was one of the lowest in Europe with only 1% of all citizens using broadband ([8]).

Given the lack of adequate broadband infrastructure in most parts of the country and the low level of demand for broadband services, the Greek authorities came up with a comprehensive support program with an overall State aid budget of € 210 million, consisting of 2 axes:

The first axis concerned the supply-side and aimed to boost network investments in broadband access infrastructure to enable successful bidders to provide broadband services in underserved territories of Greece.

The second axis focused on a series of complementary but necessary actions to stimulate demand for retail broadband services by funding the acquisition by end-users of PCs, modems, and providing financial support to certain socially or otherwise disadvantaged categories of the population.

Presence of State aid

The Commission considered that, as regards the supply-side elements of the project, the measure represented aid to the successful bidders to the extent that it directly subsidised the provision of retail broadband services in certain regions of Greece. Operators using the wholesale provision were also indirect beneficiaries of the aid. The demand-side subsidies of the measure did not constitute aid within the meaning of Article 87 (1) of the EC Treaty as either the beneficiaries were not undertakings or, as far as SMEs were concerned, the funding would not exceed the de minimis threshold.

Compatibility assessment: applying the “balancing test”

The notified project was at the core of the Greek national broadband strategy and in line with Community policies in this field outlined most recently in the Commission’s i2010 Communication ([9]) to achieve better broadband coverage and take-up. The Commission concluded that by securing or improving broadband access for citizens and businesses in underserved regions of Greece, the measure would help to achieve greater cohesion and economic development and thus serve the common interest.

Secondly, the Commission analysed whether the aid was well-designed to serve an objective of common interest. If it is true that, as regards the supply side, tariff and access regulation imposed by the Greek regulator might be another instrument of State intervention, ex ante regulation presupposes that a broadband access infrastructure already exists. This was clearly not the case for most of the areas concerned. Likewise, even if such wholesale access existed, alternative providers would need to combine the use of (regulated) wholesale products from the incumbent (full or shared unbundling of the local loop, the last mile connecting the end customer) with their own network investments, which may not be profitable in areas where demand is low. Therefore, on balance, the Commission considered that the development of broadband infrastructure by means of State co-financing was an appropriate instrument to achieve the declared objectives.

Third, as regards proportionality, the Commission found that the Greek authorities had designed the measure in a way which minimised the State aid involved and the potential distortions of competition arising from the scheme. To limit their intervention, the Greek authorities had clearly identified

([7]) Case N201/2006 “Broadband in underserved territories of Greece” of 4.7.2006 .

([8]) European electronic communications regulations and markets 2005 (11th REPORT) COM(2006)68 final, p. 122.

([9]) http://ec.europa.eu/i2010.

the geographic areas which were lagging behind in terms of broadband deployment. Moreover, State funding was provided on the basis of an open tender, with wholesale access to the subsidised infrastructure being granted to third party providers on non-discriminatory terms and without favouring or imposing any kind of access technology.

Conclusion

Altogether, the Commission concluded that the distortions of competition and the effect on trade were limited so that the measure would have a positive effect overall. Consequently, the Commission approved the project.

Metropolitan Area Networks — Ireland

In June 2005, the Irish authorities notified the Commission of the roll-out of Metropolitan Area Networks ("MANs") which are part of the Irish Regional Broadband Programme ([10]). The case concerned State support for the roll-out of an electronic communications infrastructure in a grey area, where the incumbent already offered or planned to offer basic broadband services and therefore called for an in-depth assessment by the Commission.

In October 2005, only 5.3% of the Irish population had broadband access, one of the lowest rates in Europe. There were various explanations for this "broadband gap": Ireland has a very distinct population distribution with a large part of the population located in the greater Dublin area. As a result, infrastructure investment by alternative operators has mainly been limited to the capital and to regional connectivity linking the major cities. This has led to a lack of infrastructure competition in smaller towns and cities (TV cable networks are only present in a few cities). Moreover, it was only in 2002 that Eircom, the incumbent provider, had started to offer mass market retail broadband.

The Irish government argued that there were not enough commercial incentives for private operators to build alternative infrastructures capable of providing broadband services in smaller towns outside the main cities of Ireland. The MAN programme, which involves up to € 170 million of State funds, entails the construction of open, carrier-neutral optical fibre rings to enable the provision of wholesale services to electronic communications operators. Networks will be built in up to 120 Irish towns where such an open neutral wholesale infrastructure is not available. The management and exploitation of the networks, which remain in public ownership, will be tendered out to a wholesale operator. This wholesale operator will offer services to telecommunications companies which deliver high-speed electronic communications services to end users.

The Irish authorities argued that the measure did not involve State aid within the meaning of Article 87 (1) EC Treaty. Consequently, the Commission first had to establish whether the intervention by the Irish authorities constituted State aid.

State aid or general infrastructure?

At the outset the Commission refuted the argument that the MANs represented "general infrastructure", built to remedy the lack of market investments and that no advantage would be conferred upon a specific undertaking. For the Commission, only infrastructure which is needed for the State to fulfil its responsibilities towards the general public could be considered as "general infrastructure" (i.e., bridges, ports, motorways, etc). Moreover it should be a facility that is unlikely to be provided by the market because it would not be economically viable, and the way it is operated should not selectively favour any specific undertaking. The Commission observed that fibre networks such as the MANs are actually deployed by market operators providing electronic communication services, although not necessarily on the conditions sought by the Irish Government.

Likewise, the Commission refuted the argument by the Irish Government that the running of the MANs by the wholesale operator chosen could be classified as a Service of General Economic Interest. This was in fact more of a public-private-partnership than a provision of such a service. In that respect, the planned measure was also different from earlier cases dealt with by the Commission ([11]).

The Irish authorities do not act like a market investor

The Irish authorities stated that their intervention was necessary precisely because market players are unwilling to invest in deploying an infrastructure similar to the MANs. Therefore, the Commission concluded that the investment by the authorities was not guided by profitability considerations but primarily by the aim to lower entry barriers for alternative operators to boost the competitive supply of broadband services. A market operator would have either not invested in the project

([10]) Case N284/2005 "Regional Broadband Programme: Metropolitan Area Networks ("MANs"), phases II and III" — (IRL) of 8.3.2006.

([11]) For instance case N381/2004, "Projet de réseau de télécommunication haut débit des Pyrénées-Atlantiques" (F) of 16.11.2004.

or not concluded a contract with the wholesale operator at the likely conditions. The Commission concluded that the measure involved State aid to the wholesale operator, third party operators and end users carrying out an economic activity since it gave them an economic advantage, was publicly funded, had the potential to distort competition and affected trade between the EU Member States.

Compatibility assessment

Again, the Commission assessed, directly under Article 87(3)(c), whether the aid measure was aimed at a well-defined objective of common interest and addressed either a market failure or fulfilled a cohesion objective. The project is a key element of the Irish national broadband strategy and in line with Community policies in this field. In essence, the MANs aim to improve broadband access for Irish citizens and businesses by tackling the lack of broadband infrastructure in the targeted towns.

Cohesion objective and market failure considerations

Broadband networks are generally more profitable to roll-out where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs, unit costs escalate as population densities drop. In areas where demand is not very developed and cost recovery is uncertain, private operators might find it difficult to secure funding for infrastructure projects. There is evidence that incumbents with market power in "traditional" services such as voice telephony almost invariably also had first-mover advantages by offering broadband to their existing clients, allowing them to leverage their traditional market power into new markets. These characteristics of the sector and the previous existence of a State monopoly in the Irish market have led to market failure in the form of market power by Eircom in a number of markets.

Although *ex ante* regulation had partly addressed the absence of competitive conditions and the lack of infrastructure competition, in the areas targeted by the measure, Eircom was still the only network operator that could partially compete with the future MANs. It should be stressed that Eircom is a vertically integrated provider which did not provide access to those elements of its core infrastructure for which there is no regulated access for other providers.

Consequently, the Commission considered that by funding the establishment of an open wholesale infrastructure in towns outside Dublin, the authorities pursue genuine cohesion and economic development objectives which would have a positive impact on the supply and competition in the towns covered by the measure.

Well-designed and proportional aid

As in the Greek broadband case (see above), given the inherent limitations of *ex ante* regulation as a means to enable the supply of broadband services in rural and remote regions, the Commission considered that the development of broadband infrastructure through State co-financing was an appropriate instrument to achieve the set objectives. As regards proportionality, the Commission found that the Irish authorities had designed the measure in a way which minimised the State aid involved and the potential distortions of competition arising from the scheme. The authorities have committed to roll-out MANs only where such an infrastructure or comparable services are not available, and implemented a number of necessary safeguards (such as requiring open tender procedures, a detailed concession agreement, and the wholesale character of the programme).

Overall impact on competition and trade

The Commission also assessed the overall impact of the measure on competition and trade in qualitative, rather than quantitative, terms. The lack of competition (both between and within platforms) had been identified as an important reason for the relatively poor performance in relation to broadband supply and take-up in Ireland. Consequently, the Commission found that the measure may not only benefit broadband users through facilitating the entry of alternative providers into the market, but may also increase the competitive pressure on the incumbent provider Eircom.

Eircom had already accelerated its investments in broadband infrastructure and started the mass market roll-out of retail broadband in 2003, decreasing prices in 2004 and 2005. While there could be many reasons for this behaviour, price decreases are consistent with the hypothesis that investment in the MANs would facilitate competition, and that Eircom was trying to reduce the attractiveness of the market to new entrants. Finally, the availability of an open wholesale infrastructure facilitates market entry for operators from other Member States, which would have a positive effect on Community trade.

Conclusion

In view of the particular characteristics of the Irish market, the Commission concluded that the overall effect of the measure on the broadband market would be positive and that the aid was compatible with the common market.

The Appingedam case: crowding out existing operators

This was the first State aid for broadband which the Commission declared incompatible with the EC Treaty on the grounds that the State intervention was not justified by the existing market conditions. The municipality of Appingedam, a small town in the north of the Netherlands, intended to support the deployment of a glass-fibre access network for electronic communications. The municipality considered that public intervention was needed to encourage the supply of advanced broadband services to companies and citizens. The passive layer of this "Fibre-to-the-Home" network (i.e. the ducts and fibre) would be owned by the municipality while the active layer (i.e. the management and operation of the network) would be tendered to a private-sector wholesale operator. This operator would only offer wholesale services to service providers but could not offer retail services.

Essent Kabelcom, a major cable operator also active in Appingedam, filed a complaint with the Commission in November 2004 claiming that the measure involved illegal aid. Essent had also lodged an appeal in a national court in September 2004, prompting the court to order the municipality to notify its plans to the Commission and to suspend the further rollout of the network. Because the Commission had doubts about the compatibility of the measure, it opened the formal investigation procedure in October 2005.

Presence of State aid

As in the Irish case, the Dutch authorities argued that the measure did not entail State aid and that the provision of the passive network could be seen as a typical task of a public authority providing "public" infrastructure open to all parties at similar conditions. The Commission refuted this argument for the same reasons as in the Irish case. Although the Dutch authorities did not suggest that the measure involved the provision of a service of general economic interest, the Commission also examined this aspect. Again, as in the Irish case, the Commission concluded that the wholesale operator is not entrusted with a mandate to enable broadband access to the general public as a service of general economic interest.

The Dutch authorities claimed that the investments by the municipality were necessary precisely because market players were not willing to invest in the passive fibre network as the expected return on investment is not sufficiently high. This demonstrated that the municipality was not acting as a rational private investor so its investment in the network did not pass the market investor test.

Consequently, the Commission concluded that the measure constituted State aid within the meaning of Article 87(1) EC Treaty on the grounds that the funding granted by the municipality conferred a specific advantage to the selected network operator (and the providers of electronic communications services), distorted competition, and had an effect on trade.

Compatibility assessment

In line with the assessment in the other broadband cases outlined above, the Commission examined whether the measure either remedied a market failure or pursued a cohesion objective.

Market failure?

Concerning the existence of potential market failures, recent data ([12]) confirmed the high degree of competition and the multitude of broadband offers in the Dutch market, which has the highest broadband penetration (30%) in the EU. Moreover, the Commission pointed out that the Dutch broadband market is a fast-moving environment in which providers of electronic communications services, including cable operators and Internet Service Providers, continue to introduce very high capacity broadband services without State support.

Hence, there were strong indications that market forces alone would deliver appropriate coverage and meet the consumers' demands for high-bandwidth services. In this regard, a report by the Netherlands Bureau for Economic Policy Analysis ([13]) had also stated explicitly that there is generally no market failure in the broadband market in the Netherlands, that firms have adequate incentives to invest in broadband and that the best government policy would be to rely on market forces. The report further revealed that existing market failures are mainly limited to market power and regulation by the Dutch regulator OPTA seemed to address this issue.

More specifically, Appingedam could be considered as a *black area* where demand supports a competitive supply of broadband services. As regards the *retail market,* both KPN (the fixed line incumbent) and Essent offer "triple play services" (telephony, broadband and digital/analogue TV) to end users. Both operators have the technical capabilities to further increase the bandwidth capacity of their networks. Concerning, the *wholesale market,* the Dutch regulator OPTA has already imposed regu-

([12]) Footnote 8 and OECD broadband statistics December 2005.

([13]) *Do market failures hamper the perspectives of broadband?,* Centraal Planbureau, December 2005.

latory remedies on KPN in relation to the market for the unbundling of the local loop. Moreover, Essent also offers a form of wholesale broadband access to third parties on the Dutch market.

The Dutch authorities argued that advanced content services and applications need networks with higher capacity than those offered by the existing copper or hybrid copper-fibre cable networks. However, it is difficult at this stage to envisage mass-market applications in the near to mid-term future which could not be delivered over existing (or upgraded) broadband networks. This means that services delivered over the municipal fibre network in Appingedam and those delivered over existing networks are substitutable and that accordingly the potential distortion of competition by the measure will remain high for the foreseeable future. In summary, the Commission considered that there is no market failure at present which would require financial State support and that the proposed public intervention risks crowding out private initiatives.

Cohesion objective?

The Commission also assessed whether the measure could have a cohesion policy rationale. Although Appingedam is located in a peripheral region of the Netherlands, the intervention is taking place in a town where retail and wholesale broadband services are already available via various providers of electronic communications services and networks at service conditions and prices comparable to other regions.

Conclusion

Consequently, the construction of an additional network in Appingedam with State funding would neither address a market failure nor a cohesion problem. The measure would distort competition due to its impact on the investments of private operators. Hence, in view of the absence of an objective of common interest, the Commission concluded that measure did not fulfil the criteria under Article 87 (3) (c) and was deemed to be incompatible. As the construction of the network had not yet started, no aid had to be recovered.

3. Conclusions and outlook

The assessment of recent cases shows that the market situation in Member States varies considerably and State intervention in favour of broadband can take many different forms. Therefore, each case has to be assessed on its own merits and there are no simple general guiding principles which apply to all projects. Nevertheless, while the recent decisions concern different types of State support for broadband, they highlight positive and negative aspects of public intervention and illustrate how similar measures would be assessed under the State aid rules.

A snapshot of the overall broadband market shows that the technical, economic and regulatory environment for broadband deployment and usage is evolving rapidly in the EU. Operators are migrating their networks gradually to Internet Protocol (IP)-based platforms and are rolling-out (or plan to deploy) VDSL ([14]) and FTTH ([15]) infrastructures. New wireless networks are mushrooming in many European cities.

Given the crucial importance of broadband for economic development and the creation of a knowledge and information-based society, public authorities get involved in various ways in the roll-out of these networks and could play a positive role in facilitating this process. For instance, rapid, operator-friendly authorisation procedures or lower fees for rights of way would be helpful. Moreover, if public authorities decide to invest in broadband infrastructure with private investors under equal conditions and on market terms, this would not be regarded as State aid.

That said, there are signs that public authorities are not only trying to foster the widespread development of broadband networks in remote and rural areas but have also started intervening in so-called *black areas*. This kind of intervention raises a whole new set of issues as competition is more likely to be distorted. The Commission intends to monitor these developments closely and its policy will evolve in response to new patterns of public intervention.

([14]) Very high-speed Digital Subscriber Line.
([15]) Fibre-to-the-Home, optical local access networks.

New Guidelines on State aid promoting risk capital investments in SMEs (1)

Bente TRANHOLM SCHWARZ, Directorate-General for Competition, unit I-1

In the context of the State Aid Action Plan

From 18 August 2006 the Commission has applied a new set of Guidelines on state aid to promote risk capital investments in small and medium-sized enterprises (hereafter 'the guidelines') (2) They set out how *risk capital schemes will be assessed* in accordance with Article 87 of the EC Treaty. The guidelines replace the Communication on state aid and risk capital (3) from 2001 (hereafter 'the 2001 Communication').

The guidelines constitute an *important element in the State Aid Action Plan* (4) from 2005 in which the Commission stated that "State aid policy safeguards competition in the Single Market and it is closely linked to many objectives of common interest, … It must contribute by itself and by reinforcing other policies to making Europe a more attractive place to invest and work, building up knowledge and innovation for growth and creating more and better jobs."

The guidelines help Member States improve the access to finance for SMEs. Without sufficient risk capital enterprises may never be founded or may be restricted in their growth. Given the importance of SMEs to spur economic growth and lasting job creation the guidelines represent *an important instrument in the context of* the Commission's competitiveness strategy laid down in the Communication "*Working together for growth and jobs — A new start for the Lisbon strategy*" (5).

It is commonly recognized that there is a so-called 'equity gap' for SMEs in their early stages of development, meaning that their demand for risk capital is not met, although, the risk capital investments would generate a reasonable profit. This *market failure* occurs, due to difficulties in obtaining information about potential profits and risks related to investments in companies with no or with an insignificant track record. Furthermore, often the investments are quite small implying that transaction costs involved in screening and monitoring investments easily become disproportionate to the size of the investment.

In accordance with the principles in the State Aid Action Plan, the guidelines set out conditions and assessment criteria to ensure that state aid schemes *target* a market failure. Furthermore, there are mechanisms ensuring that the schemes are *appropriate instruments,* which can leverage private investments that would not have occurred otherwise *(incentive effect and necessity),* that they are *proportional* and that the risk of *crowding out* of private investments and *other types of distortions* are limited.

Already in the 2001 Communication the Commission stated that state aid to promote risk capital can be justified *when there is evidence of a market failure* and compared to the 2001 Communication, the guidelines contain many of the same elements, e.g. ensuring that investment decisions are profit-driven. However the guidelines have a completely new structure based on two types of assessments and certain elements have been clarified in the light of experience.

Risk capital schemes involving state aid

The guidelines cover risk capital schemes supporting investments into *SMEs in their early development stages* (seed, start-up and expansion), where funding is provided by the State and private investors, usually through an investment fund and coupled with advantages for the private investors to leverage their capital. The guidelines do not cover ad hoc capital injections into individual companies.

Risk capital investments consist of either *equity or quasi-equity* (as opposed to debt). It includes investment by business angels, venture capital and alternative stock markets specialised in SMEs including high-growth companies. The guidelines specifically entail a "substance over form approach" in assessing whether an instrument will be considered to be risk capital or debt.

The guidelines mention a number of instruments that appear to be effective to leverage capital from private investors' capital, i.e. venture capital funds, fiscal incentives to investors or investment funds, and other financial instruments conferring an advantage to private investors or funds. Compared

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author.
(2) OJ C 194, 18.8.2006 p. 2.
(3) OJ C 235, 21.8.2001 p. 3.
(4) COM(2005) 107 final.
(5) COM(2005) 24.

to the 2001 Communication the Commission clarify that state guarantees linked to risk capital investments fall within the guidelines if they are limited to 50% of the potential losses arising from equity investments into SMEs. Furthermore, grants covering administrative and management costs are no longer mentioned.

Providing risk capital is essentially a commercial activity and public interventions pose a risk that public money will displace private capital (crowding out). In other words, the distortion of competition may not only be present at the level of the target SMEs obtaining the investments but also in the risk capital market. In fact, state aid can be present at three levels:

(i) the private investors;

(ii) the investment vehicle or investment fund or its management; and

(iii) the enterprises in which the investment is made (target SMEs)

As in the 2001 Communication, the guidelines set out under which conditions aid is present at each of these levels: Normally, if there is aid at the level of investors or the investment fund, this is considered to be at least partly passed on to the SMEs. By contrast, there is no aid if the State and private investors participate under exactly the same conditions, there is no advantage for the fund, and the investment is driven by profit-maximisation and commercial logic. Compared to the 2001 Communication the Commission has, on the basis of experience, specified that in addition to escape the state aid rules, normally 50% of the funding of a measures must be provided by private investors. Also, it is clarified that if there is aid at the level of investors, the investment vehicle or the investment fund, this aid is normally considered to be at least partly passed on to the target SMEs.

The new structure — two types of assessments

One of the main novelties in the guidelines is the introduction of *two types of assessments:* a *standard assessment* and a *detailed assessment.* The standard assessment applies to cases fulfilling a number of conditions on the basis of which the Commission is confident that, on the balance, the effects of the aid measure will be in the common interest. However, measures that do meet the conditions for the standard assessment may still be authorised — but only after a *detailed assessment* balancing the positive and negative effects.

The 2001 Communication entailed fixed conditions as well as elements that were considered to be positive or negative. However, all cases were subject to the same assessment. The introduction of two types of assessments in the guidelines is an implication of the refined economic approach that was announced in the State Aid Action Plan. It will ensure a level of assessment which is more proportional to the risk of distortion of competition. Furthermore, it will give additional flexibility to Member States, to take into account inevitable ups and downs of the market and specific circumstances in Member States.

To illustrate this, one of the conditions for a standard assessment is the maximum size of the investments. Based on experience and studies, the Commission considers that a market failure exists in general in the EU for investments in SMEs *under €1.5 million over a period of 12 months.* Therefore, to avoid undue distortion of competition, for investments of higher amounts the Member States will have to provide evidence in order to ensure that only measures effectively targeted at a market failure will be authorised.

In the 2001 Communication there was a fixed maximum threshold above which the guidelines did not apply. Moreover, it appeared that the maximum threshold was not sufficiently high to cover investments for which there appeared to be a general market failure in the EU. The new threshold in the guidelines represents a 50% increase compared to the previous maximum threshold for non-assisted areas (6) in the EU.

Standard assessment

A standard assessment will apply to schemes fulfilling all the conditions below:

- Investments under € 1.5 Million over 12 month into each SME;
- Investments restricted to the seed, start up or expansion stage for SMEs located in assisted areas and for small enterprises in non-assisted areas. Whereas, investments must be restricted to the seed and start-up stage for medium-sized enterprises located in non-assisted areas;
- Schemes providing at least 70% of the total budget in the form of equity and quasi-equity instruments as opposed to debt instruments;
- Private investors participation with at least 50% of the capital in SMEs in non assisted areas and with at least 30% in SMEs in assisted areas;
- Investment decisions must be profit driven (specific conditions apply);

(6) Assisted and non-assisted area refer to whether or not an area is eligible for regional aid under the Articles 87.3 (a) and (c) of the EC Treaty.

- The management of funds must follow a purely commercial logic (specific conditions apply);
- A sectoral focus may be accepted for funds focusing on specific innovative technologies or even sectors (such as health, information technology, biotechnology).

If a scheme fulfils all the conditions above, the Commission will consider that it does not distort competition contrary to the common interest and consequently, the Commission will authorise the measure.

Detailed assessment

Risk capital measures that do not comply with one or more of the conditions above may be authorised after detailed assessment. A detailed assessment applies to schemes providing:

- investments beyond € 1.5 million in an SME over a period of 12 months;
- expansion capital to medium-sized enterprises situated in non-assisted areas;
- follow-on investments beyond € 1.5 million over 12 months or financing beyond early-growth financing;
- private participation of less than 50% in investments in SMEs in non-assisted areas and less than 30% in assisted areas;
- limited or no private participation and/or predominance of debt instruments for investments in the seed stage of small companies;
- measures involving investment vehicles matching investors and SMEs (alternative market places);
- grants covering 50% of the costs of the first screening of companies (scouting costs).

The detailed assessment will be based on the balancing of a number of positive and negative elements. The positive and negative elements that may be relevant are listed in the guidelines. Based on the evidence provided by the Member States of the positive effects and taking account of possible crowding-out of private investors and other distortions of competition, the Commission will authorise the measure if — on the balance — it does not distort competition contrary to the common interest.

The *Manfredi* judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions (1)

Eddy DE SMIJTER, Directorate-General for Competition, unit A-3, and Denis O'SULLIVAN, formerly Directorate-General for Competition (2)

The reactions to the Green Paper

On 20th December 2005, the Commission published a Green Paper on damages actions for breach of the EC antitrust rules (3). The Green Paper has been met with broad interest in the antitrust community: it has been discussed at a number of conferences both in Europe and abroad, and has also stimulated debate at the OECD, the European Parliament, the European Economic and Social Committee, and in the parliaments of various EU Member States. This high level of interest is also reflected in the substantial number of responses to the Green Paper. At the time of writing, the Commission has received 147 submissions, of which 49 are from industry, 44 from law firms, 18 from academics, 15 from Member States' governments, 7 from consumers' groups, 6 from national competition authorities, 5 from judicial organisations and 3 from individual citizens. The non-confidential submissions are published on the website of the Directorate-General for Competition (4).

Practically all the responses to the Green Paper acknowledge the complementary role of private actions in the overall enforcement scheme of the EC competition rules. More particularly, there is widespread agreement that victims of competition law infringements are entitled to damages, and that national procedural rules should be such that this right can be exercised effectively. This expression of interest in an effective right to compensation has been followed, in timely fashion, by an important judgment of the European Court of Justice in a case concerning antitrust damages.

The Judgment in *Manfredi*

On 13th July 2006, the Court of Justice rendered its preliminary ruling under Article 234 EC in four references from the Giudice di Pace di Bitonto (Italy): Joined Cases C-295/04 to C-298/04, *Manfredi et al* (5). The ruling considers directly a number of the issues raised in the Green Paper on antitrust damages actions, and unequivocally confirms the Commission's priority that effective legal redress be available to the victims of infringements of the competition rules. The case follows-on from a finding of the Italian competition authority that an agreement between automotive insurers infringed the competition rules. As a result of an unlawful exchange of information, the premiums charged to consumers were inflated twenty per cent on average. Mr Manfredi and the other applicants, who alleged they had suffered an overcharge, brought actions against their respective insurers to recover damages.

In confirming its jurisdiction to issue a preliminary ruling in the case, the Court of Justice emphasised the importance of the competition rules, and their justiciability in private actions before national courts: "it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts". [Para. 31] The Court also indicated that, depending on the particular circumstances of the case in question, an anticompetitive practice may simultaneously infringe both national and Community competition law rules. [Paras. 33-52]

Concerning the right to claim damages for harm suffered through a breach of the competition rules, the Court of Justice in *Manfredi* reiterated a statement of principle which it had already given in *Courage v Crehan* (Case C-453/99), and to which the Commission referred in the Green Paper. In *Manfredi,* the Court said:

> "… as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition *(Courage and Crehan,* paragraph 26).

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

(2) Denis O'Sullivan is now a member of the Legal Service of the Council of the EU.

(3) COM(2005) 672 final: http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#greenpaper.

(4) http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#greenpaper

(5) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:C2006/224/05:EN:NOT.

> … It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC." [Paras. 60-61]

One can expect that this reasoning would also apply to damages claims for breaches of Article 82. It is interesting to note that the Court of Justice does not refer to any requirement of fault over and above the proof of the infringement, but instead states — for the first time in such clear wording — that a causal nexus between an infringement of the competition rules and the harm thereby caused is sufficient to ground a claim in damages. This corresponds closely to the situation envisaged in Option 11 of the Commission's Green Paper (6).

In *Manfredi,* the Court of Justice also considered whether Italian procedural rules which require litigants claiming damages under the competition rules to commence proceedings before a particular court — thereby incurring increased costs and delays, as compared with proceedings before an inferior tribunal — are compatible with Article 81 EC. The Court held that, so long as procedural rules are not harmonised at European level, the respective Member States' rules must safeguard the rights guaranteed by the Treaty in a manner not less favourable than those governing similar domestic actions (principle of equivalence), and that the procedural rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). [Para. 71]

The Court of Justice also referred to the principles of equivalence and effectiveness when considering procedural rules as to the limitation periods for antitrust damages actions. In the absence of Community rules it is, said the Court, for the Member States to prescribe limitation periods in actions for antitrust damages, subject to the principles of equivalence and effectiveness. Thus, limitation periods may not be so short or so inflexible as to render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm suffered. [Paras. 81-82] Here again, the Court's insistence on providing for *effective* redress directly reflects the Commission's position on limitation periods, as expressed in the Green Paper: "Suspension of or longer limitation periods play an important role in guaranteeing that damages claims can effectively be brought, especially in the case of follow-on actions". [Green Paper, text introducing Option 36.]

The Court re-emphasised the criterion of effective redress in considering how damages should be defined and quantified:

> "… it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss *(damnum emergens)* but also for loss of profit *(lucrum cessans)* plus interest." [Para. 100; compare Para. 149 of the Staff Working Paper annexed to the Green Paper]

Interestingly, the judgment in *Manfredi* does not preclude procedural rules which provide for "particular damages, such as exemplary or punitive damages" in antitrust cases, although national courts may take the steps necessary to ensure that claims under competition law do not give rise to unjust enrichment. [Para. 99]

Effective redress for antitrust damages

The judgment in *Manfredi* has now crystallised — and effectively harmonised — the law on a number of salient points. Most importantly, the Court of Justice has clearly confirmed the Commission's guiding principle that the procedures for redressing harm caused by antitrust infringements must be effective. However, the judgment still leaves open a number of other issues discussed in the Green Paper.

Access to evidence

Some respondents to the Green Paper indicate that special rules concerning access to evidence in competition-law litigation are not warranted, as antitrust cases do not present evidentiary difficulties greater than other commercial litigation. However, several potential antitrust plaintiffs indicate that enhanced access to evidence is essential to ensuring that the right to seek compensation for antitrust damages can be exercised effectively. Responses from the legal profession have emphasised that antitrust practitioners regard effective access to documents as the single most important issue in facilitating actions for damages; although there remains a degree of divergence as to the technical instruments appropriate to achieve effective access while preventing unwelcome externalities,

(6) On the question of whether there should be a fault requirement for antitrust-related damages, the Green Paper envisaged 3 options, namely Option 11 ("Proof of the infringement should be sufficient" — analogous to strict liability); Option 12 ("Proof of the infringement should be sufficient only in relation to the most serious antitrust law infringements") and Option 13 ("There should be a possibility for the defendant to show that he excusably erred in law or in fact. In those circumstances, the infringement would not lead to liability for damages" — defence of excusable error).

such as “fishing expeditions”, “discovery blackmail”, procedural abuses and excessive costs for potential defendants. Similarly, the need for protection of business secrets and other confidential information is recalled.

One can discern a need to provide for some minimum effective level of disclosure of evidence between the parties to antitrust damages cases. Given the legal-cultural differences between the Member States, and in order to avoid disclosure leading to abuses, it can be argued that a practicable system of court-supervised pre-trial disclosure based on reasonable standards of fact-pleading may be required. As an additional matter, it might also be appropriate to consider the fact-pleading requirement to be fulfilled in cases following-on from an infringement decision of the Commission or of a national competition authority.

Fault requirement

There is considerable support for a system under which proof of an infringement of the competition rules would fulfil the fault requirement in tort litigation. Following the judgment in *Manfredi,* this would also now seem to be the appropriate legal standard. Respondents’ opinions diverge concerning exculpation in cases of genuine factual or legal error. Some consider that a possibility of exculpation is a normal feature of tort litigation, while others find it a complete novelty.

Damages

The majority of respondents to the Green Paper would not like to see a system which provides for multiple, punitive or exemplary damages. These respondents argue that damages should be regarded as properly a compensatory instrument. Nevertheless, most respondents are at pains to indicate that the concept of damages should be broadly understood, in order to ensure that victims of antitrust infringements be compensated fully for their loss, including, where appropriate; compensation for loss of profits; pre-judgment interest from the time of the infringement; and, post-judgment interest until the damages awarded are paid out. These comments largely presage the judgment in *Manfredi,* although the ECJ explicitly did not rule out so-called “particular” damages.

The passing-on defence and standing for indirect purchasers

Respondents to the Green Paper are substantially divided on the question of the passing-on defence. At the one extreme, there are those who recommend allowing the passing-on defence, and limiting standing to direct purchasers. This approach is, however, rejected by other respondents, who argue that it leads to unjust enrichment of defendants. At the other extreme, there are those who would prefer disallowing the passing-on defence, while allowing both direct and indirect purchasers’ claims. In-between those two groups, there is a small minority of respondents which advocates both disallowing the passing-on defence and denying standing to indirect purchasers. The single aspect on which there seems to be a consensus — and *Manfredi* provides backing for this — is the need to avoid unjust enrichment of both claimants and defendants.

Collective and representative actions

The majority of respondents to the Green Paper who commented on the issue of consumers’ interests opposed any initiative which would facilitate collective actions. The objections focus principally on the costs of collective actions, and on the risk of multiple recovery from infringers. Of those not opposed, most respondents preferred allowing collective actions be brought only through recognised consumers’ organisations. Collective follow-on actions by consumers’ organisations may indeed serve the purpose of rendering rights under competition law effective and accessible to citizens, while clearly moderating the excesses and external costs associated with more general types of “class actions”. As a number of Member States already allow various types of collective actions, and others are actively considering introducing such measures, a certain natural development in this regard is already taking place.

Costs of actions

Respondents’ opinions are mixed as to the options raised in the Green Paper which could alleviate the financial risks for claimants who have a meritorious claim. While most submissions acknowledge that such financial risk constitutes an obstacle to potential claimants, some consider the current national rules are necessary to avoid unmeritorious litigation. Other respondents would allow the judge to decide at the end of the trial whether there are sufficient reasons to deviate from the general cost rules. A final group of submissions supports permitting the judge, by way of pre-trial pleadings, to shield the meritorious claimant against cost recovery. These respondents argue that this could be the case for follow-on actions and for claims brought by (representatives of) consumers. Since the judgment in *Manfredi* requires the Member States to make effective redress procedures available to any person injured by an antitrust infringement, it could be argued that national judges should be empowered to modulate the rules as to claimants’ costs where necessary to assure effective exercise of the right to compensation.

Coordination of public and private enforcement

Apart from a very few exceptions, there is general support among respondents to the Green Paper for precluding disclosure of leniency applications. Other respondents argue that leniency applicants do not need to be additionally "rewarded", because the incidence of requests for leniency will not be influenced substantially by follow-on actions for damages. It is thus generally accepted that it is important to preserve the high level of effectiveness of the leniency programmes in Europe, while not affecting the right of injured parties to effective redress, and that these goals are not mutually incompatible.

Conclusions

In its *Manfredi* judgment, the Court of Justice underlined yet again the need for an effective redress for the victims of competition law infringements. In doing so, the Court confirms the overall objective of the Commission's Green Paper on antitrust damages actions. Effective redress can only be achieved through rules and procedures allowing for it. In the absence of Community rules governing the matter, it is accepted that those rules and procedures are national, provided that the principles of equivalence and effectiveness are observed. The *Manfredi* judgment shows the willingness of the Court of Justice to interpret these principles, in particular the principle of effectiveness, in order to achieve piecemeal minimum harmonisation of national rules and procedures. There are still national rules and procedures in force which make it practically impossible or excessively difficult to succeed in an action for antitrust damages in certain jurisdictions. Alternatively, effective actions for antitrust damages are excluded simply because there are *no* national rules in place. Both situations are characterised by an absence of national rules allowing for effective redress. The question remains whether those situations are best remedied at the pace of the case law of the Court of Justice, or whether there is a need for Community legislation on the matter.

Commission imposes a penalty payment pursuant to Article 24(2) of Regulation 1/2003 on Microsoft (1)

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1. Introduction

On 12 July 2006 the Commission adopted a decision to levy a penalty payment of EUR 280.5 million on Microsoft for continued non compliance with the Commission Decision of 24 March 2004 in Case COMP/C-3/37.792, Microsoft ("the 2004 Decision") (2). This was the first time the Commission had to have recourse to its powers under Article 24 of Regulation 1/2003 in order to compel an undertaking to comply with a prohibition decision.

According to Article 24 of Regulation 1/2003, the Commission may impose daily periodic penalty payments not exceeding 5% of the average daily turnover in order to compel an undertaking to put an end to an infringement of Article 81 or 82 EC, in accordance with a prohibition decision taken pursuant to Article 7 of Regulation 1/2003.

The procedure under Article 24 of Regulation 1/2003 follows the one laid down in the equivalent provision of Regulation 17/62 (Article 16). However, the level of the periodic penalty payments which the Commission may impose on undertakings was increased with Regulation 1/2003 (3).

In line with the case-law on Article 16 of Regulation 17/62, the procedure involves three steps. First, a preliminary decision pursuant to Article 24(1) warning the undertaking that a periodic penalty payment will be levied from a certain date in case of non compliance by this date. The final decision pursuant to Article 24(2) will fix the definitive amount of the penalty payment to be paid by the undertaking. Between these two events, a Statement of Objections should be sent to the undertaking in order to safeguard its rights of defence (4).

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
(2) Decision C(2004) 900 final.
(3) Regulation 17/62 only permitted periodic penalty payments of between 50 and 1000 units of account per day.
(4) See in particular Judgment of 21 September 1989 in Joined Cases 46/87 and 227/88, Hoechst, [1989] ECR 2859.

2. The procedure against Microsoft pursuant to Article 24 of Regulation 1/2003

2.1. The 2004 Decision

The 2004 Decision concluded that Microsoft had abused its dominant position in PC operating systems by (i) refusing to provide interoperability information necessary for competitors to be able to effectively compete in the work group server operating system market and (ii) tying its Windows Media Player with the Windows PC operating system. The Commission imposed a EUR 497,196,304 fine on Microsoft and ordered it to bring the above-mentioned infringements of Article 82 EC to an end (Article 4 of the 2004 Decision).

In particular, the Commission ordered Microsoft to supply interoperability information to interested undertakings on reasonable and non-discriminatory terms ("the interoperability remedy", Article 5 of the 2004 Decision) and to offer a full-functioning version of its Windows PC operating system which did not incorporate Windows Media Player ("the tying remedy", Article 6 of the 2004 Decision).

The 2004 Decision also provided for the establishment of a monitoring mechanism, including a monitoring trustee, whose role would be to provide expert advice to the Commission on Microsoft's compliance with the 2004 Decision. On 28 July 2005, the Commission adopted a decision on the Monitoring Trustee as foreseen in Article 7 of the 2004 Decision (5). This decision sets out the framework under which the Monitoring Trustee works. Subsequently, the Commission invited Microsoft to put forward candidates for the position of Monitoring Trustee. After a selection procedure, on 4 October 2005, on the basis of a shortlist of candidates submitted by Microsoft, the Commission appointed as Monitoring Trustee Professor Neil Barrett, a British computer science expert.

(5) C(2005) 2988 final.

2.2. Assessment of Microsoft's compliance with the 2004 Decision

2.2.1. A first warning: the Article 24(1) Decision

The 2004 Decision granted Microsoft a 120-day deadline to implement the interoperability remedy and a 90-day deadline to implement the tying remedy ([6]). The obligations imposed by the 2004 Decision were suspended pending the Court of First Instance's consideration of Microsoft's request for interim measures. This application for interim measures was dismissed by the President of the Court of First Instance on 22 December 2004 ([7]).

After the rejection of Microsoft's application for interim measures, the Commission engaged in discussions with Microsoft about its compliance with the 2004 Decision. As regards the interoperability remedy, Microsoft submitted interoperability information in the form of a technical description ("specification") of the protocols relevant to communication between Windows PCs and work group servers (the "Technical Documentation") ([8]). This Technical Documentation was reviewed in the course of 2005 by the Commission's technical experts and several third parties (through an evaluation procedure with confidentiality safeguards) as well as by the Monitoring Trustee: these reviews all came to the conclusion that the Technical Documentation failed to provide sufficient information to build competing interoperable work group server operating system products. The Technical Documentation presented by Microsoft therefore fell short of the requirements of the 2004 Decision, namely to provide complete and accurate interoperability information.

In light of the results of the market test and on the basis of the expert opinions on the Technical Documentation, the Commission decided to open proceedings against Microsoft in order to compel it to comply with its obligations stemming from the 2004 Decision. Consequently, on 10 November 2005, the Commission adopted a decision pursuant to Article 24(1) of Regulation 1/2003 ("the Article 24(1) Decision") ([9]). By means of this decision, a periodic penalty payment of EUR 2 million per day was imposed on Microsoft as from 15 December 2005 in the event that by that date, it had not complied with Article 5(a) and (c) of the 2004 Decision, i.e. its obligations (i) to supply complete and accurate interoperability information; and (ii) to make that information available on reasonable terms.

2.2.2. The Article 24(2) Decision

2.2.2.1. The review of the Technical Documentation

Following the adoption of the Article 24(1) Decision Microsoft provided revised Technical Documentation which was in turn reviewed by the Commission's experts, by the Monitoring Trustee and third parties as to its completeness and accuracy. The review undertaken of the different versions of Technical Documentation supplied by Microsoft led to the conclusion that the documentation did not provide complete and accurate interoperability information to interested undertakings as required by the 2004 Decision ([10]).

In the light of the findings on the state of the Technical Documentation provided to the Commission by Microsoft in response to the Article 24(1) Decision and after having given Microsoft the opportunity to respond to the Commission's concerns both in writing ([11]) and in an oral hearing, the Commission concluded that Microsoft had failed to comply with its obligation to supply complete and accurate interoperability information according to Article 5(a) and (c) of the 2004 Decision.

Consequently, on 12 July 2006, the Commission adopted a decision pursuant to Article 24(2) of Regulation 1/2003 fixing the definitive amount of the periodic penalty payment imposed on Microsoft by the Article 24(1) Decision for the period between 16 December 2005 and 20 June 2006 at Euro 280.5 million ("the Article 24(2) Decision") and to increase the level of the periodic penalty payment imposed by the Article 24(1) Decision in the case of continuing non-compliance after 31 July 2006 to EUR 3 million per day.

2.2.2.2. Relevant period and amount of the penalty payment

Article 24(2) reads: "*Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the*

(6) For a more detailed discussion of the Decision, see Competition Policy Newsletter 2004, Number 2.

(7) Order of the President of the Court of First Instance of 22 December 2004 in Case T-201/04 R, Microsoft, not yet reported.

(8) Article 1(2) of the Decision defines a *"Protocol" as "a set of rules of interconnection and interaction between various instances of Windows Work Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network"*.

(9) Decision C(2005) 4420 final of 10 November 2005.

(10) In May 2006, the Monitoring Trustee concluded that "[t]he [March 2006 version of the] *Technical Documentation appears still to be fundamentally flawed in its conception and in its level of explanation and detail* […]."

(11) A Statement of Objections and two letters of facts were addressed to Microsoft.

definitive amount of the periodic penalty payment at a figure lower that which would arise under the original decision."

In the light of this wording the question arises whether the Commission may fix a definitive amount in cases where an undertaking has not yet satisfied its obligations. In the Article 24(2) Decision (recital 238) the Commission takes the position that it may indeed fix a definitive amount in such a case. Otherwise an undertaking could escape from paying periodic penalty payments imposed on it by continuously failing to comply, which would void Article 24 of its useful effect.

The Article 24(2) Decision concerns a period of established non compliance from 16 December 2005 to 20 June 2006, the date on which the draft decision was sent to the members of the Advisory Committee in accordance with Article 14(3) of Regulation 1/2003 ("the relevant period"). The Article 24(2) Decision indicates that the Commission will carry out an assessment of further revisions of the Technical Documentation undertaken by Microsoft, once Microsoft has provided such revised documentation for all protocols. The 24(2) Decision also makes clear that the penalty payment imposed by the Article 24(1) Decision (with an increase as from 1 August 2006, see below) continues to apply after the end of the relevant period.

In order to determine the level of the periodic penalty payment of Euro 2 million per day in its Article 24(1) Decision the Commission took the following factors into account: (i) the extent to which Microsoft's failure to meet its obligations had reduced the effectiveness of the 2004 Decision and (ii) the necessity of imposing a proportionate and sufficient periodic penalty payment to compel compliance by rendering it economically rational for an undertaking to comply instead of reaping the benefits of non-compliance.

The Commission found that Microsoft's continuing failure to comply was likely to further increase the risk of elimination of competition in the work group server operation system market identified in the 2004 Decision. The Commission also held that the effectiveness of Articles 5 (a) and (c) of the 2004 Decision was entirely or at least largely eliminated by Microsoft's non-compliance. This fact would have enabled the Commission to fix the definitive amount of the periodic penalty payment for the period between 16 December 2005 and 20 June 2005 on the basis of the full amount of Euro 2 million per day. However, in order to retain the possibility of fixing a definitive amount of the periodic penalty payment also for the second aspect of non-compliance identified in the Article 24(1) Decision, namely the reasonableness of the remuneration charged by Microsoft for the interoperability information, the Commission decided to fix the definitive amount of penalty payment at EUR 280.5 million, which corresponds to a daily penalty payment of EUR 1.5 million for the relevant period.

2.2.2.3. Increase of the periodic penalty payment

Given the urgent need to establish compliance, the Commission considered it appropriate to amend the Article 24(1) Decision and increase the level of the periodic penalty payment to EUR 3 million, with effect from 31 July 2006. Since it is possible that the disclosure order in Articles 5(a) and (c) of the Decision can be entirely or largely deprived of its effectiveness either through a failure by Microsoft to provide complete and accurate interoperability information or by Microsoft requiring an unreasonable remuneration, this amount applies equally to both aspects of Microsoft's non compliance preliminarily identified in the Article 24(1) Decision of 10 November 2005.

3. Conclusion

This case demonstrates the Commission's determination to ensure compliance with its prohibition decisions, if necessary by means of high penalty payments imposed on undertakings, that do not comply with their obligations.

Commission fines seven undertakings a total of € 388 million for participating in a cartel for hydrogen peroxide and perborate (1)

Gerald BERGER, Directorate-General for Competition, unit F-3, and Lorenzo PIAZZA, Directorate-General for Competition, unit F-1

*On 3 May 2006 the Commission adopted a decision and imposed fines totalling € 388.128 million on seven producers of hydrogen peroxide ("**HP**") and sodium perborate ("**PBS**"). The addressees of the fines are Akzo Nobel/EKA Chemicals, Edison/Solvay Solexis, FMC Foret, Kemira, Snia, Solvay and Total/ Arkema. Arkema (formerly Atofina), Solvay and Edison had their fines increased as they were found repeat offenders. Degussa, also a repeat offender, was however granted full immunity for being the first to provide information about the cartel. L'Air Liquide (and its subsidiary Chemoxal) was subject to the prohibition decision, but the Commission's right to impose fines had expired as the company had left the market in early 1998. The addressees of the Decision participated in a single and continuous infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement between 1994 and 2000 in the EEA involving HP and PBS.*

The products

HP is a strong oxidising agent which has several industrial applications. As a final product HP is used as a bleaching agent in the pulp and paper manufacturing industries, for the bleaching of textiles, for disinfection and for other environmental applications such as sewage treatment. HP is also used as a raw material for the production of other downstream peroxigen products, such as persalts and peracetic acid. PBS is part of the category of persalts. PBS is mainly used as an active substance in synthetic detergents and washing powders.

The infringement

In March 2003 the Commission carried out inspections at the premises of several undertakings following an application for immunity from fines by the German undertaking Degussa under the 2002 Notice on immunity from fines and reduction of fines in cartel cases (the "Notice") (2). The investigation has subsequently confirmed that the cartel covered the whole of the EEA. The market value was ca. € 450 million in 2000, the cartel members representing nearly the totality of the market.

After the inspections other applications for reduction of fines by several undertakings were lodged (see section "Application of the Leniency Notice").

On 3 May 2006 the Commission adopted a decision finding a number of leading producers of HP and PBS guilty of infringing Article 81 EC by fixing prices and market shares and exchanging confidential information in the EEA in the period 1994-2000.

The essence of this infringement can be seen from the record of a meeting between competitors in early 1995 where one of the participants stated that *"a model for sharing out among producers"* was under discussion.

The infringement covered initially the exchange of commercially sensitive information and the fixing of market shares which were intended to keep the *status quo* among the European competitors. Subsequently, the conspirators tried to regulate the market growth by building a sharing-out model according to actual and theoretical capacities (since several producers had built new works) and attempted to monitor the respect of this model.

In 1997 prices came mainly into question. From late 1997 to 1999 the prices for HP and PBS doubled. At several meetings the participants welcomed the good degree of implementation of the cartel agreements regarding prices, so that the market shares became an issue again in the final period of the cartel.

Limitations period for the imposition of fines

The decision was also addressed to Air Liquide/ Chemoxal, even though no fine could be attributed to it. The limitation period in Regulation 1/2003 in fact precludes fining companies whose infringement was terminated more than five years prior to the commencement of the investigation by the Commission. Air Liquide had actually left the market in early 1998. The Commission nevertheless decided to address the decision to this undertaking since there is clear evidence of Air Liquide's participation in the infringement for the period up to 1997, and there is an interest in enabling the

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

(2) OJ C 45, 19.2.2002, p. 3.

injured parties to bring matters before the national civil courts against all cartel participants, including Air Liquide.

Calculation of the fines

In assessing the gravity of the infringement, the Commission took account of its nature, its actual impact on the market, where this could be measured, and the size of the relevant geographic market. The infringement was considered to be very serious in nature.

In setting the starting amount of the fine for each undertaking, the Commission took into account their market share in the EEA for HP and PBS in 1999 (for Snia in 1998 as it left the market mid 1999), being the last full year of the infringement. As there was considerable disparity between each undertaking's turnover for the products concerned in the cartelised industry, the undertakings were divided into four groups. In this manner, the Commission took into account the effective economic capacity of the undertakings to cause significant damage to competition in the cartelised industry.

Several undertakings claimed some or all of the following attenuating circumstances: early termination of the infringement, a minor/passive role, the absence of an effective implementation of the practices, the implementation of compliance programmes and absence of benefit. These claims were all rejected as being unfounded apart from the minor/passive role claimed by Snia. The basic amount for Snia was therefore reduced by 50%.

Sufficient deterrence

In order to set the amount of the fine at a level which ensured that it had sufficient deterrent effect the Commission considered it appropriate to apply a multiplying multiplication factor to the fines imposed. Accordingly and in line with previous practice, it was considered appropriate to multiply the fine for Total/Arkema (by a factor of 3), Akzo and Degussa (by a factor of 1.75), Solvay (1.5) and Edison (1.25). Individual multiplying factors were also applied according to the duration of the infringement by each legal entity, i.e. 10% for each full year of duration and 5% for each 6 month period.

Repeated infringements

At the time the infringement took place, Degussa, Arkema, Solvay and Edison had already been subject to previous Commission prohibition decisions for cartel activities. This justified an increase of 50% in the basic amount of the fine to be imposed on these undertakings.

Application of the 10% turnover limit

According to Article 23(2) of Regulation n. 1/2002, the 10% annual turnover threshold was met in the case of Solvay Solexis. Its fine was therefore limited to € 25.6 million ca. instead of € 46 million which would have been attributed to it.

Application of the 2002 Leniency Notice

Degussa, EKA, Arkema, Solvay, Solvay Solexis and Kemira submitted applications under the Notice.

Degussa disclosed the existence of the cartel and otherwise met the conditions of the Notice. It was therefore granted full immunity from fines.

EKA was the second undertaking to approach the Commission under the Notice, on 29 March 2003, and the first undertaking to meet the requirements of point 21 thereof. As regards the information relating to the period from 31 January 1994 to 14 October 1997, the evidence provided related to facts previously unknown to the Commission which have a direct bearing on the duration of the cartel. Therefore the Commission granted EKA a 40% reduction of the fine that would otherwise have been imposed on it for the period from 14 October 1997 until 31 December 1999 (end of its infringement), but in accordance with point 23 of the Notice, the Commission did not take into account the information relating to the period from 31 January 1994 to 14 October 1997 for the purposes of setting the amount of the fine.

Arkema was the second undertaking to meet the requirements of point 21 of the Notice filing its leniency application on 3 April 2003, shortly after its premises had been inspected by the Commission. The Commission considered the evidence submitted by Atofina of significant added value and granted Arkema a 30% reduction of the fine.

Solvay applied very shortly after Arkema. Although it was the third undertaking to apply for a reduction of fines, it nevertheless met the requirements of point 21 of the Notice, bringing further evidence of significant added value for establishing the facts. It was awarded a reduction of 10%.

Indeed, in this case applications for reduction of fines were submitted within a short timeframe of each other. This case shows that, in applying the Notice, the substance of the information, but also its timing, are very important in making use of the benefits the Commission's leniency program offers.

Solvay Solexis and Kemira also filed leniency applications. The Commission however rejected these applications as the evidence submitted did not represent significant added value with the meaning of the Notice.

Commission fines four undertakings a total of € 344.5 million for participating in an acrylic glass cartel (1)

Edward ANDERSON, Directorate-General for Competition, unit F-2, and Gerald BERGER, Directorate-General for Competition, unit F-3

On 31st May 2006 the European Commission imposed fines on Arkema (formerly Atofina), ICI, Lucite and Quinn Barlo (formerly Barlo) for their participation in a hard core cartel. These four companies were fined a total of € 344,562,500. Arkema and ICI had their fines increased as they are repeat offenders. A fifth participant of the cartel, Degussa, also a repeat offender, avoided a fine by receiving full immunity under the Commission's leniency regime for being first to provide information about the cartel.

The product

The addressees of the Decision participated in a single and continuous infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement between 23 January 1997 and 12 September 2002 in the methacrylates industry in the EEA involving the following three products :

— **Polymethyl-methacrylate (PMMA)-moulding compounds;**

— **Polymethyl-methacrylate (PMMA)-solid sheet; and**

— **Polymethyl-methacrylate (PMMA)-sanitary ware.**

Acrylic glass — or Polymethyl-methacrylate (PMMA) is used for a range of applications. **PMMA-moulding compounds** are mainly used in the car industry for the production of headlamps, tail-lights and glass for dashboards as well as household appliances, optical media (DVDs, lenses) and electronics. **PMMA-solid sheet** is mainly used for illuminated advertising applications and shop interior displays. **PMMA-sanitary ware** is mainly used in the production of bath tubs and shower trays. These products are commonly also called **acrylic glass** and are best known under the trade names **Plexiglas, Perspex, Acrylite, Acrylplast** and **Lucite.**

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

The investigation showed that the cartel covered the whole of the EEA. The 2000 EEA market value for all three PMMA-products was ca. € 665 million for ca. 255.000 tons.

The infringement

In March 2003 the Commission carried out inspections at the premises of several undertakings following an application for immunity from fines by the German undertaking Degussa under the 2002 Notice on immunity from fines and reduction of fines in cartel cases ("Leniency Notice").

After the inspections several undertakings submitted leniency applications.

The Statement of Objections was addressed to 20 legal entities belonging to 7 undertakings in August 2005 and the Oral Hearing was held in December 2005.

The infringement's main features included: competitors discussing prices, agreeing, implementing and monitoring price agreements either in the form of price increases or at least stabilisation of the existing prices; discussing the passing on of additional service costs to customers; exchange of commercially important and confidential market and / or company relevant information; participating in regular meetings and having other contacts to agree to the above restrictions and monitor implementation within the EEA.

The Commission set the starting date with the meeting of 23 January 1997, as this is the first anti-competitive meeting for which the Commission has confirmation from more than one of the participants. At this summit meeting representatives of Arkema, Degussa and ICI discussed the disappointing profit situation relating to PMMA-moulding compounds and PMMA-solid sheet and the possibilities for a further coordination of market behaviour by the competitors, and sales managers were to be disciplined to comply more strictly with previous concluded agreements.

Fines

The practices uncovered are a very serious infringement. In fixing the fines, the Commission took account of the size of the EEA market (around

€ 665 million), the duration of the cartel, and the size of the firms involved. The Commission increased the fines by 50% for Arkema and ICI as they are repeat cartel offenders.

In setting the starting amount of the fine for each undertaking, the Commission took into account their combined turnover in the EEA for the three PMMA products in 2000, being the most recent year of the infringement in which most undertakings were active in the cartel. As there was considerable disparity between each undertaking's turnover in the cartelised industry, the undertakings were divided into three groups. In this manner, the Commission takes into account the effective economic capacity of the undertakings to cause significant damage to competition in the cartelised industry.

Several undertakings claimed some or all of the following attenuating circumstances: early termination of the infringement, a minor/passive role, the absence of an effective implementation of the practices, the implementation of compliance programmes, absence of benefit, crisis in the MMA industry. These claims were all rejected as being unfounded apart from the minor/passive role claimed by Quinn Barlo. The basic amount for Quinn Barlo was therefore reduced by 50%.

Repeated infringements

At the time the infringement took place, Degussa, Arkema and ICI had already been subject to previous Commission prohibition decisions for cartel activities [2]. This justified an increase of 50% in the basic amount of the fine to be imposed on these undertakings.

(2) As regards Degussa: Commission decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 — *Peroxygen products,* OJ L 35 of 7.2.1985, p.1); Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene,* OJ L 230 of 18.8.1986, p.1).
As regards Atofina: Commission decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 — *Peroxygen products,* OJ L 35 of 7.2.1985, p.1); Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31149 — *Polypropylene,* OJ L 230 of 18 August 1986, p.1) and Commission decision of 27 July 1994 relating to a proceeding under Art. 85 of the EEC Treaty (IV/31865 — PVC II, OJ L 239 of 14 September 1994, p. 14).
As regards ICI: Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — *Polypropylene,* OJ L 230 of 18.8.1986, p.1); Commission decision of 27 July 1994 relating to a proceeding under Art. 85 of the EEC Treaty (IV/31865 — *PVC II,* OJ L 239 of 14 September 1994, p. 14)

Sufficient deterrence

In order to set the amount of the fine at a level which ensured that it had sufficient deterrent effect the Commission considered it appropriate to apply a multiplication factor to the fines imposed. Accordingly and in line with previous decisions, it was considered appropriate to multiply the fine for Total/Arkema, Degussa and ICI. Individual multiplying factors were also applied according to the duration of the infringement by each legal entity.

Application of the 2002 Leniency Notice

Degussa was the first to inform the Commission of the existence of a cartel and was granted conditional immunity from fines in accordance with point 15 of the Leniency Notice on 27 January 2003.

Arkema was the first undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represented significant added value with respect to the evidence already in the Commission's possession at the time of its submission. Arkema qualified under point 23 (b), first indent, for a reduction of 40% of the fine.

Lucite was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represented significant added value with respect to the evidence already in the Commission's possession at the time of its submission. Although the Commission had evidence from its own inspections at Lucite of the infringement lasting until at least 28 February 2001, Lucite's evidence related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel, enabling the Commission to extend duration until 12 September 2002 (evidence which Degussa and Arkema subsequently confirmed). Lucite qualified under point 23 (b), second indent, for a reduction of 30 % of the fine. In accordance with point 23, last paragraph, of the Leniency Notice, the evidence provided by Lucite for the period of the infringement after 28 February 2001 until 12 September 2002 was not taken into account for the purpose of setting Lucite's fine.

ICI applied for leniency on 18 October 2004. The Commission rejected ICI's application as the evidence submitted did not represent significant added value within the meaning of the Leniency Notice.

The total of fines imposed in this case constitutes the fourth largest fine ever imposed on a cartel.

In this way, the Commission issued a strong warning against repeat offenders. At the same time, however, by granting full immunity from fines to Degussa, the Commission is offering an incentive to future immunity applicants to come forward and actively cooperate with the Commission's investigations.

Competition Commissioner Neelie Kroes commented on this case by stating *"Cartels are a scourge. I will ensure that cartels will continue to be tracked down, and punished. I am shocked that companies like ICI and Arkema have been fined once again. If their management needs a wake up call, then with these fines, I am happy to provide it."*

Merger Control: Main Developments between 1st May and 31st August 2006 (1)

Mary LOUGHRAN and John GATTI,
Directorate-General for Competition, unit C-4 and B-3

Introduction

Merger and acquisition activity continued at high levels both in terms of notifications received and decisions adopted during the four months from May to August. A total of 125 notifications were made as compared to 111 in the previous trimester. The Commission also adopted 115 final decisions in this trimester as compared to 101 in the previous trimester. These figures represent a marked increase compared to the same period in 2005. Of the 115 final decisions adopted during the period 107 were approvals without conditions pursuant to Article 6 (1) (b) ECMR and 4 were decisions subject to conditions and obligations pursuant to Article 6 (2) ECMR. Of the unconditional clearance decisions adopted 60 were taken in accordance with the simplified procedure. The Commission also adopted during the reference period 4 decisions after a second phase investigation. Of these 4 decisions, 2 decisions were adopted without conditions pursuant to Article 8 (1) ECMR while 2 were adopted conditionally subject to commitments pursuant to Article 8 (2) ECMR. The Commission also opened 3 Phase II investigations (Article 6(1) (c) ECMR) during this period.

The Commission also received 2 post-notification requests for referral pursuant to Art. 9 during this period. No Art. 9 referral decisions were adopted during this trimester.

In addition the Commission received a total of 20 pre-notification requests from parties for referral pursuant to Article 4 ECMR. Of these requests 15 involved requests for the Commission to accept jurisdiction of cases which were notifiable in several Member States (Art. 4 (5)) referrals). The remaining 5 cases involved requests for the Commission to refer the case to a Member State (Art. 4 (4) referrals). During the same period, the Commission adopted 19 decisions pursuant to Article 4 ECMR accepting referral requests, 13 under Article 4 (5) ECMR and 6 under Article 4 (4) ECMR.

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

A — Decisions taken under Article 6 (2)

Axalto / Gemplus

In May the Commission conditionally approved the proposed acquisition by the Dutch company Axalto of Gemplus (Luxemburg). Both parties to the transaction are active worldwide in the production and sale of smart cards, such as SIM cards for mobile phones, payment cards and government and identification cards. The parties also provide products and services related to the administration of already issued SIM cards. SIM card administration is carried out through Over-The-Air ("OTA") platforms, which enable mobile phone operators to control a SIM card without a physical connection.

The Commission's market investigation concluded that, despite the strong positions of the two companies, the transaction would not directly lead to price increases or to a decrease in the pace of innovation. However the Commission also found that the merged entity would have had both the ability and incentive to harm its competitors through misusing its intellectual property rights. Indeed, the transaction would combine two important intellectual property portfolios. Furthermore, as the two companies had sold a substantial number of OTA platforms, the Commission found that they would be in a position to hinder the activity of other card manufacturers by making the latter's SIM cards incompatible with their OTA platforms. Therefore, the Commission deemed that the proposed transaction as initially notified was likely to weaken competition and thus raised serious doubts as to its compatibility with the Single Market.

In order to address these problems Axalto undertook to grant a ten-year licence of the combined entity's patent portfolio. Furthermore, Axalto undertook to disclose interoperability information to ensure the compatibility of competitors' SIM cards with its OTA platforms. The Commission concluded that the commitments were suitable to remedy the competition concerns and granted its approval of the transaction subject to fulfilment of these undertakings.

Orica/Dyno Nobel

In May the Commission approved the proposed acquisition by the Australian company Orica Ltd. ("Orica") of most of the businesses of the Norwegian company Dyno Nobel ASA ("Dyno") outside North America and Australia. The transaction had been referred to the Commission by the national competition authorities of Sweden, Germany and Norway.

Both parties to the transaction are active in the explosives and detonators industry. Orica is a publicly listed Australian company active in mining services, chemicals, consumer products and fertilisers. Dyno manufactures and sells commercial explosives and initiating systems (detonators). The proposed operation involved the acquisition by Orica of almost all of Dyno's business in Europe, Africa, Asia and Latin America. The Dyno operations in the USA, Canada, Australia and New Zealand had been sold as a separate company. The parties were both active in the markets for commercial explosives in Norway and Sweden as well as in the European-wide market for initiating systems. Explosives and detonators are used in the mining, quarrying and construction industries.

In Norway and Sweden Dyno is by far the largest supplier of explosives followed by Orica which is the next largest competitor. The proposed transaction would have given the merged entity a dominant position in these countries. However Orica undertook to divest a subsidiary, Orica Scandinavia Mining Services, which comprises its entire explosives business in those two countries. This divestiture would remove the competition concerns that would have been created by the merger and would restore the competitive situation to the pre-merger situation. The Commission therefore cleared the operation subject to fulfilment of Orica's divestiture commitment.

Mittal / Arcelor

In June the Commission granted conditional clearance to the proposed acquisition of the company Arcelor S.A. (Luxembourg) by the Mittal Steel Company N.V. Both parties to the transaction are major steel producers. Mittal Steel, a company controlled by the Mittal family, is the world's largest steel producer. It is incorporated in the Netherlands and listed on both the New York and Amsterdam stock exchanges. Arcelor is the largest European steel producer and was created through the merger of the European steel producers Aceralia, Arbed and Usinor in February 2002. The group is listed on the Brussels, Luxembourg, Paris and Madrid stock exchanges.

The Commission's market investigation showed that the two companies' activities were largely complementary, both geographically and in terms of product range. Geographically Arcelor is principally active in Western Europe as well as South and North America, with relatively minor operations in Eastern Europe and Asia. By contrast Mittal Steel is active principally in North America, Central and Eastern Europe and Africa and has only a minor presence in Western Europe.

In terms of product range Mittal and Arcelor's activities in the European Economic Area (EEA) only overlap in the production and direct sale of a number of carbon steel products. Mittal is not active in stainless or speciality steel whereas Arcelor is active in this area. As regards carbon steel products Mittal achieves the majority of its sales in long products (such as bars, beams and rods) while Arcelor is active mainly in flat products (such as plates and coils). In steel distribution Mittal has limited activities while Arcelor has a strong position in Western Europe.

The Commission concluded that the proposed transaction would not give rise to competition concerns in the EEA markets for steel products with the exception of heavy section beams, a specific type of long carbon steel product. However Mittal offered remedies that would remove the concerns identified by the Commission in this area and the Commission was able therefore to grant approval to the transaction subject to implementation of these remedies in full.

Linde / BOC

For a more extensive treatment of this case please see the article on page 50 of this Newsletter

In June the Commission gave conditional approval to the proposed takeover of the UK-based company BOC by the German company Linde. Both companies are active in industrial and specialty gases. The initial market investigation found that the proposed acquisition could have created significant competition problems by removing an important competitor of Linde on a number of gas markets. The competition concerns were removed however by the remedy package offered by the parties which included the divestiture of Linde's industrial gases business in the UK and BOC's industrial and specialty gases business in Poland. The approval is further conditional on divesting several helium wholesale supply contracts of both Linde and BOC. Linde also undertook to break to a defined extent structural links with Air Liquide following from the existing joint ventures of BOC and Air Liquide in Asia. In the light of these commitments the Commission concluded that the proposed operation would not significantly impede effective competition within the EEA or any substantial part of it.

B — Decisions taken under Article 8

Inco / Falconbridge

For a more extensive treatment of this case please see the article on page 41 of this Newsletter

On 4 July the Commission granted conditional clearance to Inco's acquisition of the Canadian company Falconbridge. Both parties to the transaction are Canadian companies active in the mining, processing and refining of nickel and other metals. The Commission's in-depth investigation had shown that the concentration, as initially notified, would have led to a substantial impediment of effective competition on certain nickel and cobalt markets in the EEA. To address the Commission's concerns, the merging parties undertook to divest Falconbridge's only nickel refinery and related assets and proposed to sell these assets to Lion Ore, an international mining company. The Commission concluded that the proposed transaction, as modified, would not significantly impede effective competition in the EEA or a significant part of it.

Omya / J.M. Huber

On 19 July the Commission gave conditional clearance, after an in depth market investigation, to Omya's acquisition of US-based J. M. Huber's on-site precipitated calcium carbonate ("PCC") business. The transaction involved the sale by Huber of twelve PCC production facilities which are purpose built paper mill sites designed to provide a ready supply of minerals used in paper production. Six of these plants are in the EEA. The remainder are located in the US, Canada, Brazil and Russia. The case was referred to the Commission by the Finnish Competition Authority who had taken the view that the proposed transaction was liable to affect trade between Member States and significantly affect competition. The referral request was joined by the competition authorities of Austria, France and Sweden. The Commission's in-depth investigation revealed that the concentration, as initially notified, would have led to the elimination of a potential competitor in the market for the supply of calcium carbonates for paper coating. To restore effective competition, Omya and Huber undertook to divest a PCC plant in Finland together with the PCC coating technology developed by Huber. The Commission concluded that the proposed transaction, as modified, would not significantly impede effective competition in the EEA or a significant part of it. The Commission's clearance decision was conditional upon full compliance with these divestiture commitments.

Ineos / BP Dormagen

For a more extensive treatment of this case please see the article on page 56 of this Newsletter

The Commission cleared the proposed acquisition by the UK-based company, Ineos, of BP's Ethylene Oxide/Ethylene Glycol business in Dormagen, Germany. Ineos is a UK company active worldwide in the production, distribution, sales and marketing of intermediate and speciality chemicals. The business which Ineos proposed to acquire consisted of a plant located in Köln/Dormagen (Germany) manufacturing ethylene oxide and ethylene glycols and currently controlled by BP.

Ethylene oxide is a colourless gas, produced by the partial oxidation of ethylene and is hazardous, highly inflammable, explosive, toxic and carcinogenic. It is used for the production of glycols which are used mainly in the textile industry and as an intermediate for the production of other derivatives such as detergents, refrigerants and personal care products.

The Commission found that the combined entity would have high market shares in the merchant market for ethylene oxide. However the investigation also revealed that competitors would have the ability and the incentive to react to any attempted price increases by the combined entity. Furthermore there were indications from the market investigation that substantial new capacity for ethylene glycols was being commissioned in the Middle and Far East, producing ethylene glycols at substantially lower cost than in Europe. As a result imports of ethylene glycols to the EEA could be expected to increase. The subsequent reduction of ethylene glycol production in the EEA would then result in spare capacities of ethylene oxide, which could be diverted to the merchant market. Given the number of market players and their ability to divert part of their ethylene glycols production into the ethylene oxide merchant market, the Commission concluded that there would be sufficient alternative suppliers to constrain any anti-competitive behaviour by Ineos. It therefore granted an unconditional approval of the proposed acquisition.

C — Cases abandoned

China International Marine Containers / Burg Group

A proposed acquisition by China International Marine Containers ("CIMC") of the Dutch Burg Group ("Burg") which had been notified in February was effectively abandoned during the Commission's Phase II investigation. The transaction had been notified to the Commission in February and the Commission had decided to open a Phase II investigation in March. The Commission had subsequently issued a statement of objections and provisionally concluded that the transaction would create a quasi-monopoly position in the market for standard ISO tank containers leading to a significant impediment of effective competition. Additionally the Commission had taken the preliminary view that the planned deal would also impede effective competition in the market for specialised ISO tank containers by removing the best-placed entrant. ISO tank containers are cylindrical tanks, supported by a frame, that conform to the International Organization for Standardization (ISO) container manufacturing standards. They are used for the transportation of hazardous and non hazardous liquid cargoes in container ships, where they can be easily piled next to standard freight container boxes.

During the course of the in-depth investigation the parties informed the Commission of their decision to abandon the deal. After a detailed investigation of the parties' plans in this regard the Commission was satisfied that the planned transaction would be effectively abandoned. It was therefore not necessary to take any formal decision in the case.

Inco/Falconbridge: A nickel mine of applications in efficiencies and remedies (1)

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1. Introduction

Following an in-depth investigation, on 4 July 2006, the Commission approved the acquisition by Inco Limited ("Inco") of Falconbridge Limited ("Falconbridge"), subject to conditions and obligations. This decision was adopted in the context of a wave of takeover bids, friendly and hostile, in the mining industry, with record-high commodities prices. Inco and Falconbridge are both Canadian mining companies active worldwide in the mining, processing, refining and sale of various nickel products, copper, cobalt and precious metals. On 11 October 2005, Inco announced a friendly takeover bid for Falconbridge, which would have created the largest nickel company worldwide, "New Inco".

Although the merger will ultimately not go through, as Inco did not succeed in its bid (2), the decision in this case is interesting as it breaks new ground in the Commission's practice with regard to efficiencies and remedies in merger cases. It is also worth noting that the Commission's in-depth investigation was conducted particularly expeditiously in this case, as there was no extension of any time limits, and the Commission's final decision already assessed and approved a suitable purchaser of the divested business. The case was notified on 20 January, a decision to open proceedings was adopted by the Commission on 24 February and remedies were submitted by the parties on 16 March. The concentration was approved with conditions and obligations on 4 July 2006, i.e. in slightly over five months.

This decision is the first Commission decision after an in-depth investigation to address efficiency claims made by the parties in great detail. While the Commission recognized that the projected transaction was indeed likely to bring about significant operating efficiencies, essentially due to the proximity of the parties' mining and processing operations in the Sudbury basin in Canada, it found that these efficiencies were neither merger-specific (they could have been achieved through other less anticompetitive means) nor were they likely to benefit directly consumers in the relevant markets where the proposed transaction would have significantly impeded effective competition.

The Commission decision also includes many interesting developments as regards remedies. The scope of the divestiture received great attention given the specific features of the nickel industry. The market investigation indeed revealed that the nickel industry is vertically-integrated, and that there is virtually no stand-alone refinery or trading in nickel intermediate products. The essential issue was to ensure that the divested business secures a long-term source of suitable feed in sufficient quantities, at economically attractive conditions, so as to have the ability and incentive to compete with New Inco in the long term. The Commission was therefore able to approve the transaction only in consideration of the type of purchaser. The parties therefore committed to sell the refinery and related assets only to an undertaking with access to sufficient resources to ensure the viability of the divested refinery (3). In addition, given the fact that the pool of suitable purchasers was limited, with the risk that no suitable purchaser could be identified, the parties also committed to a "standstill", namely to implement the merger only after the closing of the divestiture sale (4).

Finally, the Commission cooperated closely with the U.S. Department of Justice, which identified similar competitive concerns and filed on 23 June 2006 a Consent Decree approving the same remedy package as the Commission. This case thus provides a good example of excellent cooperation between the two antitrust agencies.

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
(2) Inco had not acquired the majority of the shares of Falconbridge at the expiration of its takeover bid, on 27 July 2006.
(3) See paragraph 577 of the decision.
(4) See paragraphs 578-579 of the decision.

2. The theory of harm: the merger would have resulted in a virtual monopoly of New Inco on the markets for high purity nickel and cobalt required for specific end-applications

2.1. The relevant markets

2.1.1. Nickel and cobalt production chains and end uses

2.1.1.1. Nickel

Nickel ores are principally found in Canada, Russia, Southern Africa (sulphide ores, which are underground) or in New Caledonia, Cuba, Indonesia, Brazil (laterite ores, which are near surface). Mined nickel ores typically contain between 0.5-3.5% of nickel, and are further processed and refined to obtain various finished nickel products, starting from milling/concentrating stage (resulting in nickel concentrate), smelting or leaching stage (resulting in various intermediate nickel products: nickel matte, nickel carbonate, mixed sulphide, etc.) and refining stage (resulting in various types of nickel products: ferronickel, pellets, cathodes, powder, briquettes, foams, etc. depending on the refining technology used). The output of the various processing and refining stages of nickel ore is commonly called "primary nickel". However, nickel may also be obtained from scrap or recycled sources (so-called scrap or "secondary nickel").

Nickel is mostly used in the production of stainless steel (accounting for about two thirds of nickel consumption), in plating, in the production of non-ferrous alloys (including super alloys), and in specialty applications (e.g. batteries, foams, catalysts).

Nickel is a metal listed on the London Metal Exchange ("LME"), where standard nickel contracts are traded. The specification for nickel traded on the LME requires a 99.8% nickel content and specified maximum levels of impurities. The LME nickel price is widely used as a reference price in supply contracts for finished nickel products between nickel suppliers and their customers.

2.1.1.2. Cobalt

Cobalt is primarily obtained as a by-product of the refining of other metals (over 50% of cobalt production worldwide), mainly copper and nickel. It is also extracted by itself from arsenide ores and refined following similar processes as for nickel refining. Depending on the processing and refining technique, cobalt may be sold as metallic cobalt (metal or powder) or as cobalt chemicals (chemical solution). Cobalt is used in different applications than nickel and demand is thus driven by other factors. Cobalt can be used for metallurgical or chemical end-applications. Metallurgical applications include super alloys, various alloys and coatings and medical implants. Chemical applications of cobalt include lithium batteries, catalysts and pigments.

Cobalt is not a metal listed on the LME. Reference prices are however provided by specialized publications, such as the London Metal Bulletin or Platt's Metals Week.

2.1.2. The relevant product markets

The parties claimed that the relevant product markets were the supply of nickel and the supply of cobalt. However, the market investigation clearly showed that it was appropriate to define the relevant nickel and cobalt product markets according to end-applications. First, demand patterns differ significantly between end-applications, in particular in terms of purity, size and shape of the products, delivery requirements and structure of the demand; secondly, nickel producers are to a large extent specialized in supplying certain end-applications; and thirdly, finished nickel product prices appear to differ according to the application. The market investigation confirmed that the following relevant markets should be distinguished: (i) the supply of nickel to the plating and electroforming industry, (ii) the supply of high purity nickel for the production of super alloys/super alloys used in safety critical parts, and (iii) the supply of high purity cobalt for the production of super alloys used in safety critical parts.

2.1.2.1. The supply of nickel to the plating and electroforming industry

The plating process is used to coat an object in the desired metal by passing electric current through a suitable solution (the electrolyte). Electroforming allows covering various types of moulds with shapes or thin metal deposits.

From a demand side perspective, the market investigation showed that only specific finished nickel products can be used for plating and electroforming. Plating customers have specific requirements in terms of purity, shape, size and packaging of the nickel products. Sales of nickel products for plating and electroforming are usually made via distributors: the market investigation showed that the fragmented structure of the demand implies the need for a nickel supplier to develop and maintain a sales network of distributors. From the supply side perspective, not all nickel suppliers are capable of supplying nickel products to the plating and electroforming industry and certain producers, in particular the parties, have developed specific products for this end-application. A nickel supplier not yet active in the business would need to make significant investments to be able to supply the wide range of nickel products used in the plating and electroforming applications. Finally, the parties' internal documents also clearly pointed to the existence of a distinct product market with distinct pricing and marketing policies from other end-applications of nickel.

2.1.2.2. The supply of high purity nickel for the production of super alloys/super alloys used in safety critical parts

Super alloys are used in applications requiring operation in high-temperature and high-stress environments. Such applications include in particular the aerospace, power generation and medical industries. A specific category of super alloys are super alloys used in safety critical rotating parts, for example turbine engine blades and discs for jet aircrafts.

The market investigation showed that not all finished nickel products from any supplier can be used interchangeably for the production of super alloys, and even less so as regards super alloys used in safety critical parts due to the high purity of nickel required (very low level of impurities and trace elements) and the need for certification and traceability. The comparison of the specifications of the finished nickel products of a range of nickel suppliers and the specifications required by a range of super alloy producers showed that only very few suppliers, including the parties, are able to produce finished nickel products with a sufficient purity to meet the specifications of super alloy producers. The market investigation also revealed that there were high barriers to entry in this product market.

2.1.2.3. The supply of high purity cobalt for the production of super alloys used in safety critical parts

A particular end-application of cobalt is the production of super alloys, a specific category of which are super alloys used in safety critical applications. Super alloys are one of the major end-use applications of cobalt, accounting for 20-25% of total cobalt demand.

The market investigation indicated that not all cobalt products suitable for use in super alloys meet the specifications for high purity cobalt for super alloys used in safety critical applications. There is a very specific demand for high purity cobalt — defined by its precise chemical composition and low impurity levels — used for the production of super alloys used in critical applications. Producers of super alloys used in critical applications cannot substitute any other cobalt product with a lower quality and/or different chemical composition.

2.1.3. The relevant geographic markets

The Commission's investigation confirmed that the markets for the supply of high purity nickel for the production of super alloys/super alloys used in safety critical parts and for the supply of high purity cobalt for super alloys used in safety critical parts were worldwide in scope, as these products are produced and traded across the world and shipped extensively and transport costs represent a relatively small proportion of the final price.

However, as regards the market for the supply of nickel products to the plating and electroforming industry, the Commission's investigation indicated that the geographic scope of this market is regional (e.g., respectively the EEA, North America and Asia) for the following reasons: the demand presents different characteristics by continent, based on end users' requirements for specific shapes and sizes and on distribution patterns; suppliers of nickel to the plating and electroforming industry are geographically focussed; sales are organized on a regional level and prices are different from one region to another.

2.2. Theories of harm

A large number of respondents to the market investigation expressed serious concerns about the transaction. In the three above-mentioned end-applications of nickel and cobalt, where the parties have extremely high combined market shares at the EEA and global level, the majority of customers were concerned by the transaction as Inco and Falconbridge are the two leading suppliers and the proposed transaction would have significantly strengthened their market power. A number of competitors also expressed concerns and indicated that the transaction would be likely to increase barriers to entry and prices in these end-applications.

2.2.1. Supply of nickel to the plating and electroforming industry

After the transaction, New Inco would have become by far the largest supplier of nickel products to the plating and electroforming industry, with a combined EEA-wide market share of 75%. The market investigation showed that the other producers of nickel for plating and electroforming could not have exercised competitive constraints on New Inco, either because they lack sufficient capacity and suitable technology / products or simply because they are not active in the EEA. Distributors and customers confirmed that the U.S. company OMG (whose nickel refinery is located in Finland) would have been the only real alternative supplier to New Inco in the EEA. However, OMG has faced difficulties to source intermediate products ("feed") and it concluded a tolling agreement with Inco to ensure a reasonable capacity utilisation of its refinery (whereby OMG will refine Inco matte, and deliver back the refined nickel products for marketing by Inco). This has the consequence of considerably reducing the competitive constraint that OMG could exercise on New Inco.

Internal documents provided by the parties also indicated that Inco and Falconbridge are the closest competitors for the supply of nickel products used in the plating and electroforming industry and confirmed that the parties are the market drivers, with the broadest range of nickel products (different shapes and sizes) and "must have" brands with excellent reputation. Following the transaction, New Inco would therefore have had the power to increase unilaterally prices for nickel products, while facing limited competitive pressure from any other existing or potential suppliers of nickel products to the plating and electroforming industry.

2.2.2. Supply of high purity nickel for the production of super alloys / super alloys used in safety critical parts

New Inco would have become by far the largest and almost monopolist supplier of high purity nickel used in super alloys, with a market share of around 90% globally. The position of New Inco would have been very strong and no other nickel supplier was or would have been able to match the unique strengths of New Inco in terms of product quality, production capacity and reputation on the market for the supply of high purity nickel used for the production of super alloys/super alloys used in safety critical parts.

Competition in the super alloy market is basically currently driven by the rivalry between Inco and Falconbridge. All super alloy manufacturers have certified Inco, Falconbridge and the French company Eramet as suppliers of high purity nickel suitable for super alloy production, and they all purchase most of their requirements for high purity nickel from Inco and/or Falconbridge. They indicated that the transaction would reduce the number of suppliers of high purity nickel from three to two, leaving New Inco facing mostly the small producer Eramet only. Super alloy manufacturers do not generally find the nickel products of the other nickel producers acceptable for use in super alloys due to their inability to produce at consistent high standards. The Commission analyzed a large number of internal documents from the parties and found ample evidence that the parties themselves considered that there were only few alternatives to their own products. The Commission analyzed comprehensive sales data from Inco and Falconbridge, and was able to establish high diversion ratio between Inco and Falconbridge during a strike at Inco's Canadian operation in 2003.

The market investigation also indicated that the constraints on the future behaviour of New Inco by potential competition would have likely been minimal given the significance of barriers to entry in the high purity nickel market. Entry on the market for the supply of high purity nickel used in super alloys requires a high level of control over the nickel intermediate products used as an input by the refinery, over the refining processes and certification from the super alloy producers. As a result of the merger, New Inco would have been able to increase unilaterally prices for high purity nickel. This would have been particularly so in a context where the demand for high purity nickel is strongly increasing and high purity nickel supply is extremely tight, due to capacity constraints faced by other suppliers.

The Commission also assessed the possibility of arbitrage for super alloy producers to defeat a price increase by New Inco for high purity nickel used in super alloys. The parties claimed that they could not price discriminate between the high purity nickel they sell to super alloy producers for use in super alloy production, on the one hand, and the same high purity nickel they sell to super alloy producers or to other customers and traders for other less demanding applications, for which New Inco would face greater competition, on the other hand. According to the parties, if New Inco increased prices for the high purity nickel required for super alloy production, super alloy producers would be able to either use the high purity nickel they purchase from New Inco for less demanding applications at lower prices (internal arbitrage, within the total volume sold to a given super alloy producer) or they would be able to purchase high purity nickel from New Inco from other customers or traders (external arbitrage). The investigation however showed that Inco would have been able to identify precisely the super alloy customers (and/or the proportion of super alloy manufacturers' demand) for which it could have increased prices without risk of losing that customer, as it would have had no alternative supplier for high purity nickel. External arbitrage would also have been complicated by the strict certification procedures applied by the super alloy producers and the need to ensure a consistent and traceable supply of nickel of the highest purity.

2.2.3. Supply of high purity cobalt for the production of super alloys used in safety critical parts

As for the supply of high purity nickel, New Inco would have become the almost monopolist supplier of high purity cobalt for super alloys used in safety critical applications. According to the Commission's estimates, New Inco would have had a market share of over 95% on the global market for the supply of cobalt for super alloys used in critical applications. As evidenced by the market investigation, competition on this market is currently driven by the rivalry between Inco and Falconbridge.

The Commission's in-depth investigation confirmed that there are only few cobalt suppliers able to produce high purity cobalt meeting the strict specifications of manufacturers of super alloys. However, only Inco and Falconbridge supply high purity cobalt for super alloys used in the most critical applications. Post-transaction, the very few other producers of high purity cobalt suitable for use in super alloys would not have been able to counterbalance New Inco's significant market power due to capacity constraints and their inability to produce to consistent high standards. Barriers to entry into the market for the supply of high purity cobalt for super alloys used in critical applications include the need to have access to and develop know-how and intellectual property and the requirement to become certified by super alloy manufacturers and their customers. Given the importance of these barriers, constraints on the future behaviour of New Inco by potential competition would likely have been minimal.

Following the transaction, New Inco would have had the ability and incentive to increase unilaterally prices for high purity cobalt for super alloys used in safety critical parts, without facing any competitive pressure from another existing or potential supplier of high purity cobalt. Price increases for high purity cobalt would have been even easier to implement: unlike nickel, where the price paid by super alloy manufacturers is based on the LME price and the supplier's premium, cobalt prices are negotiated between cobalt producers/traders and customers, leaving more scope for price increases.

3. Efficiencies

The parties submitted that the proposed transaction would have generated efficiency gains arising primarily from the close proximity of their respective mines/processing facilities in the Sudbury basin, which would have allowed them to optimize their mining and processing operations. This would have resulted in increased production at lower cost and would have benefited all nickel customers and offset any potential anticompetitive effect of the transaction.

The Merger Regulation and the Commission guidelines on horizontal mergers ([5]) recognise that efficiencies brought about by a merger may counteract the effects on competition and the potential harm to consumers that the merger might otherwise have. Parties to a concentration are required to identify in detail the efficiency gains generated by the concentration that are likely to enhance the ability and the incentive of the merged entity to act pro-competitively for the benefit of consumers. Typical examples of such efficiencies include cost savings, new product introduction and service or product improvement. Efficiency claims need to be reasoned, quantified and supported by internal studies and documents if necessary. The parties have also to demonstrate that such efficiencies are likely to benefit directly customers in the relevant markets where competition concerns have been identified (pass-on to consumers). Last, the parties have to show that the efficiencies could not have been achieved to a similar extent by means that are less anticompetitive than the proposed concentration (merger specificity). In the present case, the Commission considered that these last two conditions were not fulfilled.

The Commission determined that the parties would have been able to capture much of the potential for synergies through the creation of a mining and processing joint venture in the Sudbury basin. As recognized by the parties, the largest share of the operating synergies of the proposed transaction would have been achieved at the mining and processing stages of the nickel production chain. A joint venture between Inco and Falconbridge limited to mining and processing operations in the Sudbury basin, as contemplated in an Inco internal document, would thus have allowed most of the operating synergies between the two companies to materialize, while not preventing Inco and Falconbridge from competing at the refining and marketing level. Hence, the synergies presented by the parties were not merger-specific ([6]).

([5]) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31/5, 5.2.2004.

([6]) It is interesting to note that following its successful takeover bid of Falconbridge in August 2006, Xstrata has invited the potential buyer of Inco to conclude such a mining and processing joint venture in the Sudbury basin (see article of 30 August 2006 in the *Northern Ontario Business*, http://www.nob.on.ca/aroundtheNorth/08-30-06-xstrata.asp). This confirms the Commission's assessment that the same efficiency gains could have been achieved through less anticompetitive means than a full merger.

As regards the pass-on to customers, the Commission considered that the efficiencies would not have meaningfully benefited customers for end-nickel products in the relevant markets where competition concerns have been identified. As the efficiencies were expected to be achieved at the upstream mining and processing level only (not at the final stage of the nickel production chain), any potential benefit would have been spread between all finished nickel and cobalt products of New Inco, a significant part of which are sold on other markets than the three relevant markets where competition concerns were identified. In addition, as a result of the proposed transaction, New Inco would have acquired an almost monopolistic position in these markets, where it faced little if any competitive pressure, and it would thus have had only limited incentives to share the benefits of the efficiencies with end customers in these markets.

As a result, the parties failed to demonstrate convincingly that the efficiencies brought about by the proposed transaction were not attainable with a less anti-competitive alternative and that they would have directly benefited end customers in the three relevant product markets where competition concerns were identified. For these reasons, the Commission considered that the efficiencies presented by the parties could not be considered to offset the adverse effect of the proposed transaction on competition.

4. The remedies

In order to remove the competition concerns identified during the procedure, the parties submitted on 16 March 2006 a package of commitments, consisting in the divestiture of Falconbridge's sole nickel and cobalt refinery, the Nikkelverk refinery in Norway and related assets. After extensive discussions with the Commission, the parties submitted on 26 June 2006 the final remedy package. In this final remedy package, the parties undertook to divest the Nikkelverk refinery, together with the related feed procurement entity and existing third-party feed supply agreements, and related marketing organisations and existing customer contracts, as well as Falconbridge's proprietary refining technology and trademarks ("the divested business") to a company active in metal mining and/or processing with sufficient nickel resources to sustain the viability of the refinery.

On 7 June 2006, Falconbridge entered into a binding agreement with LionOre Mining International Ltd ("LionOre") for the sale of the divested business. The same day, the parties requested the Commission's approval of LionOre as a suitable purchaser for the divested business.

Under the Merger Regulation, the Commission assesses the compatibility of a notified concentration with the common market. Where a concentration raises competition concerns as it is likely to lead to a significant impediment to effective competition, the parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of the merger. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and particular characteristics of the industry and of the markets in which competition concerns arise.

4.1. Vertical integration in the nickel industry and access to feed

In the present case, the aim of the remedy package was to ensure, post merger, the presence, over the long term of a viable competitor to New Inco on the three markets were competition concerns had been identified. In assessing the proposed remedy package, the Commission thus focused on the viability of the divested business and its ability and incentive to compete with New Inco on these markets. The Commission's investigation showed in particular that, given the current vertically-integrated structure of the nickel industry, the essential issue for the assessment of the proposed remedy was the ability of the divested business to secure a long-term source of nickel feed suitable for the production of high purity nickel on a consistent basis.

The analysis of the structure of the nickel industry indeed showed that the vertical integration of mining, processing and refining facilities is the predominant business model. Among the four main suppliers of nickel for plating and electroforming active in the EEA (Falconbridge, Inco, OMG and Eramet) and the three suppliers of nickel for super alloys (Inco, Falconbridge and Eramet), Inco, Falconbridge and Eramet are fully or to a large extent vertically-integrated with own mines and processing plants. This model also prevails in the nickel industry in general, where only three market players (OMG, Jinchuan and Sumitomo) are partially vertically-integrated. All the other large players are active at all stages of the nickel production chain. There is currently no stand-alone nickel refinery in the nickel industry. As a consequence, the vast majority of nickel intermediate products are used internally by vertically-integrated groups. There is thus no real market for the supply of third-party feed. In addition, the markets for the supply of nickel are currently very tight, as evidenced by the very high nickel prices, and the markets for the supply of nickel intermediate products are even tighter. The competition between partially vertically-integrated refineries for third-party feed is hence very strong and some refineries are experiencing difficulties to source feed at acceptable prices.

The Commission's investigation further indicated that it is essential for a nickel refinery to ensure access to sufficient and suitable quantities of feed over the long term to be viable and competitive. A nickel refinery is most efficient when it is operated at full capacity and processes over the long term a consistent and suitable feed mix. Nickel producers that are vertically-integrated can meet such requisites by ensuring that their entire production chain, and in particular the mining and processing operations, produces nickel intermediate products suitable for the refinery on a consistent basis, while partially vertically-integrated producers seek to secure sources of feed through interests in mining operations and long term supply contracts. Vertical integration appears to be even more relevant for the production of high purity nickel, for which any variation in the feed mix may have negative consequences in terms of impurities levels of the refined nickel products.

By contrast, as regards cobalt, the Commission noted that, contrary to the nickel industry, vertical integration is not the prevailing business model, with significant trading of cobalt intermediates.

4.2. How to ensure the viability and the competitiveness of the divested business?

The final remedy package combined three ways to ensure that the divested refinery would have had a sufficient and suitable feed supply and thus provided satisfactory guarantees on the viability and the competitiveness of the divested business.

First, the scope of the divested business included all existing third-party feed supply agreements related to Nikkelverk as well as all entities and teams of Falconbridge responsible for the sourcing of third party feed and for the marketing of Nikkelverk's nickel and cobalt production. With these feed sourcing and marketing entities, the refinery would have benefited from experienced personnel with an in-depth knowledge of the industry in general and of Nikkelverk's feed requirements and product characteristics in particular. The objective of this broad remedy package was to provide the divested business with all the required resources to ensure its effectiveness as from its divestment.

Secondly, the remedy package included an option for the purchaser of the divested business to conclude a ten-year contract with New Inco for the supply of nickel matte to the refinery. The quantities of matte to be delivered to the refinery under this contract would have matched exactly the quantities of feed that Falconbridge would have supplied to Nikkelverk absent the transaction. The terms and conditions of the contract had to be part of the remedy package and approved by the Commission. These provisions were designed to ensure an independent and suitable feed supply for the divested business, and to cater for the lack of developed market for nickel intermediates and the long lead time required to develop alternative sources of feed. In addition, the feed supply agreement with New Inco included flexibility provisions for the quantities of matte to be delivered so as to allow the divested business to progressively transition away from the supply agreement with New Inco as it secured alternative sources of feed.

Thirdly, in the final version of the remedy package, Inco committed to sell the divested business to a purchaser already active in metal mining with access to sufficient suitable nickel intermediate products to ensure the viability and competitiveness of the refinery in the long term. The assessment carried out by the Commission indeed had shown that there was a reasonable likelihood that the markets for nickel intermediates would remain tight in the next ten years, even beyond the expiry of New Inco's feed supply agreement with the divested business. Such situation would have significantly threatened the viability of the divested business, which could have experienced significant difficulties in sourcing feed unless it would have had access to its own feed resources for at least a significant share of its feed requirements. The Commission therefore came to the conclusion that only a purchaser, with experience in mining and processing of nickel and access to mines and sufficient intermediate nickel products, could bring sufficient comfort as to ability and incentive of the divested business to restore competition in the long term.

Finally, with the aim to provide to the Commission with the best guarantees on the suitability of the purchaser and avoid any risk in the implementation of the divestiture process, Inco agreed to commit not to implement the acquisition of Falconbridge before the closing of the sale of the refinery and the related assets. This provision provided Inco with a strong incentive to identify beforehand a purchaser with suitable and sufficient mining resources and to proceed expeditiously with the sale of the refinery.

In view of the above, the Commission considered that the proposed remedy package was sufficient to ensure both the viability and the competitiveness of the divested business and to restore competition in the three relevant product markets in the long term. The sale of the divested business would have removed the entire overlap between Inco and Falconbridge in the field of nickel and cobalt. The remedy package, which provided that the divested business would be sold to a company active in the metals mining and/or processing with sufficient feed resources to sustain its economic viability also removed the concerns as regards access to feed and ensure the viability and competitiveness of the divested business.

4.3. LionOre: a suitable purchaser

On 7 June 2006, Falconbridge entered into a binding agreement with LionOre for the sale of the divested business and Inco requested the Commission to approve LionOre as a suitable purchaser. LionOre is a mid-sized producer of nickel with operating mines in Botswana, South Africa, and Australia and several mining projects in these regions. The company has been in the nickel business since 1996 and is currently the tenth largest nickel producer in the world. LionOre currently only produces nickel concentrate and does not have any refining capabilities. The acquisition of the divested business by LionOre would have been a major opportunity for the company to integrate downstream in the supply of finished nickel products through the acquisition of a large-scale and efficient nickel refinery together with its existing sales network. Prior to the acquisition of Nikkelverk, LionOre had already publicly stated its strategy to integrate downstream to have a direct access to consumers and capture the full value of the nickel production chain.

In line with general principles and with the criteria set in the commitments, the Commission assessed whether, after the acquisition of the divested business, LionOre would have become an independent competitive force on the markets where competition concerns had been identified. In particular, the Commission assessed whether LionOre is/would have remain(ed) independent from Inco/New Inco and had sufficient financial resources to acquire the divested business and how LionOre could have integrated its existing and future nickel mining operations with Nikkelverk. The Commission's investigation showed that LionOre had sufficient resources to supply with its own feed a significant share of Nikkelverk nickel feed requirements, in particular after the expiry of the matte supply agreement. LionOre has several mining expansion plans and has been extremely successful to date in increasing steadily its nickel production through expansion of its mining activities and the acquisition of mining assets. The company has demonstrated its ability to bring new mining projects on stream and achieve rapid production growth. Furthermore, the ten–year matte supply agreement would have provided sufficient supply guarantees, should the company have experienced delays or difficulties in the implementation of its mining expansion plans. As regards cobalt, the Commission considered that LionOre would have been able to complement its own cobalt resources with purchases of third party cobalt intermediates on the market to meet Nikkelverk's cobalt feed requirements.

Finally, it is also relevant to note that LionOre's Tati operation already produces nickel intermediates that are converted into matte at the BCL smelter and refined at Nikkelverk. Falconbridge and BCL have developed a long-term relationship over twenty years to ensure BCL's capability to supply Nikkelverk consistently with suitable matte for the production of high purity nickel. The sale of Nikkelverk to LionOre would thus have maintained the existing supply chain and minimized any risk related to changes in feed supply and in refining processes at Nikkelverk. Lastly, one of LionOre's directors was a former CEO of Falconbridge and former General Manager of the Nikkelverk refinery. The Commission hence considered that LionOre was a suitable purchaser for the divested business, so as to ensure the divested business' independence, viability, and competitiveness in the long term. LionOre combines a number of characteristics that were identified as crucial to meet these conditions: (i) extensive experience and knowledge of the nickel industry; (ii) ownership of mines and mining projects that already/will produce suitable feed for Nikkelverk, and (iii) knowledge of the Nikkelverk refinery process and output. The acquisition of the divested business by LionOre would have created a new fully vertically-integrated market player in the nickel industry.

5. Conclusion

Although the acquisition of Falconbridge by Inco did not eventually materialize, the assessment of the proposed transaction by the Commission contains some interesting features in terms of merger control.

First, the Commission identified three relevant markets in the nickel and cobalt sectors where the proposed transaction would have led to the creation of a dominant market position. New Inco would even have had a near monopolistic position on two of these markets. In its decision, the Commission relied on technical statements from customers in those end-applications, showing that these customers had very few alternatives beside Inco and Falconbridge, and on internal documents from the parties showing that Inco and Falconbridge were the two leading competitors in those markets. Econometric evidence on diversion ratios during strike periods at the parties' mining operations was also used to demonstrate that Inco and Falconbridge were the closest competitors in those end-applications.

Secondly, the case is one of the first merger cases where the parties described in detail the significant operating efficiencies that the transaction would bring about and argued that they would offset any potential harm to competition. The Commission assessed the validity of these efficiency claims, and eventually concluded that, while the efficiencies were likely to materialize, they were not merger-specific and it was unlikely that they would directly benefit customers in the markets where competition concerns had been identified, so that they could not offset the anticompetitive effect of the transaction. The decision shows that the Commission examines with particular attention the potential effect of the efficiencies resulting from a merger and focuses on their impact on end customers in the specific markets where competition concerns are identified.

Thirdly, the final remedy package proposed by Inco addresses all the requirements set by the Commission Notice on Remedies and testifies to the strict approach to remedies adopted by the Commission. The Commission focused its assessment of the remedies on the viability and the competitiveness of the divested business and took the view that, due to the high level of vertical integration and the tightness of the nickel intermediates market, the essential issue for the divested business (a nickel refinery and related assets) was the access to sufficient and suitable feed to produce high purity nickel and cobalt products. The final remedy package fully addressed this concern as Inco committed to sell the divested business only to an undertaking with sufficient feed resources to ensure its economic viability and committed to grant the purchaser the option of entering into a flexible long-term feed supply agreement. Finally, by identifying beforehand a suitable purchaser, LionOre, and undertaking to postpone implementation of the transaction until completion of the sale of the refinery the Commission was able to reduce the risk that the remedy would not be effective in removing the competition concerns.

Linde/BOC: Concentration in the industries of industrial gases, specialty gases and helium (1)

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On 6 June 2006, the European Commission approved, subject to conditions, the acquisition by Linde AG ("Linde") of The BOC group ("BOC"). Both companies are active in industrial and specialty gases including helium.

The initial market investigation found that the proposed acquisition could have created significant competition problems by removing an important competitor of Linde on a number of gas markets.

These competition concerns were removed by the remedy package offered by the parties which includes the divestiture of Linde's industrial gases business in the UK including some customer contracts for specialty gases and BOC's industrial and specialty gases business in Poland. The approval is further conditional on divesting several helium wholesale supply contracts of both Linde and BOC. Linde will also break to a defined extent its structural links with Air Liquide with regard to Asian Joint Ventures.

I. Introduction

a. The concentration

Both Linde and BOC offer a broad range of gases worldwide to customers in a wide variety of different industries. The gases cover standard industrial gases, such as oxygen, nitrogen and argon in their industrial as well as — if applicable — their medical use; specialty gases, such as various refrigerants and calibration mixtures; and helium.

These gases are used in various industries including the steel, chemicals, glass, electronics, paper, food processing, health care and aerospace industries.

Linde and BOC entered into an agreement pursuant to which Linde acquires 100% of BOC's shares and thereby sole control over BOC.

b. The product market

Distinct markets per gas

The Commission has already in previous cases examined these markets (2). In its previous decisions, the Commission took the view that the different individual industrial, medical and specialty gases are generally not interchangeable because of their different chemical and physical properties and that therefore each gas constitutes a separate relevant product market. The investigation in this case confirmed this product market definition.

Distinct markets per form of supply

Industrial, medical and specialty gases are supplied in different forms (gaseous or liquid) and via different distribution channels (tonnage, bulk and cylinders). As already found in earlier decisions, these different distribution forms are generally not substitutes for the customers and therefore constitute separate markets for each gas.

Tonnage sales relate to the delivery of large quantities exceeding 100 tons per day ("tpd") under long-term agreements (usually 15 years). The gases are supplied to customers in gaseous form through pipelines or from dedicated plants located on the customer's production facility.

Bulk mainly covers the supply of gases in liquid form to customers, whose demand is between 20 to 100 tpd. The liquefied gases are transported by road or rail tanker from the supplier's plant to the site of the customer.

Cylinders are used when the quantities requested by the customers are small, ranging from 1 m3/month to 1 000 m3/month. Cylinders may be filled at the suppliers' production plant or specific filling centres where liquid bulk gases are transformed into compressed gas. From there, they are distributed either directly to the customer or via depots.

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

(2) Decisions in the cases COMP/M.1630 Air Liquide / BOC; COMP/M.1641 Linde / AGA; COMP/M.3314 Air Liquide / Messer Targets

Distinct market levels for helium

Helium has a particular position in the range of the different gases. It is supplied on a wholesale and on a retail level. It is sourced and produced at various places all over the world and is transported by wholesalers as liquid gas in special "cryogenic containers" from the respective production site to transfill centres in the areas of consumption.

From there it is supplied in smaller quantities to end-customers on the retail level. The suppliers can be helium wholesalers who are vertically integrated into the retail level or independent retailers who buy helium on the wholesale market.

In line with the previous decision *Air Liquide / BOC,* the Commission distinguished also in this case a retail and a wholesale market for helium.

c. The geographic market

Industrial/ medical gases

In the most recent case dealing with this industry *Air Liquide / Messer Targets,* the Commission rejected a market definition wider than the EEA for the tonnage supply and even found elements that pointed towards the existence of national markets.

In the present case, the market investigation confirmed that the industrial gas companies in principle can participate in bids on an EEA-wide basis, but that local presence confers important competitive advantages. In line with the previous decision in this sector, the Commission therefore assumed an EEA-wide market for tonnage which however shows important regional aspects.

The market investigation, moreover, confirmed that the geographic scope of the bulk and the cylinder markets can be considered as national despite of the local aspects which are of particular relevance in the cylinder business. Due to the overlapping catchment areas of the cylinder filling centres and the existence of swap agreements between suppliers to reduce transportation costs, competition takes place at national level.

Helium

Helium is extracted, refined and liquefied at 14 sources worldwide. It is a by-product of the production of natural gas and liquid natural gas ("LNG"). The wholesalers active in the EEA source helium in Poland, Russia, Algeria, Qatar, and the US. Imports into the EEA are significant. Approximately one third of the total EEA-supply of helium is imported from the US alone. Against this background the Commission considered the present geographic market for wholesale helium as worldwide whereas the retail helium markets have proved to be national in scope.

Specialty gases

Specialty gases are predominantly supplied in cylinders. Their prices are, however, generally higher than those of industrial gases. This, at least for some specialty gases, justifies a geographic market definition wider than national. For the purpose of the decision it was not necessary to clearly define the geographic scope of all of the specialty gases markets. The market investigation has, however, shown strong indications that the markets for specialty gases belonging to the group of noble gases and noble gas mixtures as well as electronic specialty gases are at least EEA-wide. The specialty gases belonging to the group of refrigerants and chemicals show national elements with a tendency towards a wider scope. The markets for calibration mixtures are considered to be at least national.

d. The procedure

The proposed operation raised serious doubts as to its compatibility with the Common Market in the bulk and cylinder supply of several industrial and medical gases in Poland and in the UK as well as on an EEA-wide basis; on the worldwide helium wholesale market and on the helium retail markets in Poland and the UK as well as on the markets for refrigerants in those two countries and for ethylene oxide (belonging to the chemicals group) in the UK and Ireland.

In order to address the competition concerns identified by the Commission, the notifying party submitted a set of commitments mainly consisting of divestitures of subsidiaries as well as important Linde and BOC contracts. After having tested these commitments on the market, the Commission concluded that the proposed remedies would effectively remove the serious doubts and cleared the transaction subject to these commitments.

The Polish competition authority agreed with this assessment and withdrew a previously submitted request for a partial referral based on concerns about the affected Polish markets.

The competitive conditions as well as the remedies for the worldwide helium wholesale market were moreover assessed in close cooperation with the US-FTC which examined the case at the same time. This cooperation allowed the parties to address the concerns of both competition authorities in parallel in a coherent and effective way.

II. Industrial gases

a. *Single dominant positions in bulk and cylinders in Poland and the UK*

While Linde has wide-spread activities all over the EEA, BOC has focussed its European activities exclusively on Poland and the UK, in the latter they have historically enjoyed a leading position. The only overlap on the national bulk and cylinder markets for several industrial gases therefore occurred in these two countries.

Bulk and cylinder supply in Poland

In Poland, Linde and BOC have been active to comparable extents and have in most markets been the strongest suppliers.

Linde's pre-merger leading position in the *bulk* supply of oxygen, nitrogen, argon, carbon dioxide and hydrogen would be significantly enhanced by the addition of the BOC activities. Linde would have become by far the strongest market player in all these markets with market shares always exceeding 40% and going up to 80%. For most bulk gases the market would not only be highly concentrated in terms of sales, but also in terms of production capacity. The market investigation gave indications that the competitors in Poland would be dependent on the parties due to capacity constraints, swap and supply agreements.

Therefore the Commission concluded that the merged entity would, with high probability, be able to raise prices since neither customers nor competitors would have sufficient means to counteract such a strategy.

A similar situation would result from the merger in the Polish cylinder markets for several industrial gases. The combined entity would be by far the largest supplier with market shares between 60 and 70% for most gases. Bulk gases are used to fill cylinders and are therefore vertically related to the cylinder supply. Given the merged entity's leading position on the bulk markets, the Commission concluded that the high market shares and the competitors' comparatively lower flexibility in capacity would likely lead to price increases post-merger on the cylinder markets in Poland.

Bulk and cylinder supply in the UK

In the UK, BOC has enjoyed a historically strong position while Linde has been active in the individual gases to varying extent, however, always on a significantly smaller level than BOC.

In *bulk* oxygen, nitrogen and argon, BOC has had pre-merger strong market positions with shares well above 50%. Regarding hydrogen, both Linde and BOC have strong market positions and the combined share would exceed 60% after the merger.

In almost all *cylinder* gases, BOC has held very high market shares in the UK while Linde was a smaller competitor.

The removal of Linde as a serious threat to the historical market leader BOC and a potentially stronger competitor in the future, would reinforce the current very strong market position enjoyed by BOC in most of the various bulk and cylinder markets which could result in price increases post-merger.

b. *Coordinated effects in industrial gases on EEA-level*

In addition to the concerns set out above, the Commission came to the view that the merger would be likely to lead to coordinated effects on the overall industrial gas market in the EEA through a geographic division of the industrial gas markets between Air Liquide and Linde and through the creation of structural links between the two companies.

On the bulk and cylinder markets, the transaction would to a large extent complete the division of the EEA between Linde and Air Liquide, with one or the other of them having a dominant or leading position in virtually every EEA country. With the acquisition of BOC's strong position in Poland, Linde would become an incontestable leader in the whole of Eastern Europe, thereby mirroring the strong position and coverage of Air Liquide in the West. The same would be true for the tonnage market.

As a result of these symmetric positions both companies would thus be likely to have a common incentive not to compete effectively, by allocating geographic markets through the adoption of a *chacun chez soi* approach in Europe ([3]). As already highlighted in the Air Liquide/Messer case, evidence of past collusion between these firms on the bulk and cylinder markets constitutes an important indication in this respect. The markets, moreover, show a high degree of transparency which allows for a coordinated behaviour and in particular for the monitoring of any deviations.

The transaction would also grant Linde joint control together with Air Liquide over important Asian joint ventures. Structural links of this kind would further facilitate the exchange of information and bring about new means of retaliation.

(3) See Horizontal Merger Guidelines, para. 46.

III. Helium

a. Non-coordinated effects in helium wholesale

There are only 14 sources in the world where conditions exist to justify helium recovery. Helium producers are natural gas/LNG producers, such as Krio (Poland), Cryor (Russia), Sonatrach (Algeria) and Exxon (US). They themselves, however, are normally not active in the wholesale business. They either enter into long-term supply contracts (up to 20 years) with industrial gas companies who act as wholesalers or create joint-ventures with them in order to jointly produce helium. Some of the wholesalers are vertically integrated into the production of helium.

Traditionally, Air Products, Praxair and BOC have had relatively symmetric leading positions on the helium wholesale markets worldwide (market shares of 25 — 40% each). Air Liquide is a smaller player with an estimated helium wholesale market share of below 10% on a global scale. Capacity shares based on the access to helium sources lead to a similar market structure which has shown significant stability in the past due to the difficulties of getting access to the helium sources.

Linde has very recently acquired an own access to helium sources both by long-term agreements and by a joint venture ([4]) with the Algerian company Sonatrach (Skikda source) and thereby entered the helium wholesale market. The market investigation confirmed that Linde had already started and was expected to continue to exert considerable competitive pressure in the helium wholesale market with the new quantities acquired.

The Commission considered, that Linde's incentives to compete on this market would decrease post-merger since Linde would then be part of the group of the three established leading companies and no longer an aggressive entrant competing to ensure its position on the market and gain market share. The Commission therefore concluded that the elimination of Linde as an aggressive new entrant would lead to non-coordinated effects and a subsequent increase in prices on the helium wholesale market.

b. Coordinated effects in helium wholesale

Furthermore, the Commission had concerns that the merger could even lead to a weakening of competitive pressure as a result of coordinated effects. The helium wholesale market is prone to coordination. Helium is a homogeneous product and the market structure has been historically stable. Moreover, the investigation confirmed that there is a high degree of transparency on the market. Furthermore, the three largest players are moreover connected by various swap and supply agreements.

The removal of Linde as an aggressive "maverick" would increase the risk of tacit collusion in this market and thereby raise serious doubts as to the compatibility of the merger with the common market.

c. Single dominance in helium retail in the UK and in Poland

On the helium retail markets in Poland and in the UK, BOC had pre-merger the by far leading position with market shares of more than 50% whereas Linde had market shares below 30% in the UK and below 20% in Poland. Linde can be regarded as an important competitive constraint to BOC due to its strong background in industrial gases. The market investigation confirmed that many customers prefer to buy helium from their industrial gas suppliers. Therefore, in both countries, the merger would lead to the removal of the most important remaining competitive constraint on BOC. The Commission therefore concluded that the merger would lead to serious doubts on the helium retail markets in these two countries.

IV. Specialty gases

On the Polish markets for calibration gas mixtures and for refrigerants, the merger would lead to a substantial overlap of the parties' market shares on the markets for environmental gas mixtures. The market investigation had identified concerns about the effects of the combination of two close competitors and major suppliers in the Polish market for these specialty gases.

On the market for ethylene oxide sold in cylinders for mainly medical applications, the merger would lead to a substantial overlap leading to strong market positions for the parties in the UK and in Ireland. The Commission therefore concluded that the notified transaction would raise concerns with respect to the UK and Irish markets for the ethylene oxide.

V. Remedies

a. Description of the proposed remedies

In order to remove the Commission's concerns the parties to the merger committed themselves to the following remedies:

([4]) Formally the mentioned joint venture consists of two joint ventures which are closely connected.

(i) Divestment of the BOC subsidiary active in Poland ("BOC Gazy") and, thus, essentially all of BOC's gases business in Poland.

(ii) Divestment of the Linde subsidiary active in the UK ("Linde Gas UK") and, thus, essentially all of Linde's gases business in the United Kingdom.

(iii) Severance to a defined extent of structural links between Linde and Air Liquide following from the existing joint ventures of BOC and Air Liquide in Asia.

(iv) Divestment of either

- Linde's shareholdings in the joint ventures with Sonatrach and four specified Linde helium supply contracts (Alternative A) ([5]); or, alternatively,
- two specified Linde and three specified BOC helium supply contracts with a larger combined volume than Alternative A (Alternative B).

  Alternative B was offered due to possible difficulties in obtaining Sonatrach's consent to the sale of Linde's shares in the joint-ventures and would become effective should Alternative A fail to be divested within a certain period of time ([6]).

(v) Divestment of Linde's customer contracts in the ethylene oxide business of its wholly-owned subsidiary Chemogas N.V. (Belgium) in the UK and in Ireland.

b. Assessment of the remedies

Industrial gases

The proposed remedies with respect to the affected national markets in Poland and in the UK eliminate the complete overlap created by the transaction. Therefore the serious competition concerns regarding the national markets for cylinder and bulk supply in these two countries would be clearly removed.

The commitments, moreover, eliminate the serious doubts resulting from the likelihood of coordinated effects through the division of the industrial gases markets. In particular, the divestiture of BOC's complete Polish business will ensure that Eastern Europe is not dominated by Linde and will prevent the increase in geographic symmetry between the leading players Air Liquide and Linde in the EEA. In addition, the severance to a defined extent of certain structural links between Air Liquide and Linde removes the additional element, facilitating coordination that would have been brought about by the merger.

Helium wholesale and retail

The market test of Alternatives A and B confirmed that the proposed remedies are in principle capable of removing the concerns which were raised by the transaction. The market participants overall regarded Alternative A as too risky due to the uncertainty as to whether Sonatrach would consent to the change in the joint venture shareholdings and the investments necessary to remove some technical problems of these joint ventures. In the light of this and in coordination with the US-FTC whose assessment had reached the same result, the Commission decided that Alternative A should be dropped and the final remedy should only contain a commitment as to Alternative B. The market test, moreover, indicated that assets and customer contracts would have to be added to the supply contracts to ensure the viability of the remedy. As a consequence, the parties modified the proposed remedy accordingly.

The remedy removes the concerns which were raised by the transaction with regard to the helium wholesale market. Linde had entered the helium production level and the helium wholesale market as a newcomer and had thereby exerted specific competitive pressure on the market, in particular on the three established wholesalers. With the remedy, another company will take over this role.

On the helium retail market, all overlaps in the UK and Poland are removed by the divestiture of BOC's Polish business and Linde's UK business.

Specialty gases

The proposed remedies eliminate the complete overlap created by the transaction on the affected markets for refrigerants and calibration gas mixtures in Poland. The concerns regarding the specialty gases markets belonging to these two groups of gases will therefore be clearly removed. Concerning the UK and Irish markets for ethylene oxide, the parties will divest Linde's customer contracts and will thereby allow a new player to enter into these markets.

IV. Conclusion

This case has shown that even problematic cases involving highly complex markets which require extensive investigation may be cleared in the first

([5]) Alternative A was later removed from the Commitments on the basis of the results from the market test.

([6]) In addition, Linde later offered to divest a sufficient number of cryogenic containers as well as wholesale contracts if so required by the purchaser.

phase if sufficiently clear-cut remedies are offered by the parties. Moreover, the coordination of both competition authorities — the US-FTC and the Commission — allowed for a joint analysis of the worldwide helium wholesale market as well as a consistent assessment and solution for both sides of the Atlantic while at the same time avoiding for the parties a doubled burden caused by different remedies addressing the same competition concern.

Ineos/BP Dormagen: Illustrating the forward-looking nature of merger control analysis ([1])

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On 10 August 2006, the European Commission approved, after an in-depth investigation, the acquisition of BP's ethylene oxide and ethylene glycol business, situated in Dormagen, Germany ("BP Dormagen") by Ineos Group Limited ("Ineos"). Ineos is a company active, among others in the manufacture of ethylene oxide and ethylene glycols.

The main part of the competitive assessment in this case was related to the market of ethylene oxide, where the combined entity would have high market shares irrespective of alternative product and geographic market definitions. However, after an in-depth market investigation, the transaction was cleared on the basis of the forecast middle-term market development that would have significant effect on the parties' future position on this market.

a. The concentration

Ineos is a UK limited company active worldwide in the production, distribution, sales and marketing of intermediate and speciality chemicals. On 16 December 2006, Ineos acquired Innovene, the former olefins, derivatives and refining business of BP (excluding the BP Dormagen Business). That operation was cleared by the Commission on 9 December 2005 (Case No COMP/M.4005 — Ineos/Innovene). On 24 January 2006, Ineos notified its intention to acquire control of the BP Dormagen Business, controlled by BP. The BP Dormagen Business consists solely of a plant located in Köln/Dormagen (Germany).

The only products manufactured and sold by the BP Dormagen Business are ethylene oxide ("EO") and ethylene glycols ("EGs or glycols"). Ineos produces a wide range of chemicals including EO and EO-derivatives (including EGs). Consequently, the only horizontal overlaps relate to EO and EGs.

b. The product market

EO is a colourless gas, which is produced by the partial oxidation of the ethylene. EO has an ethylene content of 82% and is a hazardous product, being highly inflammable and explosive. It is also toxic and carcinogenic. EO can be used in the non-purified state to produce EGs or be further purified.

EGs are intermediate chemicals produced mainly by the non-catalytic hydration of EO. EGs account for 37.5% of total EEA consumption of EO and are only produced by integrated EO producers.

An alternative route for processing EO involves its further purification: purified EO can then be used for production of various other chemical intermediates. Most of this purified EO is used captively by the integrated EO producers in downstream operations to produce EO derivatives, the remainder is sold to third parties, which compete with EO producers on the various EO derivatives markets.

Ethylene oxide

The Commission has examined ethylene oxide in previous cases ([2]). It identified a separate product market for EO as it is characterised by low substitutability especially when used as a direct raw material in chemical reactions. The investigation in this case confirmed this product market definition.

As only purified EO is sold to third parties, the competition assessment in this case concentrated on the market for purified EO. At a late stage of the proceedings, Ineos submitted that the purified EO could be further sub-segmented into high-grade EO ("HG-EO") or low-grade EO ("LG-EO") depending on the level of impurities (mainly the content of aldehydes). However, the market investigation confirmed that it was not necessary to further sub-divide relevant product market according to purity levels of the purified EO as only H-G EO was sold to the third parties.

The Commission also investigated whether a distinction needs to be made between long term arrangements for supply of EO to customers whose

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

([2]) Case No COMP/M.2345 — DEUTSCHE BP / ERDÖLCHEMIE, 26 April 2001 and Case No COMP / M.4005 — INEOS/INNOVENE, 9/12/2005.

plants are located on, or adjacent to, the EO supplier's site and connected via pipe line ("on-site") and supplies to other customers ("off-site") which are served by other means such as truck or rail. The Commission found that there were some differences in price levels, contract lengths, and quantities purchased between these two supply methods. However, the Commission did not have to make a decision on this issue, given that the transaction would not significantly impede effective competition, irrespective of whether on-site and off-site supplies are considered to constitute a single or two separate markets.

Ethylene glycols

Ineos submitted that EGs constitute a separate product market, in line with a previous Commission decision ([3]). However, in a subsequent decision([4]), the Commission had noted that demand-side considerations might make it necessary to distinguish between the different types of EG. These are: mono-ethylene glycol ("MEG"), di-ethylene glycol ("DEG") and tri-ethylene glycol ("TEG"). MEG accounts for the great majority of the production (about 90%), with the remaining production divided between DEG (about 9%) and TEG (about 1%).

In this case, the majority of market participants indicated that EGs should be further segmented into three markets, for MEG, DEG and TEG, because they are used in very different applications and are not substitutable to any extent. However, from the supply-side point of view, MEG, DEG, TEG are invariably manufactured together and are always produced in very similar proportions. The exact market definition was left open as the transaction would not significantly impede effective competition with respect to EGs under any of the alternative product market definitions.

c. The geographic market

Ethylene oxide

In previous decisions ([5]) the Commission has considered the geographic dimension of the EO market was probably Western Europe (defined as the EEA plus Switzerland) although the exact market definition was left open. In this case the relevant production plants are located in Antwerp (Belgium), Lavera (France) and Dormagen (Germany). Ineos submitted that the market is EEA-wide as EO from these plants is transported over long distances (according to Ineos' data, in some cases more than 1000 km, although the majority of deliveries are within 600 km). However, the great majority of customers and at least half of the competitors consider the geographic market to be regional. Shipping distances appear to be between 0 km to 800 km with the large majority between 0 to 600 km, due to transport costs and the hazardous nature of the product.

According to the limitations on transport distance, the Commission identified possible regional markets for EO as: (i) United Kingdom and Ireland, (ii) Nordic countries (Norway, Sweden and Finland), (iii) Mainland North-West Europe, or "MNWE" (the Netherlands, Denmark, Belgium, Luxemburg, Germany, Austria, Central and Northern France) , (iv) the Mediterranean basin (Italy, Portugal, Southern France, and Spain), and (v) Central and Eastern Europe. In addition, the Commission found out that regional price differences and limited trade flows tend to confirm this geographic market segmentation. However, it was not necessary to conclude as to the exact geographic market definition for EO as the Commission found out that the transaction would not significantly impede effective competition on either possible geographic market (an EEA-wide geographic wide or a MNWE market, the only regional market where both parties were active).

Ethylene Glycols

Ineos submitted, in line with what has been argued in previous decisions ([6]), that the relevant geographic market for EGs is at least Western Europe and even global. This is because EGs are not hazardous products and, in consequence, they are easily transportable. Prices are comparable at a global level, and imports into the EEA, mainly from Middle East and Russia, represent around 13% of the total EEA consumption.

The vast majority of the respondents to the market investigation confirmed that the geographic market is at least EEA-wide. However, for the purposes of the decision, the exact market definition was left open as the transaction would not significantly impede effective competition in the common market or a substantial part of it under any alternative geographic market definitions.

([3]) Case No COMP/M.2345 — DEUTSCHE BP / ERDÖL-CHEMIE, 26April 2001

([4]) Case No COMP / M.3467 — DOW CHEMICALS/PIC/WHITE SANDS JV, 28 June 2004

([5]) Case No COMP/M.2345 — DEUTSCHE BP / ERDÖL-CHEMIE, 26April 2001 and Case No COMP / M.4005 — INEOS/INNOVENE, 9 December 2005.

([6]) Case No COMP/M.2345 — DEUTSCHE BP / ERDÖL-CHEMIE, 26/04/2001, Case No COMP / M.3467 — DOW CHEMICALS/PIC/WHITE SANDS JV, 28 June 2004

d. The competition assessment

Ethylene oxide

The overall size of the EO market in the EEA, including production for captive use, is around 3,000 ktpa (kilo tonnes per annum). The merchant market represents around 18% of the total production or about 560 ktpa, of which about 33% by value is accounted for by on-site customers and 67% by off-site customers.

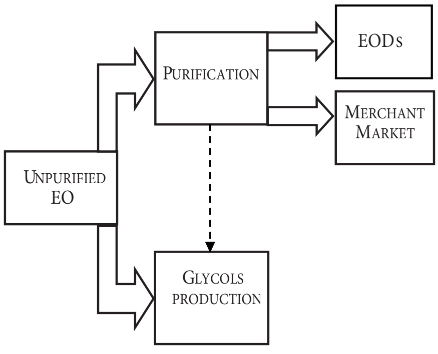
In terms of market structure, the transaction is a merger between two of the three largest EO suppliers giving rise to combined market shares above 45% under any reasonable definition of the relevant product and geographic markets for EO. The combined entity's closest competitor, Shell, represents [15-25] % of the overall merchant market for both on-site and off-site supplies. All the remaining competitors have market shares below 10% (many below 5%) for both total and off-site sales.

However, taking into account that the merchant market represents a fairly small proportion of total production, relatively small changes in the overall production may have a significant impact on the merchant market. As a result, in its assessment the Commission has concentrated on the importance of integrated producers' captive use of EO and its impact on sales to third parties. The Commission examined the conditions relating to the supply of EO and, in particular, those factors capable of constraining the behaviour of the combined entity on the merchant market for EO.

In order to do so, the Commission identified the main aspects on which the availability of EO on the merchant market depends:

— the production capacity for EO,
— the purification capacity,
— the downstream uses of EO, in particular the split between EGs and other uses,
— the incentives to use additional EO internally and/or sell to the merchant market.

The diagram below shows the interrelationships between the production of EO and the possible outlets for this material.



First, the Commission assessed whether currently the parties' competitors have sufficient spare EO capacity to supply the merchant market. In this regard, it is the purification capacity that is critical as merchant market sales are only of purified EO. The investigation showed that although the parties' plants represent an important part of the spare purification capacity, their competitors' spare capacity would be able to constrain the parties' anticompetitive behaviour as they represent significant volumes compared to the relatively small merchant market.

Also, an important part of the Commission assessment in this case was focused on a relationship between the production of purified EO and EGs. A reduction in the production of EGs may enable integrated producers (those producers making both EO and EGs) to increase their purified EO production. This relationship is based on the fact that both products use the same raw material (unpurified EO) and, consequently, a reduction in the production of EGs will release unpurified EO which could be used for the production of additional quantities of purified EO — subject to purification capacity constraints.

Ineos submitted that MEG is used as a swing product allowing EO producers to switch to and from the supply of EO or other EO derivatives depending on market conditions. In order to prove it, Ineos submitted two econometric studies that examined the effects of capacity outages on EO production and EO usage. These studies show past evidence that the parties' competitors were able to increase their production of purified EO at the expense of the production of glycols in response to outages at the Ineos and BP Dormagen Business' plants. Moreover, the outages were found not to affect total EO sales to third parties, which suggests that reductions in the EO sales by the affected plants were (to some extent) offset by increased EO sales by competitors.

The Commission concluded that although these studies had some limitations (in particular they relied on a small set of data) and as such could not be directly extrapolated to predict how the parties' competitors could react to more permanent reductions in merchant sales by the combined entity, they indicated a potential for such competitors to counteract anticompetitive behaviour of the combined entity.

The Commission then estimated how big this potential swing from glycols to purified EO could be, taking into account all capacity constraints. The Commission found that in case of the largest foreseeable reduction in production of glycols the potential swing from glycols to purified EO could, in case of unilateral price increase by the merged entity, bring to the EO merchant market quantities that are significant compared to the current overall size of that market.

The Commission also took into consideration the impact of new glycols capacity coming on stream in the Middle East and Asia on the market situation in Europe. It found that these new EO production capacities were likely to result in an increase of exports of EGs to the EEA and that as a result a decrease in EG production in the EEA could be expected. This in turn could increase the availability of EO in the EEA for third party sales and the in-house production of other EO derivatives.

Accordingly, the Commission considered it appropriate to assess the impact of the operation in a prospective manner, that is in relation to the forecast and reasonably expected developments in the future.

The Commission's investigation showed that the total spare capacity for the production of EO in the EEA is expected to grow in the coming years and utilization rates will be lower. Although the spare purification capacity is expected to decrease in the near future, however, as the merchant market is relatively small and is not expected to increase substantially in the near future, the remaining spare purification capacity can still act as a constraint on unilateral increases in prices by the combined entity.

Additionally, in order to assess the impact of the anticipated increase in imports of glycols from the Middle East on the European EO merchant market, future economic incentives of EO producers to supply the merchant market were taken into account. In order to compensate the predicted downturn in EO consumption for glycols and in order to keep the utilization rates for EO production at the highest possible levels, EO producers would need to find other outlets for their supply of EO. As all other EO derivatives (apart from glycols) and the merchant market require purified EO, European EO producers would have incentives to increase their current purification capacities.

The Commission found that in contrast to front-end expansions in the main EO reactor and recovery stages, expansion in the purification sections is less expensive and often does not need to be accompanied by other investments across the plant. Assuming that competitors will be able to increase their current purification capacities in order to absorb the expected decrease in production of glycols, the extent to which increased depends upon EO producers' captive use of EO for EODs, their ability to increase their EODs capacities and their incentives to use EO captively or sell it to the merchant market.

The Commission's investigation revealed that in the near future, the EODs' capacity of integrated producers will be partially constrained due to increased demand for EODs. Increases in EODs production capacity are more costly and take more time than increases in EO purification capacity. Consequently, not all of the purified EO released as a result of the decrease in production of glycols in the EEA will be absorbed by increased production of EODs by integrated producers. It will consequently be available to the merchant market.

Therefore, a significant impediment of effective competition in the merchant market for EO can be ruled out. EO customers will have supply alternatives which will be sufficient to constrain the combined entity's behaviour.

Glycols

World production and consumption of EG is estimated at some 17,000 ktpa, of which EEA production is around 1,700 ktpa for a demand of some 1,950 ktpa. World demand over recent years has been relatively stable, due in particular to the demand in China and the Far East for MEG used for polyester textiles. This has, in turn, stimulated investments in substantial new EG capacity in Asia and the Middle East scheduled to come on stream over the next few years.

The Commission's investigation indicated that the combined entity's market share on a global merchant market did not exceed 5% for any possible product market definition. On an EEA-wide merchant market, the combined entity's share did not exceed 20% for any relevant product market (around [10-20]% for EG as whole, MEG and DEG, and around [15-25]% for TEG). Also the combined entity would face competition from various strong competitors such as BASF, MEGlobal, Sabic, Shell, Clariant as well as from imports.

In the light of the combined entity's limited market share, the presence of significant competitors with comparable or larger market shares and the predicted downturn in glycols production in Europe (as a result of increased imports), the Commission concluded that the proposed transaction does not raise competition concerns in the market for EG.

e. Conclusion

This case is a good example of the fundamentally prospective nature of merger analysis. It shows how such a forward-looking analysis may need to be broadened to several interrelated markets in order for the Commission to reach sufficiently robust conclusions — and cautions that such analysis may be quite sophisticated.

State aid in feed-in tariffs for green electricity (1)

Brigitta RENNER-LOQUENZ, Directorate-General for Competition, unit G-4

Introduction

On 7th July 2006 the Commission endorsed a feed-in tariff for electricity from renewable sources under the Austrian Green Electricity Act (2). The case shows how the design of support schemes for green electricity and in particular the national choice of the financing of these schemes influences the assessment whether they involve State aid in the meaning of Article 87(1) EC.

The decision confirms the view taken by the Commission already in previous cases (3), but brings together in one decision the reasoning for a wide range of elements which are crucial for the set-up of such support schemes. The decision demonstrates in particular the importance of the jurisprudence of the European Courts on parafiscal levies when it comes to identify whether or not state resources are involved in a support mechanism. It also highlights the requirement for a scheme to respect other provisions of the Treaty, in particular the free movement of goods, in order to qualify as compatible aid.

The facts of the case

The Austrian Green Electricity Act (4), in force since 2003, obliges the so-called eco-balance group representatives ("Ökobilanzgruppenverantwortliche") to purchase green electricity from eligible generators at a fixed feed-in tariff ("Einspeisevergütung"). The eco-balance group representatives attribute the purchased electricity to the electricity traders, who are obliged by the law to buy the attributed electricity at a fixed transfer price ("Verrechnungspreis"). The difference between the feed-in tariff for electricity and the fixed transfer price is raised by a levy imposed on the consumption of electricity by final consumers ("Förderbeitrag").

The eco-balance group representatives

The eco-balance group representatives are in fact the three high voltage grid operators, i.e. the most important APG for the zone "East" covering 85% of electricity consumption and the grid operators for Tirol and Vorarlberg. All three are in the majority publicly owned (APG Verbund Austrian Power Grid AG as the most important one is a 100% subsidiary of Verbund AG which is 51% publicly owned whilst 49% are owned by institutional investors and in widespread shareholdings; TIRAG — Tiroler Regelzone AG is 100% owned by the Land Tirol, VKW Übertragungsnetz AG is a 100% subsidiary of Voralberger Kraftwerke AG which is 96.6% owned by Voralberger Illwerke, itself 95% owned by the Land Vorarlberg). They have the legal personality of joint-stock companies ("Aktiengesellschaft") and are thus by law relatively independent from their owners; they have no discretionary power as to the implementation of the measure as the decisive elements of the mechanism (such as the modalities of distributing the electricity to the electricity traders, the purchase prices for green electricity to be paid to the producers as well as the price to be paid by the traders and the contribution by final consumers) are stipulated by the Austrian authorities in advance. Any discretion on the distribution of electricity is due to technical needs to balance wind power, and has no commercial reasons. They have no influence on the price adaptations or on their distribution between traders and end consumers. Any litigation between the companies involved stemming from purchase obligations is settled in Civil Court and not by administrative procedures.

For the future, the Eco balance group representatives will be replaced by the "Green Electricity Settlement Centre" ("Ökostromabwicklungsstelle"). The purchase and selling of green electricity will be carried out in accordance with a licence to be granted by the Ministry for economic affairs and labour. This license will be tendered in compliance with the provisions on the tendering for service licenses. Independently of the ownership, the Centre will be subject to the control of the national court of auditors.

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

(2) State aid NN 162/a/2003 and N317/a/2006, State aid NN 162/b/2003 and N 317/b/2006

(3) N53/2005-Hungary, N504/2000-United Kingdom, N707/2002-The Netherlands, N543/2005-The Netherlands, N490/2000-Italy, N161/2004-Portugal.

(4) Ökostromgesetz, BGBl I Nr. 149/2002, in der Fassung der Regierungsvorlage 655 dB, des Abänderungsantrages, beschlossen im Wirtschaftsausschuss vom 25.November 2005 (1225 dB) und des Abänderungsantrages in 2. Lesung, beschlossen im Plenum des Nationalrates vom 23. Mai 2006.

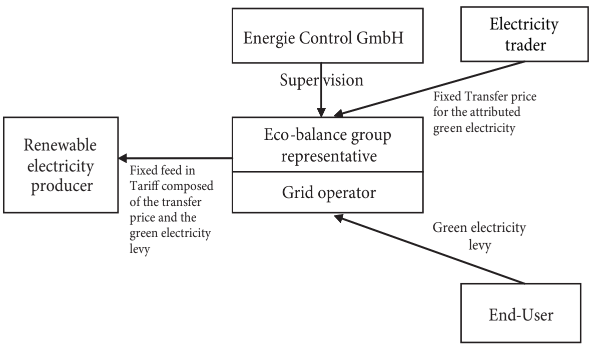
The feed-in tariffs paid to renewable electricity producers

The eco-balance group representatives are obliged to buy green electricity which is offered to them at prices decided by the Ministry of Economic Affairs and Labour. The tariffs were calculated in order to compensate for the difference between the market price for electricity and the long-term marginal costs of green electricity production.

The funding of the support mechanism

The funding of the support mechanism is based on two pillars: Fixed prices to be paid by the electricity traders on the purchase of green electricity and a levy raised from all consumers of electricity.

The following graph shall illustrate the funding of the support mechanism:



Firstly, the support mechanism is funded through fixed prices ("Verrechnungspreis") to be paid by the electricity traders. The price at which electricity traders have to purchase green electricity from the eco-balance group representatives is fixed by the law.

Secondly, the gap between the feed-in tariff and the transfer price is closed by a levy on every kWh of electricity sold to final consumers. The levy is set annually in advance on the basis of the estimated size of the gap by the Ministry of Economic Affairs and Labour and collected by the eco-balance group representatives via the grid operators. A mismatch (too high or too low revenues from the levy in comparison with the gap) is compensated when setting the levy for the next year.

The existence of aid

In the case at hands the measure clearly transferred a financial advantage to a selective group of undertakings involved in intra-community trade. The remaining question was therefore whether the measure is financed directly or indirectly through State resources and whether this is imputable to the State.

In the so-called "PreussenElektra" judgement (5) concerning the German Stromeinspeisungsgesetz, insofar as private net operators and electricity suppliers were obliged to pay, the Court denied this criterion as the mere fact that a purchase obligation is imposed by law and confers an undeniable advantage on certain undertakings is not capable to turn the private resources of the undertakings into State resources.

As the financing of the Austrian support mechanism for green electricity is based on two pillars, the fixed prices raised from the electricity traders and a levy, the Commission distinguished as follows:

a) The fixed prices raised from the electricity traders

The fixed prices raised from the electricity traders could be regarded as a purchase obligation in the meaning of the PreussenElektra-judgement, according to which no State resources are involved in such kind of situations where the transfer of resources takes place between private undertakings. However, contrary to the situation in the PreussenElektra-judgement, the purchase prices are channelled through a clearing mechanism. This is the eco balance group representatives, respectively the Green Electricity Settlement Centre.

The eco balance group representatives are at least dominated, partly even fully owned by the State. While the ownership of the Green Electricity Settlement Centre is still unknown it can already be said that the State influences the Centre via the necessity to hold a license. Furthermore, important changes in the ownership structure have to be communicated to the Minister for economic affairs and labour who can forbid them if conditions for granting the license would not be met any longer. The Centre will also be under the control of the national court of auditors.

The Commission believed that this situation deviates from the type of a system that was assessed by the Court in the PreussenElektra judgement, precisely because of the channelling of the purchase price through publicly dominated/respectively controlled bodies that control the purchase prices paid to them and transfer the funds to the final beneficiaries. In its so-called "Stardust Marine"-judgement (6) the Court decided that resources under the control of public undertakings are always State resources. However, the Court also

(5) Case C-379/98, PreussenElektra/Schleswag, judgement of 13.3.2001, [2001] ECR I-2099.
(6) Case C-482/99, France vs. Commission, judgment of 16.5.2002, [2002] ECR I-04397.

stated that in such situation it has to be verified if a measure involving these resources is imputable to the State.

The electricity purchase obligations are set by the Ministry of Economic Affairs and Labour in accordance with the Green Electricity Act and are thus imposed by the State. The measures concerned involving State resources are thus indeed imputable to the State. Furthermore, the purchase prices paid by the electricity traders become State resources through the State channelling through the owned/controlled eco balance group representatives respectively the Green Electricity Settlement Centre.

The Green Electricity Settlement Centre could, independent of its ownership also be described as a clearing mechanism, similar to a fund. It is established by the law and designated by the State to administer the transfer of money to the green electricity producers. The financial contributions transferred to the Settlement Centre are imposed by legislation and thus by the State, and the money is used to favour specific enterprises.

The first pillar of the funding of the support mechanism therefore constitutes an aid pursuant to Article 87(1) EC.

b) The levy

In addition to the fixed prices raised from the electricity traders, the system is also financed through a levy. The levy is paid by all consumers regardless of their purchase of green electricity. It is raised by the eco balance group representatives respectively the Green Electricity Settlement Centre and distributed to green electricity generators on the basis of legal provisions, which determine in detail the mechanism. The State therefore, by law, exercises control on the funds. Furthermore the funds are channelled via public bodies, i.e. the eco balance group representatives, respectively via a state controlled body i.e. the Centre.

In particular the fact that the levy is imposed on all customers regardless whether there is concrete purchase of renewable electricity displays their very fiscal nature, which is only made possible by the powers of the State.

Long standing jurisprudence ([7]) predating the PreussenElektra ruling established three criteria for the proceed of such levies to constitute State resources:

(i) The levy must be imposed by the State;

(ii) Its proceed must be poured into a body designated by the State (this body does not have to be State owned, not do the proceeds have to become the property of the State);

(iii) The proceeds must be used to give an advantage to certain undertaking.

The Commission took the view that this jurisprudence was not altered by the PreussenElektra ruling, even in the case where the proceeds of the levy would be given to a company that would then use them for meeting a purchase obligation at fixed price. The Commission's reasoning in this respect is that the levying mechanism turns the resources into State resources before they reach the beneficiary.

A case involving the question of the State aid nature of a parafiscal levy was the object of the so-called "Pearle" ruling ([8]). This ruling introduces the relatively new concept of imputability to the State in the parafiscal levy context. In fact, the Pearle ruling adds a fourth condition to the three above, linked to the imputability to the State:

(iv) The proceeds must be used in a way which is prescribed by the State (this rules out cases where the use of the proceeds are decided by companies themselves, maybe even if the State later on enshrines the result of their choice)

As in the case under scrutiny all these criteria are fulfilled, the Commission concluded that the second pillar of the funding of the support mechanism, i.e. the financing through the levy, involves State resources and therefore constitutes an aid pursuant to Article 87(1) EC.

From the reasoning given by the Commission in the present case, the following lessons seem to emerge:

> Money transferred via public undertakings constitute State resources. Where a Member State defines the use of the money by legislation, imputability of the resources to the State derives directly from the legislative action.
>
> Clearing mechanism will often be considered as funds. Where money is channelled through a fund to the final beneficiaries, state resources are involved if three criteria are fulfilled:
>
> a) the fund must be established /designated by the state (but needs not to be owned by the State)
>
> b) the fund must be fed by contributions imposed by the state

([7]) Case C-78/76 Steinike & Weinlig, judgement of 22.3.1977, [1977] ECR 595.

([8]) Case C-345/02 Pearle BV and others, judgement of 15.7.2004, [2004] not yet published.

c) the fund must be used to favour specific enterprises

Where a measure is financed through a parafiscal levy, the measure involves state resources if

a) the levy is imposed by the state
b) its proceeds are poured into a body designated by the State (this body does not have to be state owned, nor the proceeds have to become the property of the state)
c) the proceeds must be used to give an advantage to certain undertakings

Compliance of the financing mechanism with Article 25 and 90 of the EC Treaty

The measure was financed partly through a levy paid by the final consumers on their electricity consumption. This levy was raised equally on imported and nationally produced electricity.

Austria recognised that this financing mechanism could have led to discriminations against imported green electricity as imported electricity was subject to the levy although only domestic electricity producer could benefit from the support system. This could constitute a breach of Articles 25 and 90 of the EC Treaty, which outlaws custom duties on imports and exports between Member States respectively taxes that have the effect of discriminating against products from other Member States.

The application of the jurisprudence on parafiscal levies, which has been developed first in the context of agricultural products, on a product like green electricity raises certain problems in practice. First, the origin of green electricity is not as easily traceable as the origin of e.g. agricultural products. In this respect, the certificates of origin that Member State have to issue in compliance with the renewables directive, should facilitate the implementation of the jurisprudence. Second, green electricity benefits from support schemes in many Member States, whose nature, quantity and form of support vary strongly. This can lead to unwanted trade effects on countries offering detaxation of imported and highly subsidised electricity. However, the jurisprudence on parafiscal levies does rightly not allow a deviating application taking into account the level of subsidy on a certain product. Any unwanted effects of such situations have to be tackled foremost at their source, which is the difference in subsidisation of comparable products in different Member States. This is not an easy task, in particular as Member States in order to fulfil the (consumption) target of green electricity set at a national level by the renewables directive, have established the support of domestic production of green electricity according to their specific domestic cost structures and production potentials.

From 1 January 2007, Austria hence replaced the former fee on consumption by a metering fee which consumers have to pay as a lump sum per metering point ("Zählpunktpauschale"). The amount of the fee depends on the grid level to which the consumer is connected but is independent of his actual consumption. The differentiation was introduced in order to arrive at a tenable distribution of the burden between households on the one side and industrial consumers on the other side.

One can rightly argue that the new financing system is less incentives to increase energy efficiency than the original fee based on consumption. However, the argument needs to be balanced by the fact that the levy is only a small part of the electricity price and that consumer's behaviour is driven far stronger by the overall development of the electricity price than by the levy. In so far, the potentially negative effect of the new system on energy efficiency seems acceptable compared to the need for a system to comply with one of the most important principles of the EC Treaty, protecting the free movement of goods.

In order to remedy potential discrimination of importers of green electricity since the Green Electricity Act came into force, Austria provided detaxation for green electricity imports for the period 2003-2006. Importers can apply for reimbursement provided that they proof that their imports are indeed of green origin. The reimbursement for 2006 cannot exceed 110% of the reimbursement for 2005. Electricity traders who did not supply Austrian customers in 2005 (new entrants) can ask for reimbursement for max. 100 GWh in 2006. The Austrian authorities explained that the conditions on documentation to proof the green origin of imported electricity are primarily based on the Community system of guarantees of origin. Some additional documentation is necessary in order to prevent artificially high declarations against which the certificates of origin do not guarantee sufficient protection. The limits for reimbursement for the year 2006 aim at limiting artificially high declarations in a year for which no sound documentation is yet available. The increase of 10% is considerably higher than the average increase of total electricity demand of about 2% p.a.. The limitation for new entrants to 100 GWh corresponds to about 3% of the net import volume of about 3000 GWh. This is also higher than the annual electricity demand increase of 2%.

This shows that a Member State, though being under an obligation to remedy past discrimination, has some margin to define objective and transparent criteria, that take into account the nature of the product and are necessary to protect the system against abuse.

Conclusion

The decision demonstrates that support schemes are likely to involve state aid where Member States set up administrative structures for the implementation of the scheme or intervene in the financing of the support scheme. Member States often consider such interventions in the financing mechanism as necessary not least in order to control the upward effects on electricity prices.

The assessment of these measures as state aid is sometimes perceived as a barrier for national policy to promote green electricity. These concerns however need to be re-considered in the light of the advantages that state aid control offers in this field. First, State aid control is aligned to the EU objective of promoting the development of electricity from renewable sources and it is equipped to deal with different types of support schemes. It leaves Member States wide flexibility to design their national support measures. It limits national support primarily with the objective to prevent overcompensation. This protection against subsidisation above need is certainly a necessary shield in developing the single market for electricity, in which green electricity is supposed to play an increasing role. This control therefore also works for the benefit of the electricity consumers who directly or indirectly pay for the support of green electricity.

The current case has demonstrated that perceived problems in the normal application of Community principles such as the free movement of goods may stem from heterogeneous subsidisation of green electricity. In the absence of harmonisation, State aid control can help to some extent to establish certain standards and thereby can help the integration of green electricity in the liberalised electricity market.

State aid and preferential tax regimes for financial holdings The Luxembourg's Exempt 1929 Holdings case [1]

Pierpaolo ROSSI, Directorate-General for Competition, unit H-2

Taxation and the competitive structure of financial services markets

"Traditional" financing has changed considerably in the past century and traditional lending institutions (banks) have been gradually taking on new functions as markets changed. The credit markets have been the motor for big changes. First, companies in search for finance have raised more and more capital through privately issued loan instruments, as opposed to public equity which are traded on regulated markets (such as stocks and bonds). Second, the lending has been organized outside the regulated banking industry, by financial traders (hedge funds) and other credit operators that are not traditionally supervised. This has expanded the market for credit derivatives, converting loans, such as mortgages and credit card balances, into securities that are sold to investors (a process known as securitization), however, outside public exchanges. Third, most of this lending has been provided to private buy-out firms specialized in leveraged acquisitions (private equity funds) which use the money to buy public companies and remove them from the stock market (delisting).

As a result, traditional banks have also adapted to changes and are now able to provide insurance, trust, and securities-dealing services through their subsidiaries, charging however specific additional costs. As financial markets change and innovate, the role and functions of banks are shifting as well. Traditionally, banks' basic role has been to act as the intermediary between depositors and borrowers. The way banks fulfill this basic function has changed. Worldwide, the financial services' marketplaces are in a state of general transformation, deregulation and consolidation. With the current pace of progress in information and communication technologies, the financial industry is set for major changes in the future. However, central bankers and regulators have started to increasingly worry about the risk of financial stability that may be lurking in the complex debt instruments created by the unregulated financial industry. Furthermore, a number of conflicts may arise when traditional banks promote the use of unregulated vehicles with a view to providing higher yields than normal, while charging, however, increasingly important fees.

In the Common Market, the need for adequate regulation of financial services is essentially driven by two conditions. On the one hand, the introduction of localization rules provides the legal framework for the cross-border provision of financial services. On the other hand, regulation is needed to govern the wave of consolidations, the emergence of new competitors for banks, the expanded choices for consumers, and their increasing level of sophistication. The increasing complexity of the financial products and of the institutions managing such products, finally demand higher level of specialization and the creation of dedicated corporate structures and special purpose vehicles such as holding companies to carry out transactions in the most efficient manner possible. Holding companies are companies which typically hold as durable investments substantive participations in other companies and are themselves participated by other companies, but also perform financial activities, as their activities include the management of the participations held and the maximization of their value mainly through their financial assistance to such companies. In an international context, holding companies are created by multinational enterprises to streamline their business structure so that ownership, management and coordination are concentrated in one single legal entity.

By allowing banks and insurances to form financial holdings, similarly to unregulated private funds, Member States hope that additional structural flexibility will promote competition and result in efficiency gains for their national financial sector. In general, it is expected that banks will reorganize their activities under a holding company structure which would help them to better compete with unregulated financial institutions, take advantage of innovations in financial markets and, combined with favorable tax rules, use the financial leverage to maximize profits and reduce taxation. Promotion of such special purpose vehicles such as holdings by a financial centre depends on the combination of economic factors such as the presence of industry participants and the availability of professional advisers and regulatory factors such as the

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

attitude of the regulatory authorities including the tax authorities and the latitude of exchange regulation controls. As to the regulatory aspect of the localisation of financial services ([2]), given the freedom to provide services within the EU, the single market constitutes a perfectly integrated marketplace for EU providers. The classical features of a financial center are therefore linked to the know-how of its participants with regard to value creation in asset management, political and economic stability, the high quality of services provided, the protection of privacy and the strictness of its discipline to prevent abuse.

In addition to deregulation to promote competition and efficiency, national authorities have understood that the tax conditions are critical constituents of the success of a financial centre. Tax conditions are in fact a decisive factor in governing the location and success of any financial centre because they have a direct influence on the competitive or trading conditions of the financial services providers that choose to locate their business activities in the centre. Unlike deregulation, however, tax incentives do not promote efficiency, but rather alter the optimal allocation of financial investments through tax discounts aimed at hiding local production costs and inefficiencies. In other words, the preferential tax regimes for financial holdings may unfairly alter competition in the internal market by dramatically shifting the convenience balance in favor of unregulated, more expensive, and closely held private funds as opposed to transparent bank lending. It is noticeable that all financial centers of world importance enjoy certain local advantages with regard to regulations such as special surveillance and monitoring conditions, legislation on trusts and fiduciary companies, banking secrecy, and most of all taxation. While the former advantages do not involve State resources, the preferential tax regimes in favor of financial holdings hinge on the extraordinary renunciation to tax resources by national treasuries and may accordingly fall within the scope of application of State aid rules as the case of Luxembourg's Exempt 1929 Holdings illustrates.

Only in 1991, Justice Tesauro had difficulty finding cases of State aid granted to banks ([3]), while nowadays it is quite common to refer to Commission decisions on State aids to the banking sector. The situation has substantively changed, thanks to the progressive liberalization in the EU, which prompted a higher degree of cross-border competition. In particular, the mutual recognition approach has gone against the anti-competitive effects of national regulations and provided the impetus for further harmonization. For example, a credit institution being licensed in a Member State with a universal banking regime ([4]) can conduct activities through a branch set in another Member State that does not allow its own credit institutions to conduct all the activities of a universal bank. To avoid negative competitive effects on the host country credit institutions, the latter Member State will also allow its credit institutions to carry out most of the activities listed in the Annex to the Second Banking Directive (listing the activities of a universal bank), thus accepting to harmonize its internal rules to the most advanced common standard. Arguably, essential harmonization combined with mutual recognition entails risks for the quality of the banking regulation as it may trigger a "regulatory race to the bottom", where institutions able to carry out a EU-wide business will opt for the jurisdictions with less rigid and expensive (more lax) regulatory and supervisory requirements. There are several arguments, however, indicating that regulatory competition within the EU is limited. The Directive's requirement that a credit institution has its head office in its home Member State and that it actually operates the banking business there naturally discourages banks from "forum shopping". In addition, the home regulators' responsibility for depositors' insurance suggests that retention of strict requirements is in the

([2]) The localisation rules for financial services in the EU serve the purpose of defining the regulatory responsibility in the Single market and are only applicable to financial services provided by a provider which is incorporated in one of the EU Member States, and has accordingly been granted a so-called "single passport" by the supervisory authorities of the said Member State. The single passport gives to the "holder" the right to provide its services throughout the EU, subject as a rule only to the supervision of its home country supervisor. These rules have been enacted pursuant to a number of so-called "financial services directives" for the purpose of facilitating the exercise the freedom to provide services granted by the Treaty to nationals of the EU Member States, including the legal persons incorporated under the laws of the said Member State. As a result, localisation rules do not apply in case of services provided by companies established outside the EU to purchasers within the EU and in case of services provided by a so-called "third country" branch, i.e. a EU branch of a company established outside the EU to purchasers within the EU.

([3]) G. Tesauro, *Disciplina comunitaria degli aiuti di Stato e imprese bancarie,* in Dir. comm. int., 1991, p. 405-416, Relazione alla tavola rotonda di Genova del maggio 1991.

([4]) There are three types of financial structure for banking activities that can be found in the EU: 1) The traditional universal banking system found in Germany and the Netherlands, whereby banks are licensed to engage in a full range of financial activities, including issuing and negotiating securities; 2) The hybrid system, like the one found in the UK after the so-called Big Bang, France and Greece; and 3) The Belgian model, whereby banks are subject to strict limitations which exclude involvement in the securities business.

interest of the home regulator. A lax of prudential framework increases the risk for ex-post reaction to financial crises and therefore the risk for possible losses on the deposit guarantee schemes or for the costs from lending of last resort (LOLR) operations ([5]). Finally, banking systems with higher standards and reputations have better access to capital and business markets.

Other forms of State intervention in support of the banking activities have resulted, however, in competition distortions, which have altered the credit market dynamics in the EU for many years. Member States have engaged a different form of anti-competitive race, that in the form of State aid to national banks, and financial intermediaries most notably involving rescue and restructuring assistance to ailing national champions, the grating of State guarantees for the national banking sector and various preferential tax regimes for financial holdings and financial products to improve the competitiveness of both traditional banking institutions and deregulated financial providers in various Member States. From a competition viewpoint, these forms of individual State aid and aid schemes are susceptible to greatly damage competition as far as they alter the level playing field between undertakings in the common market. Furthermore, excessive concentration of market power in few national banks and their public strength are of considerable concern as they may lead to excessive profits, distortion of credit policies, undue influence in lending and conflicts of interest. It was widely recognized that the banking sector retained some peculiarities influencing competition which regulators had to take into account.

To make sure that competition is not affected between EU providers it is necessary to avoid any undue alterations of the level playing field between regulated and unregulated financial intermediaries in the common market, even if these are established in different jurisdictions and subject to diverse tax rules. State aid rules (Article 87 and 88 EC) provide the Commission with the regulatory instrument to prevent and eliminate alterations of the level playing field deriving from public intervention, even through the tax system, without prejudice to Member States prerogatives in the field of taxation. Against this background, the Commission shall scrutinize all regulations of the financial services sector, with a view to limiting inappropriate State interventions, especially in the form of preferential tax regimes to prevent competition distortions incompatible with the correct functioning of the financial services' market.

A first group of preferential tax regimes which may fall under State aid review concerns the application of reduced nominal tax rates to the revenues deriving from financial activities as opposed to the ordinary tax rates applicable to other companies. In its landmark decision on the International Financial Activities in the Netherlands ([6]), the Commission ruled that a derogatory tax reduction consisting in a partial tax exemption and tax deferral for interest deriving from inter-company loans within a multinational group constituted State aid incompatible with the common market. Certain favourable rules to determine taxable profits earned by financial intermediaries may result into extraordinary tax advantages proscribed under the State aid prohibition set by Article 87(1) EC.

The starting point to determine taxable profits is the Member States' accounting rules. In most corporate tax systems, the accounting of the financial instruments traded by financial institutions largely depends on the nature of the instrument and the motives of the holder. A trader entering in an arrangement for hedging purposes may accrue the receipts and payments in its accounts evenly in the accounting periods in which they are effectively realised. Alternatively, a financial trader may mark-to-market the instruments, thus recognising unrealised gains and losses. Under certain legislations, mark-to-market accounting is elective and reserved to certain financial institutions whose accrued flexibility in determining the taxable income provide sizeable tax benefits. Member States may decide whether foreign exchange gains and losses arising in respect of monetary item contracts (i.e. money contract held as receivables or payables by a company for the purpose of its trade) enter or not into the computation of the trading income for corporate tax purposes and whether exchange gains or losses are realised or unrealised, while providing special rules for financial intermediaries. The existence of derogatory rules for financial intermediaries may influence the market for

([5]) LOLR is defined as the discretionary provision of liquidity to a financial institution (or the market as a whole) by the central bank in reaction to an adverse shock which causes an abnormal increase in demand for liquidity which cannot be met from an alternative source (other than the central bank). The LOLR mechanism aims at preventing liquidity problems from impairing the solvency of individual banks and the stability of the banking system without however distorting the conditions of competition (the loan must be repaid). Under the Second Banking Directive, it is for the home country to decide to act as LOLR if impairment of a branch solvency of the parent bank or that of other home banks due to their dealings with the branch or due to depositors' panic.

([6]) Commission Decision of 17 February 2003, OJ L 180/2003, p. 52.

the exchange of money contracts, with the creation of unjustified financial advantages for the intermediaries established in certain Member States.

It shall also be noted that the most common return on a financial asset is interest. The main fiscal concern for recipients of interest income is the limitation of withholding taxation imposed on interest payments. The availability of a broad income tax treaty network, which will generally reduce and sometimes eliminate the withholding tax on the interest received or distributed, is critical for the competitiveness of a financial centre. But the ordinary tax reliefs against withholding taxation are sometimes not enough and specific reimbursement of taxes or exemptions in respect to interest income deriving from foreign sources may grant monopolistic position to intermediaries established in certain Member States. Even recently, the Commission decided that a tax system where corporate income tax is only refunded to foreign shareholders of Maltese companies specifically receiving payments from abroad, including interest payments, constitutes incompatible aid and asked Malta to repeal the system in question, as it was found to alter fair competition between undertakings especially those operating in the financial sector ([7]).

Another competitive tax factor in the credit market is the deductibility of interest charges. Favorable rules governing tax deduction of interest expense are sometimes granted to enhance the after tax returns of special purpose vehicles. Specific special-purpose-vehicle regimes are accordingly designed to provide for "tax neutral", meaning that their taxable income is effectively nil. This is achieved by reducing the business income through interest payments to the note holders and other costs incurred in connection with the operations of the special purpose vehicles, thanks to its flexibility in deducting interest expenses under the national tax legislation. In another landmark decision concerning the Corporate Treasury Centers in France ([8]), a special purpose vehicle entrusted with more flexibility in deducting interest expenses deriving from inter-company loans, the Commission ruled that a specific tax deduction granted to such centers constituted State aid and was incompatible with the Common Market.

Given the negative effects on competition that certain preferential tax regimes for financial holdings may determine in the credit market, the Commission carefully examines the forms of taxation relating to the financial intermediaries, with a view to limiting possible market distortions. The Commission's practice in this field demonstrates that Member States' derogatory tax rules for financial products, such as debt issuance notes, securitizations, collateralized debt obligations, assets covered securities and other asset repackaging transactions, may affect fair competition between financial centers in the EU, to the detriment of market efficiency. The higher returns derived from such financial products no longer reflect efficiency increases and managerial expertise in risk allocation, but rather the tax breaks granted by Member States. Inevitably, these special tax regimes artificially segregate the geographic markets where the tax benefits are unavailable to the detriment of market efficiency and freedom.

The Commission Decision on Luxembourg's Financial Holding Regime

On 19th July 2006, following a five-year long cooperation procedure with Luxembourg, the Commission decided that the preferential tax regime in favour of the Exempt, *Milliardaire* and Financial Holdings of 1929 was incompatible with State aid rules ([9]). The scheme constituted an existing aid ([10]) granted under the Luxembourg's Law

([7]) Commission Decision of 23 March 2006 on the tax incentives granted by Malta in favour of the International Trading Companies (ITC) and the Companies with Foreign Income (CFI). Under the Maltese tax system, companies divide their business earnings into two schedules, namely income from domestic and foreign sources. The foreign income account includes all income and capital gains derived from foreign assets and profits and from a branch, agency or permanent establishment located outside Malta. Maltese companies receiving foreign-source income allocate this income to a so-called foreign income account, which will be taxed at the standard corporate tax rate of 35%, similarly to the domestic income. However, unlike the domestic income, the foreign income is entitled to foreign tax credit relief with respect to taxes incurred abroad. Furthermore, when a Maltese company distributes the profits deriving from the foreign source income account to its non-Maltese shareholders, the latter receive an extraordinary tax refund on top of the foreign tax relief. The combination of the refund and the foreign tax relief on foreign-source profits may result in zero or minimal taxation (up to 6.25% effective tax rate) in Malta, in lieu of the ordinary 35% tax rate.

([8]) Commission Decision of 11 December 2002, OJ L 330/2003, p. 23.

([9]) The text of the letter to the Member State is published on the website of the European Commission: http://ec.europa.eu/comm/competition/state_aid/decisions/additional_docs.html.

([10]) Pursuant to Article 1 of the State aid Procedural Regulation, Council Regulation (EC) 659/1999.

of 31st July 1929 and subsequent modifications, because enacted before the Treaty entered in force. Although the scheme was very old, its specific tax advantages have become more and more used by private funds to set outside the regulated banking industry. For this reason the scheme was recently amended under the law of 21st June 2005, without altering its existing State aid nature however, as the tax exemption remained unchanged, to exclude the most blatant tax abuse structures.

Following an in depth investigation procedure, the Commission conclusively decided that the scheme constitutes incompatible State aid but has not asked the beneficiaries to repay the aid granted, considering its existing State aid nature. A Commission decision on existing aid schemes does not have retroactive effects and it accordingly does not demand to recover the aid from its beneficiaries. The decision on the 1929 Holdings however demanded that the aid is formally repealed by the end of 2006, while the aid effects must be definitely eliminated by the end of 2010 to allow the current beneficiaries to terminate their ongoing contractual obligations without incurring tax penalties.

Description of the scheme

Under the law of 31 July 1929, the Exempt 1929 Holdings are not subject to any direct taxes in Luxembourg, including the corporate and the municipal business taxes ([11]), and real estate ([12]) and the net worth ([13]) taxes. Accordingly, dividends, interest, royalties and capital gains earned by an Exempt 1929 Holding are not taxable in Luxembourg. Payments of dividends, royalties and interest made by an Exempt 1929 Holding are not subject to any withholding taxes ([14]). Companies established in Luxembourg can be registered as a 1929 Holding, provided that they exclusively engage in acquiring, holding and developing the value of any forms of participation in other Luxembourg or foreign companies, including providing loans, holding patents, and licensing copyright or know-how to the participated companies. An Exempt 1929 Holding is not allowed to have any industrial activities on its own account or to maintain a commercial establishment open to the public.

A particular form of Exempt 1929 Holding, is the Exempt *Milliardaire* Holding, which can be formed by means of a contribution of shares of foreign companies, or whose paid-up share capital and reserves amount to at least € 24 million (LUF 1 billion). The exempt status is also applicable under certain conditions to the so-called Exempt Financial Holdings, another classification of the Exempt 1929 Holdings, which enjoy more latitude in financing the activities of the subsidiaries or affiliates of the group to which the holding belongs. Companies are considered to be members of a group if they use a common denomination which constitutes the symbol of reciprocal dependence or if the companies of the same group hold a substantial participation (at least 25 percent) in their share capital and maintain continuous economic relations between them. With respect to intra-group financing the Financial Holdings may, similarly to the *Milliardaire* Holdings, carry out a greater range of activities than an ordinary Exempt 1929 Holding. While the other Exempt 1929 Holdings may only finance companies in which they hold a direct participation, the Financial Holdings may grant loans to any group member company.

([11]) Luxembourg resident companies and permanent establishments of foreign companies are subject to corporate income tax *(impôt sur le revenu des collectivités)* levied at the maximum rate of 22 percent, and to the municipal business tax *(impôt commercial communal)* levied at a variable rate depending on the municipality, but with an average of 7,5 percent, on the taxable income corresponding to the gross income less expenses excluding non deductible expenses such as direct taxes, hidden payments of dividends and directors' fees.

([12]) A municipal tax levied on the value of real estate owned by undertakings.

([13]) Luxembourg imposes a net worth tax on resident companies and on permanent establishments of foreign companies at the rate of 0,5 percent applied on the net assets as at 1 January of each year, as the difference between assets estimated at their fair market value and liabilities vis-à-vis third parties.

([14]) Dividends are subject to withholding tax at the rate of 20 percent on the gross amount paid (25 percent if the withholding cost is borne by the payer), unless the Parent-Subsidiary Directive (90/435/EEC) applies. This withholding tax maybe reduced pursuant to treaty provisions. Interest is generally not subject to any withholding taxes, unless qualified as hidden dividends. This withholding tax maybe reduced pursuant to treaty provisions. Most types of royalties paid to non-resident beneficiaries are subject to withholding tax levied at the rate of 10 percent (11,11 percent if the withholding cost is borne by the payer). Luxembourg has recently enacted in its tax legislation the exemption provided for by Council Directive 49/2003/EC of 3 March 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ L 157 of 26.6.2003, p. 49). This withholding tax maybe reduced or waived pursuant to treaty provisions.

Appraisal of preferential tax regimes for financial holdings

The preferential tax regimes for financial holdings tend to have broad application. Unlike the direct subsidies which are necessarily limited to a restricted number of beneficiaries (not least for budgetary reasons), the preferential tax regimes are set to attract the greatest possible number of beneficiaries at reduced or no cost for the treasury which would have not taxed the beneficiaries in the absence of the preferential tax regime. It is accordingly problematic to characterize them as State aid, with particular respect to proving the condition that the measures provide selective advantages in favor of certain undertakings or productions and that they affect competition and trade in a sense proscribed by Article 87. Application of State aid rules to taxation presents particular difficulties since the schemes of taxation tend to be expressed in general terms while they produce unequal effects on taxpayers according to the specific circumstances they are in.

Distinguishing legitimate tax preferences for holdings from forbidden State aid

In the light of the State aid definition given by the Court ([15]), State aid is present when State intervention alters the pre-existing competitive position between competing undertakings. When State intervention takes the form of a business tax reduction, taxation is treated as a special factor in the costs of production incurred by undertakings in the course of their business. A reduction of the tax imposed on certain undertakings accordingly alters the competitive standing of such undertakings vis-à-vis their competitors. Taxation is however treated as a constant where it is an element of general taxation, so that even if the effective rate of taxation is reduced by effect of a general tax reduction it remains constant as a factor in the State aid equation. On the other hand, where a proportion of the general tax is not charged on derogatory grounds, the effect is that of a variable and accordingly to alter the pre-existing cost structure of the beneficiary of the charge relief. A fundamental element in the determination of the presence of State aid thus rests in the definition of the general tax system, which is made by reference to the Member State's tax jurisdiction, since to constitute State aid a measure must be imputable to the Member State. The notion of general tax system includes the limitations, exclusions or exceptions from taxation, such as, for example (in the area of direct business taxation), the differential taxation applied on residence as opposed to the source criterion, or the differentiations between active and passive income. Such limitations are considered as part of the general tax system (the constant) and, as they define the fundamentals of a tax system of reference, they cannot be subject to State aid control ([16]).

In its Notice on State aid and direct business taxation ([17]), the Commission clarified that the main criterion in applying Article 87(1) EC to a tax measure is to prove that the measure provides in favor of certain undertakings in the Member State an (unjustified) exception to the application of the tax system ([18]). Under the above-mentioned Court judgment *Commission v Italy* ([19]), the tax system of reference should thus first be determined to decide whether an advantage has been granted, that is to say, whether the exception derives directly from the basic or guiding principles of the tax system concerned or whether it is a derogation from the

([15]) Judgment of the Court of Justice of 2 July 1974, Case C-173/73, Italy v Commission 1974 [ECR], p. 709, paragraph 14.

([16]) Under the tax expenditure theory developed by Professors Surrey and McDaniel in the US, it is possible to identify a tax preference as derogation from the general tax system. The way to identify the benchmark or normative structure of a tax system is by defining the fundamental issues that characterize the corporate taxation of a country, including the definition of what is included in the tax base, what the tax rates are, whether a company's profits are taxed twice or if there is an integration of taxation of these profits when received by the shareholder, how cross-border transactions are taxed, and how taxes are administered. Under this analysis, it is recognized that the exemption of the business income deriving from outbound investments as applied by many European countries does not derogate from the general tax system if it is part of the normative benchmark of a Member State provided by such country's legislation and its bilateral tax treaties. But it is often found that countries' legislation and tax treaties contain provisions that derogate from the benchmark or normative response to the fundamental tax issues mentioned above. These provisions are intended to provide subsidies and incentives to address specific economic objectives which are external to taxation, and have been labeled tax expenditures. They need to be examined as spending programs rather than tax provisions.

([17]) OJ C 384 of 10.12.1998, p. 1.

([18]) Paragraph 16 of the Commission Notice.

([19]) Case C-173/73, Italy v Commission, paragraph 14. The tax system of reference can be found either with respect to a normative benchmark or with respect to a functional benchmark, which is more in line with the interpretation of the Court which excludes the presence of State aid if a tax measure is "justified by the logic and general scheme of the tax system". The distinction is more theoretical than practical because it is evident that the normative benchmark has to be determined with respect to the national tax system concerned (and may not be defined on the basis of Community principles which are not to be found in EC law) which must be interpreted in accordance with the general objectives or principles of the tax system in question.

tax system ([20]). Holding companies often benefit from the so called participation exemption system which is a general method to provide relief against multiple taxations. All companies holding substantive participations in other companies are holding companies, which derive passive income from the participated companies and capital gains from the sale or exchange of the participations held, and further distribute such income to their shareholders both nationally and internationally. When the activity of a holding company is limited to holding the portfolio participations, the holding is named pure because it does not have any operating role ([21]). It should be noted however that for competition law purposes also a holding is a financial undertaking unless it can be proven that its activities are limited to the mere exercise of its rights as shareholder and the perception of the fruits of the participations held like a passive stock owner ([22]).

In most national jurisdictions, the dividends distributed by the participated companies to the holding companies and the gains realized from the sale of participations traditionally benefit from favorable taxation as opposed to ordinary business income, because the holding and the controlled companies are considered to constitute one economic entity having the form of a group of companies. If the dividends and the gains earned by a holding were subject to ordinary tax, the income derived by the controlled "operating" companies would be taxable a first time upon production, a second time when earned by the holding company as dividends or gains and a third time, upon further distribution to the holding's shareholders, as dividends. To avoid multiple taxation of the profits realized at the level of the operating companies, the distributed dividends and the gains realized by a holding are either subject to reduced taxation or exempt in their entirety. Such preferential tax regimes however are not extraordinary in that they do not constitute derogation from the ordinary tax burden of companies, but rather the adaptation of the tax system to the specificity (multiple taxation) of the holding companies. In this respect, the exemption is justify by the nature or general scheme of the tax system and does not provide any derogatory advantage to the holdings.

In opening its formal State aid investigation with respect to the preferential tax regime in favor of Luxembourg's Exempt 1929 Holdings, the Commission did not consider the tax exemption of 1929 Holdings as opposed to taxation of other companies in Luxembourg, but it rather examined whether the exemption granted to the 1929 Holdings was a derogation with respect to other holding companies. The Commission found that the former holdings are granted several specific advantages which are not justified by the objective of avoiding the multiple taxation incurred by holdings. For example, the most significant exemption granted to the Exempt 1929 Holdings is the one relative to the interest from inter-company loans to the participated companies or to other companies directly or indirectly related to the group to which the holding belongs. The Commission considered that such exemption constituted an exceptional advantage not available to other holdings in Luxembourg. The payments received are deductible expenses incurred by the paying companies and their exemption is therefore unrelated to any taxation applied at the level of the paying companies. It was evident that the exemption granted to the Exempt 1929 Holdings was an advantage at the expense of Luxembourg's treasury, without any justification under Luxembourg's tax system.

The specificity of preferential tax regimes for holdings

The specificity notion derives from the existence of a disparity of treatment between situations that, under the nature or general scheme of a given tax system, are in comparable legal and factual situations and should therefore be treated alike. Specificity is difficult to prove in case of preferential

([20]) In its practice, the Commission recognizes this fundamental approach. Unlike in other areas of State intervention in the economy, taxation is a domain of ordinary State involvement and the tax systems are used to pursue important economic policy objectives. Of course Member States are subject to Treaty rules including the prohibition of granting State Aid in whatever form including taxation, but cannot be deprived of their fundamental autonomy in setting their tax systems in the way they consider most appropriate. To fall within the scope of application of State Aid review a State measure should accordingly constitute an exception from the application of the tax system with respect to its nature and general scheme. The Commission shall accordingly not question the preferences (exceptions, exclusions, etc.) which are directly provided by Member States under the nature or general scheme of their tax systems, rather such preferences fall outside the scope of application of State Aid rules because they are part of the normative benchmark.

([21]) Non-operating financial holding companies are commonly found in most countries, and some jurisdictions go as far as to require the establishment of such holding companies when different non-banking businesses are bundled with banks. However, financial conglomerates in many countries have a variety of options in how they may organize their activities, and they have responded by choosing a variety of organizational structures. There is thus no empirical evidence that the holding company structure is necessarily more efficient than other structures, provided that rules governing all types of structures are similar.

([22]) Judgment of the Court of 10 January 2006, Case C-222/04, Finanze v Cassa di Risparmio di Firenze, not yet published, paragraphs 111 et seq.

regimes for holdings, because the advantage is not specifically granted to any industry or economic sector. The Commission found however that the scheme in question was not effectively open to the entire Luxembourg's economy because it only favored certain specific corporate vehicles which essentially provide certain coordination and financial services to related companies in the same group, thus constituting typical instruments to grant private lending to closely held companies and as such was State aid.

In particular, the Commission found that the tax benefits granted to the Exempt 1929 Holdings were limited to certain undertakings only, characterised by their functions. This led to the conclusion that they were selective or specific in the sense proscribed by Article 87(1) EC. The Exempt 1929 Holdings' scheme was *de-jure* and *de-facto* limited to Luxembourg's companies carrying out a *numerus clausus* of activities, essentially having financial nature. In order to benefit from the exemption, the beneficiaries have to establish a separate entity dedicated to perform the eligible activities described under the 1929 legislation. The establishment of such structure involved additional costs in addition to the ordinary business expenses, including (i) the administrative cost of a new company, (ii) the cash or stock contribution to meet the minimum paid-in capital requirement, (iii) the capital duty imposed on the initial capital contributions (totalling 1 percent of the contributions' value), (iv) the annual subscription tax (totalling 0,20 percent of the paid-up share capital and share premiums' value), (v) the locking-in of resources dedicated to the set-up the holding, and (vi) the opportunity cost concerned with more productive use of capital. For the Commission, the presence of considerable additional costs related to the creation of the Exempt 1929 Holding effectively limited the exemption only to certain undertakings creating a dedicated structure in Luxembourg ([23]) and was therefore selective.

Justification by the nature of the derogation

If a tax preference is found to be selective, it may still be justified by the nature or general scheme of this system in relation to sectors being excluded, but only if necessary and proportionate to achieve the objective set forth by the measure ([24]). As observed by the Court, the question to be determined is whether under a particular statutory scheme a State measure is such as to favor certain undertakings (or certain productions) in comparison with other undertakings (or other productions), 'which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question' ([25]). Where the distinguishing criterion used by the national legislation at issue is justified by the nature or general scheme of that legislation, a selective measure is not in the nature of State Aid, while in case a justification is not provided the measure fulfills the selectivity requirement.

To illustrate, under a recent judgment ([26]), the Court upheld a Commission decision relating to the banking sector considering that a reduced tax rate for part of the profits earned by the Italian banks taking part in corporate reorganizations ([27]), was not justified by the specificities of the banking sector as the tax advantage in question was only available to banks carrying out certain transactions and was therefore not available to all companies in that sector ([28]).

According to Luxembourg, the Exempt 1929 Holdings' scheme was also justified as a tax vehicle to encourage distributions of the profits accumulated by operating companies and avoid further taxation of such profits when received by certain holdings. Due to their non-taxable companies' nature, the Exempt 1929 Holdings were accordingly excluded from the benefits of the Parent-Subsidiary Directive and of most bilateral conventions to avoid double taxation and prevent fiscal evasion. For Luxembourg, this justified a specific tax relief for the Exempt Holdings, which typically operate in a multinational context.

For the Commission, however, although in such an international context, there is often the problem

([23]) See joint Cases T-92/00 and T-103/00 Ramondin, [2000] ECR II-4217, Paragraphs 38-40.

([24]) Judgment of the Court of Justice of 8 November 2001, Case C-143/99 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, 2001 [ECR], I-8365.

([25]) Case C-143/99, paragraph 17.

([26]) Judgments of the Court of Justice of 15 December 2005 in Cases C-66/02 and C-148/04.

([27]) Commission Decision of 11 December 2001on the tax measures for banks and banking foundations implemented by Italy, OJ L 184 of 13.7.2002.

([28]) Point 32 of the Commission Decision of 11 December 2001. For the Commission, the measures under examination did not represent an adaptation of the Italian corporate tax system to the distinctive features of banking, but, rather, ad hoc aid having the effect of improving the competitiveness of certain undertakings, i.e. the banks taking part to certain corporate restructurings. For the Commission, the fact that the banking sector might be in need of restructuring at a particular time is an extrinsic factor bearing no relation to the normal operation of the tax system in the banking sector; therefore, it does not imply that it is in the nature or general scheme of the system that banking should benefit from more favourable rules on mergers. For these reasons, the Commission could not accept that the measures in question were justified by the nature or general scheme of the system.

of making good a holding company of the taxes withheld by the foreign State of a paying operating company, Luxembourg ordinarily provided a foreign tax credit relief with respect to the taxes paid abroad. This relief however could not exceed the Luxembourg's tax imposed on that income and since a 1929 Holding's income was fully exempt the scheme was more beneficial than the normal credit system [29]. The Commission concluded that the need to provide relief from foreign tax paid could not justify the exemption in favour of the Exempt 1929 Holdings, and the specific nature of their tax regime was accordingly confirmed.

Effects on competition and trade

Under the settled case law of the Court, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition [30] and a measure affects intra-Community trade when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade [31]. In this respect, the Commission considered that the 1929 Holdings were typically active in the financial sector as they perform specific business activities such as providing loans, issuing bonds, perform invoice discounting and managing financial assets in favour and/or with respect to both directly and indirectly controlled companies and other companies in a group to which an Exempt 1929 Holding belongs. Furthermore, the Exempt Financial Holdings and the Exempt *Milliardaires* Holdings enjoy high flexibility in exercising such financial activities even with respect to unrelated entities and can manage collective investment funds. The Exempt 1929 Holdings are clearly active in purchasing, managing and licensing patents with respect to directly and indirectly owned subsidiaries, or other companies in the group to which the holdings belong. Finally, the Exempt 1929 Holdings provide management, coordination and other intra-group services, which also constitute economic activities that can be provided by independent service providers in the market.

For the Commission, competition is distorted because the above indicated activities enjoy full exemption from various income taxes when performed by the Exempt Holdings, while being taxable when performed by independent providers exercising comparable business activities such as financing, factoring, managing intangibles and providing coordination services, outside of a group structure. In substance, for the Commission, in the relevant market of corporate services traditional banking lending is in competition with unregulated lending, and the higher yields of lenders and cost borne by companies for the latter services should solely reflect better services rather than incorporate a State premium in the form of reduced taxation. The Commission concluded that trade and competition could be affected in several ways because of the tax regime in favour of Luxembourg's Exempt 1929 Holdings. The Commission furthermore found that the scheme could result in anticompetitive practices ranging from below-market financing of the Exempt Holdings' affiliates to withholding of credit to the competitors of the affiliates. In conclusion, in competitive financial markets, financial intermediaries should not be subsidised to finance their affiliates nor should their position been strengthened to give them the power to injure the competitors of their affiliates. Furthermore, the geographic restrictions stemming from the limited jurisdiction of Luxembourg's exemption may in fact enhance the availability of local credits and influence the development of secondary markets for credit in Luxembourg, to the detriment of the common market.

Compatibility with the Common Market

The Commission normally enjoys a certain discretion in applying the exceptions set forth by Article 87(3) EC and possible declare State aid to be compatible with the common market. Besides the case in which State aid is granted in compliance with the specific compatibility guidelines, pursuant to Article 87(3)(c) EC the Commission may authorize *"aid to facilitate the development of certain economic activities ... where such aid does not affect trading conditions to an extent contrary to the common interest"*. The Commission balances the positive effects of the aid on the economic development with the distortions involved in the light of the common interest, and may exceptionally authorize the aid, if the overall effect is positive.

While this is normally the case when the tax preference is State Aid to investments or to job creation (where the positive effects for the Aid recipients are more easily measures), it is not the case of the preferential tax regimes for holdings which constitute operating aid. Operating aid is aid that reduces the operation costs of its beneficiaries without producing durable economic developments or efficiency gains for its beneficiaries. Operating aid

(29) This advantage is particularly relevant with respect to the Exempt Financial holdings and *Milliardaire* Holdings which enjoy accrued flexibility in providing loans to participated and affiliated companies, and in licensing intangibles.

(30) Case T-214/95 Het Vlaamse Gewest vs. Commission [1998] ECR II-717.

(31) Case Philip Morris 730/79 [1980] ECR 2671, Paragraph 11.

is normally forbidden because disproportionate with respect to its objectives and highly disruptive of fair competition.

Since the beginning of its probe, it seemed to the Commission that none of the derogations provided for in Article 87(2) and (3) EC could apply, because the aid scheme constituted operating aid, which did not appear to be linked with specific projects, but rather to reduce the holdings' current expenditures without contributing to pursue any Community's objectives. The Commission investigation confirmed that such fiscal aid regimes were indeed incompatible with the common market.

The Commission furthermore noted that, as confirmed by the case law of the Court ([32]), the simple fact that the preferential tax regime for the Exempt 1929 Holdings was available to companies registered in Luxembourg constituted a breach of the freedom of establishment of undertakings registered in other Member States. In this respect, the Commission could not authorise aid which is contrary to a specific provision of the Treaty. State aid, certain conditions of which contravene other provisions of the Treaty, cannot for this sole reason be considered by the Commission to be compatible with the common market ([33]) and accordingly the aid was considered by the Commission to be incompatible with the common market.

Procedure

With its decision, the Commission ruled that the 1929 Holdings' scheme fulfilled all the relevant conditions to be considered operating State aid incompatible with the common market, as it afforded to its beneficiaries several derogatory tax exemptions translating into reduced tax liability, which are de-jure and de-facto reserved to special tax vehicles established in Luxembourg and exercising a select number of business activities including the provision of financial and licensing services to related companies in a multinational group and manage collective investment funds. The Commission concluded that in the relevant market of corporate services certain forms of unregulated lending benefited from higher yields than traditional banking lending because of the reduced taxation under the Luxembourg scheme for Exempt 1929 Holdings. As remedy, the Commission demanded Luxembourg to abolish the exempt status of the Exempt 1929 Holdings.

Phasing-out the existing holdings

Considering the existing aid nature of the scheme, it was possible for the Commission to grant a transitional period in order to avoid damaging Luxembourg's financial marketplace, since the Exempt Holdings existing at the date of the Commission's decision had reasonable expectations to believe in a non abrupt termination of a scheme in place since 1929. Under the case law of the Court of First Instance ([34]), "*in accordance with the principle of legal certainty, the Commission is, as part of its constant review of existing aid, only empowered to require the elimination or modification of such aid within a period which it is to determine*". The Commission enjoys a discretional power in granting a transitional period before an existing aid scheme is abolished, during which the aid can be lawfully implemented.

In exercising its discretion, the Commission had to motivate the decision to fix such a period. A motivation could only be based on the legitimate expectations of the existing beneficiaries as opposed to new holdings. The Luxembourg authorities had observed that such a long-lasting and open-ended tax exemption could not be repealed "from one day to the next" without provoking fundamental changes in the nature of Luxembourg's tax system. The argument persuaded the Commission that while the preservation of an exemption system in favour of the 1929 Holdings was incompatible with the common market, its long-lasting nature (76 years without fundamental changes) provided legitimate reasons for the existing beneficiaries to maintain the exemption for some more time after it being declared incompatible State aid.

Account taken of other specific and factual elements presented by the Luxembourg's authorities, the Commission decided, on the one hand, to demand the immediate elimination of this incompatible existing aid scheme, and on the other hand to leave the necessary time for Luxembourg to adapt its legislation and for the current beneficiaries to divest from the existing holding structures without suffering tax consequences.

The Commission accordingly concluded that it was appropriate to demand the most rapid elimination of the Exempt Holding regime and enjoined Luxembourg to amend its legislation by the end of 2006. The Commission also requested that no new holdings are created as of the date of notification of its decision. The Commission however

([32]) Case C-307/97, Compagnie de Saint-Gobain, Rec. [1997], p. I-6161.

([33]) Case C-156/98, Germany v Commission [2000] ECR I-6857.

([34]) Cf. joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, Alzetta v. Commission considered that the current beneficiaries should not be deprived of their exempt status until the end of 2010, i.e. four years after the suppression of the scheme (end 2006). This transitory period was granted in order to give time to the holdings concerned to divest from the existing holding structures account taken of the fact that suppression of the tax exemption will greatly change the economics of the ongoing investments and will require a substantive restructuring of the corporate groups to which the holdings belong.

It was clear that the transitory period for the exempt status to end in 2010 was granted to the existing beneficiaries, these being the only ones to enjoy legitimate expectations to a future duration of the scheme. Considering the specific nature of the holding regime in question, the Commission imposed a special condition consisting in the immediate loss of the exempt status in case of a partial or total transfer of the stock of an existing holding to a new beneficiary. The clause was evidently targeted to avoid an abuse of the existing status which could take place if an exempt holding changes ownership. The Commission considers that in such a case the holding shall loose its exempt status because it no longer enjoys the expectations of an existing beneficiary. Luxembourg was mandated by the Commission to implement the decision by adopting the necessary rules in order to ensure the effective suppression of the scheme while preserving the legitimate expectations of its current beneficiaries and to progressively restructure Luxembourg's financial marketplace.

La Commission autorise le régime de soutien français en faveur des programmes mobilisateurs pour l'innovation industrielle géré par l'Agence de l'innovation industrielle (1)

Jean-Charles DJELALIAN et Isabelle NEALE-BESSON, Direction générale de la concurrence, unité G-3

Le 21 février 2006, les autorités françaises ont notifié à la Commission le régime de soutien de «l'Agence de l'innovation industrielle» en faveur des «programmes mobilisateurs pour l'innovation industrielle».

La Commission européenne a décidé le 19 juillet 2006 de ne pas soulever d'objection à la mise en œuvre de ce régime, considérant l'aide comme compatible avec le traité CE, en application de son article 87, paragraphe 3, sous c), et avec l'article 61, paragraphe 1 de l'accord EEE. En effet, la Commission a estimé que le régime d'intervention de l'Agence remplissait les conditions définies dans l'encadrement communautaire des aides d'Etat à la recherche et au développement (encadrement R&D) (2).

En vertu de cet encadrement toutefois, étant donné leur impact potentiel sur la concurrence, toutes les aides d'un montant supérieur à 5 millions d'euros prévues pour le financement de programmes de plus de 25 millions d'euros devront être notifiées pour examen individuel par la Commission avant leur octroi. Ainsi, la Commission sera en mesure de vérifier avant le démarrage de chaque grand programme que le soutien ne se fait pas au détriment des autres concurrents européens. A cet égard, la proposition actuelle pour le futur encadrement des aides d'Etat à la recherche, au développement et à l'innovation offre un cadre pour une meilleure appréciation de l'effet des aides sur la concurrence et les échanges.

L'Agence de l'innovation industrielle

En janvier 2005, le Président directeur général de l'entreprise Saint-Gobain, M. Jean-Louis Beffa, a remis au Président de la République française, M. Jacques Chirac, un rapport intitulé «Pour une nouvelle politique industrielle». Ce rapport réaffirmait la part importante de l'industrie dans la croissance économique française mais soulignait la trop faible spécialisation de cette économie sur des industries à haute valeur ajoutée technologique ainsi que la faiblesse de l'effort privé industriel en matière de recherche-développement, comparés aux Etats-Unis ou au Japon. Le rapport définissait ainsi deux axes pour l'intervention de l'Etat : un rôle d'initiateur de grands projets de R&D présentant des investissements et des risques majeurs et un rôle de coordination entre industriels et laboratoires publics sur des projets stratégiques identifiés.

Dans ce contexte, l'Agence de l'innovation industrielle a été créée en août 2005 afin de remplir une triple mission de sélection, de financement, ainsi que de suivi et d'évaluation technique et financière de projets stratégiques, les «programmes mobilisateurs pour l'innovation industrielle», associant de grandes entreprises industrielles, des petites et moyennes entreprises (PME) et des laboratoires de recherche. La structure de l'Agence, ainsi que sa dotation d'un budget propre, ont été conçues afin d'améliorer le ciblage et la coordination des fonds publics et de permettre les arbitrages en faveur des programmes les plus prometteurs. L'Agence est dotée d'un budget initial de 2 milliards d'euros. Elle dispose d'un conseil de surveillance composé de représentants de l'Etat, de parlementaires, de représentants d'organisations professionnelles, d'industriels et de scientifiques et présidé par M. Jean-Louis Beffa. Ce Conseil détermine la politique de financement de l'Agence, décide de l'octroi, de la poursuite ou de l'arrêt du financement des programmes et en établit les modalités. L'Agence est également assistée d'un Conseil scientifique et industriel ; la Caisse des dépôts et consignations assure son support administratif et financier. Le règlement intérieur de l'Agence prévoit des dispositions en matière de gestion des conflits d'intérêts et des règles de confidentialité. Un commissaire du gouvernement est chargé du contrôle de l'Agence.

Les programmes mobilisateurs pour l'innovation industrielle

Les «programmes mobilisateurs pour l'innovation industrielle» impliquent des investissements pouvant atteindre plusieurs centaines de millions d'euros. Ils sont sélectionnés par l'Agence sur base de propositions émanant des industriels dans le cadre d'un appel à projets permanent. Ils doivent

(1) Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leurs auteurs.

(2) JO C 45, 17.2.1996, p. 5.

avoir pour objectif la production d'un nouveau produit ou service de haute technologie sur un marché de taille mondiale à un horizon de 5 à 10 ans et comporter une forte composante d'innovation, caractérisée par l'introduction de nouveautés scientifiques, ou par l'intégration de plusieurs technologies complexes. Par ailleurs, la collaboration à l'échelle européenne est encouragée. Le nombre de programmes sélectionnés est prévu entre 10 et 20 par an, la période d'octroi des aides étant de six ans. Les domaines d'intervention envisagés touchent les énergies non polluantes, les technologies de l'information, les biotechnologies et la santé, ainsi que la mise au point de transports rapides et économes en énergie.

Chaque programme est coordonné par une entreprise chef de file qui est contractuellement liée à l'Agence. L'Agence veille à la mise en place au niveau de chaque programme d'une politique de titularité et d'exploitation des droits de la propriété intellectuelle générée correspondant à l'effort consenti par chaque partenaire.

L'aide

Le soutien financier concerne les activités de recherche industrielle et de développement pré-concurrentiel, définies conformément à l'annexe I de l'encadrement R&D. Les dépenses éligibles doivent être exclusivement liées aux activités de recherche et sont définies conformément à l'annexe II de l'encadremement R&D et aucune dépense antérieure au dépôt d'une demande d'aide formelle auprès de l'Agence n'est retenue. Le soutien public prend la forme de subventions et d'avances remboursables. Le taux maximal d'intervention de l'Agence est de 50% des coûts éligibles pour les entreprises ; les intensités sont calculées pour chaque partenaire du programme et respectent les intensités maximales autorisées par l'encadrement R&D.

Certains bonus de 10% sont applicables dans les cas suivants , conformémement au point 5.10 de l'encadrement R&D:

— quand le bénéficiaire est une PME,
— quand le programme s'inscrit dans les objectifs d'un projet spécifique du programme-cadre de recherche-développement (PCRD) en application,
— quand le programme implique une collaboration effective entre les entreprises et les organismes publics de recherche ou entre deux partenaires indépendants de deux Etats membres.

Les principes du système d'avances remboursables mis en place sont conformes au point 5.6 de l'encadrement R&D et à la pratique décisionnelle courante de la Commission qui autorise des avances remboursables correspondant à 40% des coûts éligibles pour des travaux de développement pré-concurrentiel dès lors que:

— Un scénario de succès raisonnable est défini pour le remboursement de l'avance, assorti d'indicateurs et de différents seuils.
— Le remboursement est graduel et proportionné au niveau de succès atteint.
— En cas de succès, non seulement le principal mais aussi les intérêts de l'avance (par application du taux de référence) sont remboursés.
— En cas de succès supérieur au seuil défini dans le scénario, le remboursement doit être supérieur au principal et aux intérêts: un mécanisme d'intéressement permettra de demander contractuellement aux bénéficiaires d'avances remboursables de s'acquitter de retours supplémentaires, indexés par exemple sur le chiffre d'affaires ou les volumes de ventes.

Conformément au point 2.4 de l'encadrement R&D, les travaux des organismes de recherche à but non lucratif pourront faire l'objet d'un financement par l'Agence à hauteur maximale de 100% des coûts additionnels résultant du programme dans les cas où:

— ces organismes interviennent en sous-traitant des entreprises et qu'ils facturent leurs prestations au prix du marché, ou
— ils interviennent en tant que partenaire et que les droits de propriété intellectuelle issus des travaux de R&D sont détenus par l'organisme de recherche à but non lucratif (seul ou conjointement avec une ou plusieurs entreprises) et l'exploitation par les entreprises de la part des droits de propriété intellectuelle détenus par l'organisme donne lieu à compensation aux conditions du marché.

Les projets des grandes entreprises ne peuvent bénéficier d'aides que si leur effet incitatif est démontré conformément au point 6.1 de l'encadrement R&D. A cet égard, la Commission a noté que la sélection d'un programme nécessitait la démonstration que l'aide permettrait aux entreprises de dépasser quantitativement ou qualitativement leurs activités de R&D classiques. En outre, l'Agence analyse le caractère incitatif de l'aide suivant différents paramètres à différents stades du processus de sélection des programmes conformément au point 6.2 de l'encadrement R&D:

— démonstration que l'ambition technologique ne découle pas simplement d'une stratégie commerciale normale, compte tenu du marché et de ses évolutions;

— démonstration de l'existence de risques technologiques, commerciaux ou financiers majeurs ou de barrières d'investissements à l'entrée nécessitant un effort financier exceptionnel; ces programmes ne seraient pas entrepris sans intervention publique;
— démonstration du caractère prépondérant du facteur temps dans un contexte de concurrence internationale;
— ou encore démonstration d'une défaillance du marché pour le financement du programme.

De plus, l'Agence privilégie les programmes concernant des segments de marché entièrement nouveaux ou dominés par des concurrents extra européens. L'existence d'externalités positives est également prise en considération. Enfin, l'Agence assure un suivi technique et financier des programmes, chaque programme prévoyant la définition d'objectifs précis et d'étapes intermédiaires, la possibilité de réorienter les travaux et des conditions d'arrêt en cas d'échec.

Notification des programmes individuels

Les programmes sélectionnés par l'Agence pour une aide d'équivalent subvention brut supérieur à 5 millions d'euros pour des dépenses éligibles supérieures à 25 millions d'euros feront l'objet d'une notification individuelle conformément au point 4.7 de l'encadrement R&D. Les sept premiers programmes retenus par le Conseil de surveillance de l'Agence réuni les 25 avril et 4 juillet 2006 sont repris dans le tableau 1. A la date de rédaction du présent article, ces programmes n'ont pas encore été formellement notifiés par les autorités françaises. Ce n'est qu'après accord de la Commission que les conventions d'aide seront établies avec les partenaires de ces programmes.

Dans le cadre de son examen individuel, la Commission veillera à ce que les projets soutenus visent effectivement la promotion des activités de R&D et l'amélioration de la compétitivité européenne mais n'impliquent pas de distorsion de la concurrence contraire à l'intérêt commun. A cet égard, la Commission vérifiera l'éligibilité des dépenses et la qualification des travaux par stade de recherche. Elle analysera la proportionnalité et la pertinence des seuils retenus pour le remboursement et l'intéressement dans les cas d'utilisation des avances remboursables. Elle vérifiera l'application des bonus et appréciera l'effet d'incitation de l'aide.

De plus, conformément au futur encadrement des aides d'Etat à la recherche, au développement et à l'innovation qui devrait être adopté avant la fin de l'année 2006, la Commission analysera les effets négatifs potentiels de l'aide sur la concurrence entre les entreprises des marchés de produit concernés. Dans cette perspective, l'incidence de la R&D sur les marchés de produit étant très évolutive, la Commission procèdera à une analyse prospective et tentera d'apprécier si l'aide pourrait fausser la concurrence en perturbant la dynamique des marchés par la réduction des incitations des opérateurs à investir, en créant ou en entretenant un pouvoir de marché, ou encore en maintenant une structure de marché inefficace. Enfin, la Commission évaluera l'impact de l'aide sur les échanges dans le marché commun, notamment en termes de délocalisation d'activités et de déplacement des courants d'échanges.

Tableau 1: Premiers programmes soutenus par l'Agence de l'Innovation Industrielle

Programme	Description	Chef de file	Coûts (M€)
BioHub	Valorisation des ressources agricoles par les biotechnologies	Roquette Frères	98
HOMES	Bâtiment économe en énergie	Schneider Electric	88
NanoSmart	Nouveaux substrats semi-conducteurs	SOITEC	162
NeoVal	Système de transport modulaire automatique sur pneus	Siemens	62
Quaero	Recherche et reconnaissance de contenus numériques	Thomson	250
TVMSL	Télévision Mobile Sans Limite	Alcatel	98
Véhicule Hybride HDi	Chaîne de traction hybride électrique — diesel	PSA Peugeot Citroën	471

Environmentally Friendly Engine: the Commission authorises aid for a British project led by Rolls-Royce ([1])

Almorò RUBIN DE CERVIN and Jean-Charles DJELALIAN, Directorate-General for Competition, unit G-3

Description

The Environmentally Friendly Engine (EFE) project aims to develop new innovative technologies designed to meet the needs of improved environmental performance of aero-engines and to reduce ownership costs. The Advisory Council for Aeronautics Research in Europe (ACARE) has defined the technological paths and objectives until 2020 in its Strategic Research Agenda. EFE will contribute to ACARE's goals by reducing the perceived noise level and the weight of the engine, and by cutting carbon dioxide (CO2) emissions per passenger kilometre (which means a cut in fuel consumption) as well as nitrogen dioxide (NOx) emissions.

EFE is conducted by a consortium led by Rolls-Royce PLC, the leading aero-engine producer, and comprises several firms in the sector, such as Bombardier, HS Marston, Smiths and Goodrich. The consortium also includes a number of universities (Cambridge, Oxford, Belfast, Sheffield, Birmingham and Loughborough). The co-operation is carried out under collaboration agreements which set out how the project is managed, the financial terms, the intellectual property rights (IPR) principles and confidentiality clauses.

The aid takes the form of a £47.5 million grant (€67 million) with an intensity of 50% of the eligible costs. The UK authorities have also provided an estimate of the long term impact of the project on their economy, which shows its significant potential, depending on the successful outcome of the research that will be carried out.

Assessment

The measure consists of public funding granted to a selected number of enterprises, active in a sector where there is trade between Member States. The conditions for the existence of aid established in Article 87, paragraph 1 of the EC Treaty are met.

The measure is part of the scheme N319/2005 "Grant for Collaborative Research and Development" previously approved by the Commission ([2]). Because of the size of the project, the UK authorities have complied with the requirement under point 4.7 of the R&D framework and have notified the individual aid prior to its application. Indeed, the consortium was waiting for Commission's approval before starting the project.

The Commission has found that the project falls entirely under the stage of industrial research as defined in Annex I of the R&D Framework. EFE is not a prototype and cannot be used in any engine; the research activities are not directly linked to any product. At the opposite, EFE constitutes a research platform meant to acquire new knowledge, feeding validated technologies and materials for the next generation of aero-engines. Moreover, EFE appears complementary with other research projects funded by the sixth Community Framework Research Programme ([3]) . An aid intensity of 50% can be applied as the project remains distant from the market and its impact on competition will be limited.

The Commission has also found that the intervention by the UK authorities has an incentive effect for the following reasons:

— The public support is intended to reduce the technological risks linked to this type of projects.

— Government funding brings together a large number of partners. The UK authorities have indicated that without public support the project would be scaled down.

— EFE will develop clustering between the partners and foster co-operation among industries and universities. The latter will widely disseminate the results through publications in respect with IPR and confidentiality agreements.

— The project carries potentially positive technological development which could help to reach the research objectives set at European level. Without public support the project could have been delayed, thereby missing the next wave of aircraft replacement.

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

([2]) Official Journal C 79, 1.4.2006, page 25.

([3]) Such as VITAL (EnVIronmenTALly Friendly Aero Engine) or NEWAC (NEW Aero engine Concept).

— EFE will involve around a hundred research jobs and safeguard a number of other jobs. It will increase the level of private expenditure in R&D.

The Commission has considered that the measure respects the conditions set out in the Community Framework for State aid for Research and Development ("R&D Framework") ([4]), does not threaten to distort competition in the Single Market and is therefore compatible with the EC Treaty in application of its Article 87, paragraph 3, sub c.

([4]) Official Journal C 45, 17.2.1996, page 5-16.

Mutualité Fonction Publique: La France accepte les propositions de la Commission ([1])

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1. Introduction

Le 20 juillet 2005, la Commission proposait à la France l'adoption de mesures utiles au titre de l'article 88, paragraphe 1, du traité CE ([2]) visant à mettre fin au régime d'aides incompatibles dont bénéficiait historiquement la Mutualité Fonction publique (MFP). Le 28 décembre 2005, la France marquait son accord sur lesdites mesures lesquelles doivent être mises en œuvre le 1er janvier 2007, au plus tard.

Avant de s'intéresser à la substance de cette affaire, il est souhaitable de brièvement resituer le mouvement mutualiste français dans son contexte historique et social.

En France, la protection sociale des personnes est assurée par trois types d'institutions. Outre les institutions «classiques» de prévoyance régies par le code de la sécurité sociale et les compagnies d'assurance régies par le code des assurances, on trouve également les mutuelles, régies par le code de la mutualité. Ces mutuelles, organismes à but non lucratif, sont regroupées en unions, elles-mêmes membres de grandes fédérations nationales. L'adhésion à une mutuelle, par essence volontaire, tend à garantir une protection sociale sans que soient pris en considération l'âge, la situation financière ou l'état de santé des mutualistes.

Avant même l'instauration de dispositifs publics de protection sociale en France au milieu du XXème siècle, le mouvement mutualiste, fondé sur la notion d'entraide et le plus souvent sur l'appartenance à une profession, a permis dès le XIXème siècle le partage des risques et, partant, la démocratisation de l'accès à la prévention. Fondé sur les principes de liberté, de solidarité, de démocratie et d'indépendance, le mouvement mutualiste a vu, dans de nombreux pays européens, le nombre de ses adhérents sans cesse augmenter et ses activités se diversifier. On estime aujourd'hui que plus d'un français sur deux est adhérent à une mutuelle.

2. Contexte: les mutuelles françaises de la fonction publique

En France, la MFP est une union d'une trentaine de mutuelles de fonctionnaires, spécialisées par catégorie professionnelle ([3]) et représentant 75% des adhérents de l'ensemble des mutuelles de fonctionnaires et environ 25% des effectifs de la mutualité française. La MFP exerce, à titre exclusif et par délégation de la loi, des activités de gestion des prestations du régime obligatoire de sécurité sociale des fonctionnaires. Elle exerce également des activités d'action sociale, telles que la gestion de centres médicaux, et de services d'assurance et de prévoyance complémentaires sur des marchés ouverts à la concurrence.

Gestion du régime de base de la sécurité sociale

La MFP et ses mutuelles membres ont été chargées de la gestion du régime de base de sécurité sociale des fonctionnaires français en 1947 et assurent ainsi les prestations en nature de l'assurance obligatoire maladie, maternité et invalidité des fonctionnaires titulaires de l'État et de leurs ayants droit ([4]).

Gestion du régime d'assurance complémentaire

Parallèlement au régime de base précédemment décrit, la MFP et ses mutuelles membres offrent aux fonctionnaires des produits d'assurance maladie et prévoyance. Ces produits constituent un régime complémentaire facultatif au régime de base. À cet égard, l'adhésion des fonctionnaires aux mutuelles est essentiellement motivée par la volonté de bénéficier d'une «complémentaire santé».

Œuvres sociales

La MFP et ses mutuelles membres offrent également à leurs adhérents des services de prévention ainsi que l'accès à des prestations d'action sociale (assistance matérielle ou financière aux adhérents et à leur famille) et à des réalisations à caractère sanitaire, social et culturel (accès à des établis-

([1]) Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leurs auteurs.

([2]) JO C 295 du 26 novembre 2005, p. 12.

([3]) Par exemple, personnels des ministères (Intérieur, Justice…), personnel de police, personnel hospitalier, personnel des collectivités territoriales.

([4]) Article L.712-6 du code de la sécurité sociale.

sements tels que crèches, pharmacies, opticiens, laboratoires d'analyse ou centres de vacances ou de loisirs).

3. Les aides à la MFP

À la suite d'une plainte introduite dans le courant de l'année 2003, la Commission a débuté l'instruction de ce dossier. Le plaignant dénonçait l'existence de trois mesures d'aides d'État au profit de la MFP et ses mutuelles affiliées.

La première mesure consistait en l'absence de prise en considération du coût réel des frais de gestion relatifs aux prestations du régime obligatoire de sécurité sociale des fonctionnaires pour la détermination du montant des remises consenties par l'État. En effet, à défaut d'existence d'une comptabilité analytique dans le chef des mutualités de la MFP, on ne pouvait exclure la possibilité que d'éventuels excédents perçus dans le cadre de la gestion du régime de sécurité sociale financent les activités d'assurance complémentaire.

La seconde mesure d'aide consistait dans le versement de subventions directes aux mutuelles. Le code de la mutualité prévoit en effet, en son article R.523-2, que «l'État peut accorder aux mutuelles constituées entre les fonctionnaires, agents et employés de l'État et des établissements publics nationaux des subventions destinées notamment à développer leur action sociale et à participer à la couverture des risques sociaux assurée par ces mutuelles». À ce titre, les subventions étatiques en cause bénéficient non seulement aux activités à finalité sociale des mutuelles, mais également à la réalisation des prestations d'assurance maladie complémentaire. La Commission a pu constater, à cet égard, l'absence de critères liés à l'octroi de ces subventions et, plus spécifiquement, à leur affection et à leur utilisation.

Enfin, la troisième mesure concernait la mise à disposition des mutuelles par l'État et les collectivités locales, sans contrepartie financière, de personnel et de locaux. Il est apparu lors de l'instruction du dossier, qu'il n'existait aucune disposition réglementant ces mises à disposition.

La MFP et ses mutuelles sont-elles des entreprises?

L'application des règles de concurrence, au titre desquelles figurent les règles relatives aux aides d'État, suppose que soit en cause une «entreprise». En l'espèce, dans la mesure où elles exercent des activités économiques d'assurance maladie complémentaire de nature facultative, les mutuelles en cause doivent être qualifiées d'entreprises au sens de l'article 87, paragraphe 1, du traité CE. Bien que relevant du statut de personne morale de droit privé à but non lucratif, les mutuelles exercent, dans cette mesure, une activité économique en concurrence avec les compagnies d'assurance dès lors que les éléments de solidarité caractérisant les prestations d'assurance en cause sont limités et ne sont pas comparables à ceux caractérisant les régimes obligatoires de sécurité sociale (voir arrêt de la Cour du 16 novembre 1995, FFSA/Ministère de l'Agriculture et de la Pêche,C-244/94 Rec. p. I-4013 et, a contrario, s'agissant de régimes obligatoires de sécurité sociale, arrêts de la Cour du 17 février 1993, Poucet et Pistre, C-159/91 et C-160/91, Rec. p. I-637, du 22 janvier 2002, Cisal, C-218/00, Rec. p. I-691, et du 16 mars 2004, AOK-Bundesverband e.a., C-264/01, Rec. p.I-2493). On rappellera dans ce contexte que, selon une jurisprudence constante, le statut juridique, le mode de financement et la finalité sociale poursuivie par une entité sont indifférents aux fins de sa qualification comme entreprise (voir, notamment, arrêt FFSA/Ministère de l'Agriculture et de la Pêche, précité).

À cet égard, il est intéressant de noter qu'il n'incombait pas à la Commission de procéder à une appréciation distincte de la qualification d'entreprise de la MFP et de ses mutuelles membres en fonction de la nature sociale ou économique des différentes activités leur incombant. Il est vrai qu'il ne pouvait d'emblée être exclu que, à l'exception de leurs activités de nature économique liées aux prestations d'assurance complémentaire, les mutuelles membres exercent des activités à finalité sociale dans le cadre de la gestion des prestations obligatoires de sécurité sociale et des actions sociales. Cependant, en l'absence de réglementation clairement définie et/ou appliquée, il demeurait à tout le moins un risque que les activités sociales subventionnées ne financent les activités économiques de «complémentaire santé». Il en était ainsi des remises destinées à couvrir les frais de gestion relatifs aux prestations du régime obligatoire de sécurité sociale des fonctionnaires, mais également des mises à disposition à titre gratuit de personnel et de locaux. En effet, aucune disposition ne permettait de garantir que ces remises soient exclusivement réservées aux activités non économiques des mutuelles.

Rappelons dans ce contexte, que la qualification de la MFP et de ses mutuelles en tant qu'entreprise ne constitue pas une nouveauté dans la mesure où la Commission avait antérieurement considéré, dans trois décisions [5], que les mutuelles étaient en concurrence avec d'autres sociétés d'assurance françaises et étrangères.

(5) Décision de la Commission C(2001)3456fin du 13.11.2001 (cas E46/2001, non publié), décision de la Commission C(2004)1922fin du 2.6.2004 (cas E46/2001), décision de la Commission C(2005)434fin du 2.3.2005 (cas E20/2004).

Des aides d'État incompatibles avec le marché commun

S'agissant, d'une part, de la qualification d'aide d'État des mesures dénoncées, on constatera que les conditions d'application de l'article 87, paragraphe 1, du traité CE sont satisfaites, les «mutuelles constituées entre les fonctionnaires, agents et employés de l'État et des établissements publics nationaux» bénéficiant d'avantages dont ne bénéficient pas les autres mutuelles ou tout autre organisme d'assurance (critère de la sélectivité). Ces avantages consistent dans la possibilité d'utiliser librement les excédents potentiels provenant des remises de gestion et les subventions directes ainsi que dans l'éventuelle gratuité de la mise à disposition de locaux et de personnel. On relèvera à cet égard que le manque de précision et, partant, de transparence, voire l'absence de réglementation nationale pertinente constituent la «pierre angulaire» des griefs formulés par la Commission. À ce titre, figure non seulement l'absence d'affection stricte des fonds alloués à des activités précisément déterminées, mais également l'absence de sectorisation comptable ou compatibilité analytique. Par ailleurs, il ne fait aucun doute que ces avantages consentis par la France à la MFP et à ses mutuelles étaient financés au moyen de ressources étatiques, que ce soit par le biais de prestations positives, telles que les subventions directes et les remises de gestion et également par des mises à disposition de locaux et de personnel consenties sans contrepartie et allégeant, ce faisant, les charges grevant normalement le budget desdites mutuelles.

Concernant enfin les conditions liées à l'affectation des échanges et à la distorsion de concurrence, la Commission a notamment relevé l'intensification de la concurrence sur le marché de l'assurance maladie et de prévoyance complémentaires. Il convient, dans ce contexte, de mettre en exergue les données rappelées par la Commission concernant l'importance du rôle de la MFP et de ses mutuelles membres sur le marché de l'assurance complémentaire santé en France, ces dernières ayant représenté, en 2003, 26% du marché offert par l'ensemble des mutuelles et 15,72% de l'ensemble des opérateurs d'assurance complémentaire.

S'agissant, d'autre part, enfin de la compatibilité avec le marché commun, les modalités de versement des aides étant déconnectées des coûts réellement supportés, opaques ou non réglementées, elles ne pouvaient être considérées comme remplissant les conditions des exemptions prévues à l'article 87, paragraphes 2 et 3, du traité CE.

Une recommandation de mesures utiles justifiée par la nature d'aide existante des mesures en cause

Aux termes de l'article premier, sous b), lettre i), du règlement (CE) n° 659/1999, du Conseil du 22 mars 1999, portant modalités d'application de l'article 93 du traité CE [devenu article 88 du traité] ([6]), une aide existante est définie comme étant «toute aide existant avant l'entrée en vigueur du traité dans l'État membre concerné, c'est-à-dire les régimes d'aides et aides individuelles mis à exécution avant, et toujours applicables après, ladite entrée en vigueur».

En application de cette disposition, la Commission a considéré que les trois mesures d'aide d'État en cause constituaient des mesures d'aides existantes car leur mise en œuvre était antérieure à l'entrée en vigueur du traité en France, à savoir le 1er janvier 1958. En effet, les remises de gestion ont été consenties aux mutuelles en cause consécutivement à la délégation du régime obligatoire de sécurité sociale par une loi de 1947. Quant aux subventions directes, elles résultent d'un arrêté de 1949 repris, en dernier lieu et en substance, dans un arrêté de 1962 ([7]). Enfin, la Commission a constaté que les mises à disposition de personnel et de locaux ont toujours caractérisé les relations unissant l'État aux mutuelles.

Dans ce contexte, la Commission a également précisé que les activités d'assurance complémentaire facultative concernées par lesdites mesures n'ont été réellement assujetties à la concurrence que consécutivement à l'adoption des directives communautaires adoptées en la matière, à savoir les directives 92/49/CEE et 92/96/CEE du Conseil des 18 juin et 10 novembre 1992, concernant respectivement le secteur de «l'assurance non vie» et de «l'assurance vie» ([8]).

D'un point de vue juridique, eu égard à la qualification d'aide existante retenue et en dépit de leur incompatibilité avec le marché commun, la Commission n'a pas exigé la récupération des avantages dont ont bénéficié la MFP et ses mutuelles membres. On rappellera, à cet égard, que seul le constat concomitant de l'incompatibilité de l'aide d'État en cause et de son illégalité est de nature à permettre à la Commission d'en exiger la récu-

([6]) JO L 83 du 27 mars 1999, p. 1.

([7]) Arrêté du 19 septembre 1962 sur les conditions de participation de l'État à la couverture des risques sociaux assurés par les sociétés mutualistes constituées entre les fonctionnaires, agents et employés de l'État et des établissements publics nationaux (dit arrêté «Chazelle»).

([8]) JO L 228 du 11 août 1992, p. 22 et JO L 360 du 9 décembre 1992, p. 27.

pération [9]. Or, seules les aides nouvelles mise en exécution en violation de l'article 87, paragraphe 3, du traité CE, peuvent être qualifiées d'aides illégales.

Cependant, eu égard à l'incompatibilité avec le marché commun des mesures d'aides, la Commission a proposé que les régimes soient supprimés ou, à tout le moins, amendés afin que ne perdurent pas les distorsions de concurrence en résultant.

Ainsi, en application de l'article 18 du règlement n° 659/99, la Commission a adressé à la France, le 20 juillet 2005, une recommandation proposant l'adoption de mesures utiles consistant, en substance, (1) en ce que soit instaurée une comptabilité analytique permettant une affectation des coûts et des produits selon l'activité en cause, (2) en une limitation des remises de gestion aux coûts réels de gestion du régime de base de la sécurité sociale, (3) en une suppression de toute aide sélective affectée à la gestion du régime d'assurance complémentaire des mutuelles, (4) en un découplement de l'assurance complémentaire et de l'accès aux œuvres sociales ainsi que (5) en une évaluation et une identification comptable des mises à disposition de personnel et de locaux.

D'un point de vue procédural, la France a été invitée à marquer son accord à la mise en œuvre desdites mesures utiles qui constituent une recommandation de la Commission, au sens de l'article 249 du traité CE, ne présentant pas de valeur juridique contraignante. À défaut d'accord de l'État membre concerné, on rappellera que la Commission, pour autant qu'elle maintienne la position originellement prise eu égard aux commentaires de l'État membre, ouvre la procédure formelle d'examen de l'article 88, paragraphe 2, du traité CE afin que cet État ainsi que les tiers intéressés soient mis en mesure de présenter leurs observations. Au terme de cette procédure ne présentant pas de caractère suspensif, la Commission adopte une décision finale contraignante.

En l'espèce, comme il a été précédemment constaté, la France a marqué son accord sur les mesures utiles proposées par la Commission, mais a toutefois demandé que soit différée l'échéance de mise en œuvre des nouvelles règles initialement fixée au 1er janvier 2006. Faisant droit à cette demande justifiée par la difficulté tant matérielle que procédurale de ladite mise en oeuvre, la Commission a accepté, le 16 mai 2006, [10] que cette dernière soit achevée au 1er janvier 2007.

4. Conclusion et perspectives de réforme en France

Dans le cadre de leur mise en œuvre des mesures utiles, les autorités françaises ont, d'ores et déjà, abrogé l'article R-523-2 du code de la mutualité (ancien) relatif aux subventions directes ainsi que son arrêté d'exécution Chazelle [11].

Ces abrogations font suite à la recommandation de mesures utiles de la Commission, mais également, au niveau national, à l'arrêt du Conseil d'État du 26 septembre 2005, Mutuelle générale des services publics [12]. Bien que ne présentant pas de lien direct avec l'application des règles de contrôle des aides d'État, il est intéressant de noter que la juridiction suprême administrative française a fait droit à la demande de la Mutuelle générale des services publics tendant à obtenir l'abrogation de l'article R-523-2 du code de la mutualité (ancien) et de l'arrêté Chazelle. Le Conseil d'État a en effet considéré que ces dispositions violaient le principe d'égalité de traitement devant le service public en réservant l'attribution des subventions qu'elles prévoient aux mutuelles exclusivement constituées de fonctionnaires et d'agents de l'Etat et de ses établissements publics, à l'exclusion des mutuelles, telles que la requérante, accueillant également d'autres catégories d'adhérents.

Dans ce contexte, la France vient d'adopter une base légale autorisant l'État, les régions, les départements, les communes ainsi que leurs établissements publics à contribuer au financement des garanties de protection sociale complémentaire auxquelles les agents qu'ils emploient souscrivent (article 22 bis de la loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires [13]). Il s'agit sans nul doute de la première étape qui devrait permettre, selon le souhait des autorités françaises, l'octroi d'aides d'État compatibles avec le marché commun à la MFP et à ses mutuelles membres aux fins de la réalisation des activités de gestion du régime d'assurance complémentaire. Cependant, comme indiqué dans l'exposé des motifs de cet amendement du gouvernement, approuvé par le Parlement lors de sa séance du 29 juin 2006, il n'est pas préjugé des modalités de mise en œuvre de l'aide octroyée, ces modalités devant garantir l'effet utile des mesures utiles de la Commission.

(9) Voir, à cet égard, arrêts de la Cour du 2 juillet 1974, Italie/Commission, 173/73, Rec. p. 709, paragraphe 16, et du 11 juillet 1996, SFEI, C-39/94, Rec.1996, p. I-3547, paragraphe 41.
(10) JO C 268 du 4 novembre 2006, p. 5.
(11) Précité, note de bas de page n° 7.
(12) Arrêt n° 262282.
(13) JORF du 14 juillet 1983.

State aid in the broadcasting sector: two decisions regarding ad hoc aid to public service broadcasters in Portugal and the Netherlands (1)

Pedro DIAS, Directorate General for Competition, unit H-2 and
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Introduction

In CPN's Spring 2004 edition, the application of State aid rules regarding the public broadcasting sector in several Member States was discussed (2). At the time, the Commission had made a significant leap forward in its assessment of the financing of public service broadcasters in the European Union. The article had a special focus on the existing aid cases. Recently, the Commission adopted two more decisions, this time with regard to *ad hoc* aid which was granted to the Dutch and the Portuguese broadcasters. Whereas in the Portuguese case the Commission did not find evidence of overcompensation, in the Dutch case it found that the public broadcasters had been overcompensated and ordered the Dutch authorities to recover the respective amount. This article is a follow up of the Spring 2004 article and presents the Decisions taken in these two *ad hoc* aid cases.

Background

Following several complaints from commercial broadcasters, the Commission initiated different procedures with regard to the financing of the public service broadcasters in Portugal and the Netherlands (3). It opened, on the one hand, a procedure regarding new aid granted through *ad hoc* financing and, on the other hand, a procedure concerning existing aid, granted through the regular or annual funding.

It should be noted that, depending on the qualification of an aid measure as "new aid" or "existing aid", different procedures have to be followed. The existing aid procedure covers the regular or annual financing of the public service broadcasters. These traditional financing systems generally existed in many Member States prior to their accession to the EU. In some cases, e.g. France, Italy, Portugal and Spain the Commission considered that the national financing systems were not or no longer compatible with the Treaty and cooperated with the Member States in adapting these systems to the state aid rules. These investigations have been closed in the meantime. Furthermore, the Commission initiated cases in Germany, the Netherlands and Ireland. The latter cases are still pending.

The new aid procedure covers state aid measures which are not part of the regular or annual financing of the public service broadcasters. Any new aid granted in the past which is incompatible with the Treaty has to be recovered by the national authorities, thereby restoring the situation before the aid was granted.

In September 2003, the Commission asked Portugal in the existing aid procedure to review certain aspects of its existing financing system for the public service broadcaster, in order to make it compatible with the common market. Portugal was requested to introduce safeguards to keep the financing of RTP within the minimum necessary to ensure the proper execution of its public service tasks and to prevent the broadcaster from unduly benefiting from its commercial activities (thereby avoiding overcompensation and cross-subsidies). Moreover, changes were needed to ensure that public and private broadcasters competed on equal terms in commercial markets such as TV advertising (market conform behaviour for commercial activities). Following a commitment from Portugal to introduce these changes before the end of 2006, the Commission decided to close the existing aid procedure in March 2006 (4).

In the Dutch case, in March 2005 the Commission services presented their preliminary view on the existing regular financing system to the Dutch authorities (5). The latter submitted a draft new Media law to the Commission, but this proposal has not yet been adopted by the Dutch Parliament.

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

(2) CPN 1/2004. Available at the following internet address: http://ec.europa.eu/competition/publications/cpn/cpn 2004_1.pdf.

(3) The Dutch public service broadcasters are actually private undertakings entrusted with a public service mission but will be referred to as public service broadcasters for the purpose of this article.

(4) Cf. Commission Decision E 14/2005, on http://ec.europa.eu/competition/state_aid/decisions/e14_2005/en.pdf and see also the press release IP/06/349 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/349&format=HTML&aged=1&language=en&guiLanguage=en.

(5) Cf. press release IP 250/2005 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/250&format=HTML&aged=1&language=EN&guiLanguage=en.

Ad hoc funding measures

The Portuguese ad hoc State aid case concerned a financial restructuring agreement between the Government and the public service broadcaster intended to reduce the €1 billion debt accumulated by RTP by 2003. The agreement runs from 2003 to 2019 and involves capital injections from the Government. In July 2006, the Commission decided not to raise objections to this measure without initiating the formal investigation procedure. The capital injections granted to RTP under the restructuring agreement were regarded as new aid because of their *ad hoc* nature. Although the public service concession contracts provided for a specific financing possibility for investments in public service equipment by means of capital injections, it was clear that the capital injections under the restructuring agreement were not intended to finance concrete investments. On the contrary, they resulted from an *ad hoc* decision by the State and were not calculated with relation to the existing parameters of RTP's annual compensation system. Furthermore, these capital injections were intended, among others, to cover certain public service costs for which RTP could not claim compensation under the rules of the concession contracts in place in the relevant period.

In the Dutch case, after having assessed the complaints, the Commission opened the formal investigation procedure in February 2004 ([6]). It received several comments from interested parties. However, many of these comments concerned the activities of broadcasters on neighbouring markets. Since these issues were not directly related to the granting of *ad hoc* aid and given their fundamental importance, they will be dealt with in the existing aid procedure.

Both *ad hoc* aid cases concern illegal measures since they were implemented without prior notification to and approval by the Commission.

Like in the Portuguese case, in its decision to open the formal investigation procedure on the Dutch case, the Commission came to the conclusion that the aid granted was to be considered as new aid because of its *ad hoc* character. In the final decision, adopted in June 2006, it was further explained why the measures had to be considered as new aid. For example, the legal basis for granting the aid was established after the entry into force of the Treaty. Moreover, the actual payments were only made as of 1994. In addition, the conditions under which the bulk of the actual payments were made were laid down in so-called Transfer protocols and these protocols were only adopted in 1999 and in 2002. Finally, contrary to the regular annual funding, the *ad hoc* payments could not be qualified as payments to which the public service broadcasters were entitled. The payments were made upon request and were scrutinised by the NOS and were thus not an automatism. Finally, the funding was granted for specific purposes laid down specifically in the protocols, — which was not the case for the regular annual funding.

In line with the application of the State aid rules to public broadcasters explained in the Spring 2004 article, in both cases the Commission assessed the proportionality of the compensation on the basis of Article 86(2) EC treaty and of the Broadcasting Communication ([7]). In particular, the Commission assessed whether or not the broadcasters concerned had been overcompensated for the provision of the television public service.

In order to asses the proportionality of the compensation received, the Commission had to take into account not only the *ad hoc* measures but also all regular or annual payments to the broadcasters and compare the overall amounts with the net public service costs ([8]). The Commission also had to assess possible anti-competitive behaviour, notably price undercutting. In the Portuguese case, the Commission considered that sales of sports rights by RTP between 1998 and 2000 were done below market value and, thus, involved state aid. In the Dutch case, after an in-depth investigation regarding the price setting in the advertising market, the Commission came to the conclusion that there was no evidence of such behaviour. Despite the fact that discounts had been granted, revenues remained relatively constant. Thus, it could not be held that the public broadcasters had foregone income by lowering the advertising prices.

In the Portuguese case, the Commission came to the conclusion that the net present value of the capital injections in favour of RTP between 2003 and 2019 was lower than RTP's net public service costs until the end of 2003, taking into account all annual compensations and other *ad hoc* aid measures in the same period.

([6]) Commission Decision, C 2/04 (ex NN 170/03) — Ad-hoc measures to Dutch public broadcasters and NOB — Invitation to submit comments pursuant to Article 88(2) of the EC Treaty (Text with EEA relevance), OJ C 61, 10.3.2004, p. 8 — 21.

([7]) Communication from the Commission on the application of State aid rules to public service broadcasting ("Broadcasting Communication"), OJ C 320, 15.11.2001., p 5-11.

([8]) Net public service costs are the costs of providing the public service minus the revenues from the exploitation of the public service, such as advertising revenues (cf. Broadcasting Communication para. 57)

With regard to the Dutch public service broadcasters, the Commission firstly found that they did not, according to the Decree concerned, allocate costs that are shared by the public service and non-public service activities in a consistent manner. It could therefore not be concluded that the costs were correctly allocated on the basis of accepted cost allocation methods. Consequently, the Commission considered for instance that all the net revenues of the commercial activities of the public service broadcasters should be taken into account in determining whether State funding had been proportional to the public service costs. This was actually consistent with the Dutch rules, which oblige the broadcasters to use all of their profits, including those from commercial activities, for public service purposes.

Secondly, contrary to the Portuguese case, the Commission did find an overcompensation of the Dutch public service broadcasters in the period 1994-2005. Due to the fact that the final decision covered a period which was slightly different from the period covered by the decision to open the formal investigation procedure and since the figures at the individual level were made available by the Dutch authorities only after the adoption of that decision, the conclusion on the level of overcompensation was different. Whereas, in the opening decision, the Commission had established an overcompensation of about €110 million, it came to the final conclusion that the broadcasters had received an overcompensation of € 76 million. This overcompensation was included in the reserves of the individual broadcasters. Nevertheless, in 2005, the umbrella organisation of the Dutch public service broadcasters, already recovered a portion of the excess reserves from the individual broadcasters. The NOS allowed these broadcasters, at that stage, to maintain 10% of their annual compensation as a buffer, but had to transfer their individual excess reserves to the umbrella organisation. The excess reserves were transferred to the NOS and, instead of being handed back to the State, the funds remained with the NOS.

In addition, the NOS was itself overcompensated by the State. However, not all of the overcompensation was due to the granted *ad hoc* aid. Part of the overcompensation stemmed from the regular annual financing. The Commission thus ordered the Dutch authorities to recover the *ad hoc* overcompensation directly from the NOS, rather than from all the individual broadcasters.

Conclusion

Following the same line of assessment, the Commission came to different conclusions in the two procedures. In the Portuguese case, it turned out that the aid, which was granted illegally, was compatible with the Treaty, since it was lower than the costs incurred with the public service and, therefore, in line with Article 86(2) EC. In the Dutch case, the broadcasters did receive overcompensation. They received aid exceeding the costs related to the fulfilment of their public service mission. Nevertheless, since the excess reserves, except for the 10% reserve margin, had been transferred to the NOS and the NOS itself also received overcompensation, the Dutch authorities were ordered to recover the overcompensation directly from the NOS rather than from the individual broadcasters. For the future, such overcompensation should be prevented by a system whereby the building up of reserves should not exceed the 10% and whereby the excess reserves should be transferred back to the State ([9]).

The *ad hoc* aid cases in both Member States and the Portuguese existing aid case having been closed, the Commission now intends to bring to an end the existing aid case in the Netherlands, which is the only remaining procedure with regard to these two countries. Nevertheless, the closure of this latter procedure depends critically on the possible adoption of the above mentioned new Media Wet and thus also on the political developments in the Netherlands in the coming months following the elections which took place in November.

([9]) The Dutch authorities committed themselves to apply the system of monitoring the excess reserves, which was for the first applied in 2005, for the coming years untill the new Media Act would be adopted. The new Media Act should also contain such a rule.

Information Section

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Assistants to the Director-General	*Jean HUBY*	02 29 98907
	Thomas DEISENHOFER	02 29 85081
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Adviser: Consumer Liaison Officer	*Juan RIVIERE Y MARTI*	02 29 51146/02 29 60699
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2. Information technology	*Manuel PEREZ ESPIN*	02 29 61691
Deputy Head of Unit	*Jean-Jacques CAVEZ*	02 29 61336
3. Document management, information and communication	*Corinne DUSSART-LEFRET*	02 29 61223/02 29 90797
DIRECTORATE A		
Policy and Strategic Support	***Emil PAULIS***	02 29 65033
1. Antitrust policy and scrutiny	*Joos STRAGIER*	02 29 52482
Deputy Head of Unit	*Céline GAUER*	02 29 63919
2. Merger policy and scrutiny	*Carles ESTEVA MOSSO*	02 29 69721
3. European Competition Network and Institutional Relations	*Kris DEKEYSER*	02 29 54206
Deputy Head of Unit	*Donncadh WOODS*	02 29 61552
4. International Relations	*Blanca RODRIGUEZ GALINDO*	02 29 52920
DIRECTORATE B		
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1. Energy, Water	*Lars KJOLBYE*	02 29 69417
Deputy Head of Unit	*Dominik SCHNICHELS*	02 29 66937
2. Basic industries, Chemicals and Pharmaceuticals	*Georg DE BRONETT*	02 29 59268
3. Mergers I	*Dan SJOBLOM*	02 29 67964
Deputy Head of Unit	*John GATTI*	02 29 55158
4. Mergers II	*Olivier GUERSENT*	02 29 65414
DIRECTORATE C		
Information, Communication and Media	**...**	
Adviser	*Claude RAKOVSKY*	02 29 55389
1. Telecommunications and post; Information society Coordination	*Michael ALBERS*	02 29 61874
Deputy Head of Unit	*Reinald KRUEGER*	02 29 61555
— Liberalisation directives, Article 86 cases	*Christian HOCEPIED*	02 29 60427/02 29 52514
2. Media	*Arianna VANNINI*	02 29 64209
Deputy Head of Unit	*Gerald MIERSCH*	02 29 96504
3. Information industries, Internet and consumer electronics	*Per HELLSTROEM*	02 29 66935
Deputy Head of Unit	*Nicholas BANASEVIC*	02 29 66569
4. Mergers	...	

DIRECTORATE D		
Services	***Cecilio MADERO VILLAREJO***	02 29 60949
Adviser	*Fin LOMHOLT*	02 29 55619/02 29 57439
1. Financial services (banking and insurance)	*Irmfried SCHWIMANN*	02 29 67002
2. Transport	*Linsey Mc CALLUM*	02 29 90122
Deputy Head of Unit	*Maria José BICHO*	02 29 62665
3. Distributive trades & other services	*Zsuzsanna JAMBOR*	02 29 87436
Deputy Head of Unit	*Rüdiger DOHMS*	02 29 55984
4. Mergers	*Joachim LUECKING*	02 29 66545
Deputy Head of Unit	*Helena LARSSON HAUG*	02 29 69338
DIRECTORATE E		
Industry, Consumer goods and Manufacturing	***Paul CSISZAR***	02 29 84669
1. Consumer goods and Foodstuffs	*Yves DEVELLENNES*	02 29 51590/02 29 52814
Deputy Head of Unit	*Andrés FONT GALARZA*	02 29 51948
2. Mechanical and other Manufacturing industries including transportation equipment	*Paolo CESARINI*	02 29 51286/02 29 66495
3. Mergers	*Maria REHBINDER*	02 29 90007
Deputy Head of Unit	*Guillaume LORIOT*	02 29 84988
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1. Cartels I	*Paul MALRIC-SMITH*	02 29 59675
Deputy Head of Unit	*Tea MÄKELÄ*	02 29 54430
2. Cartels II	*Dirk VAN ERPS*	02 29 66080
3. Cartels III	*Jaroslaw POREJSKI*	02 29 87440
Deputy Head of Unit	*Flavio LAINA*	02 29 69669
4. Cartels IV	*Ewoud SAKKERS*	02 29 66352
Deputy Head of Unit	*Sari SUURNÄKKI*	02 29 91828
DIRECTORATE G		
State aid I: Cohesion and competitiveness	***Humbert DRABBE***	02 29 50060/02 29 52701
1. Regional aid	*Robert HANKIN*	02 29 59773/02 29 68315
Deputy Head of Unit	*Klaus-Otto JUNGINGER-DITTEL*	02 29 60376/02 29 66845
2. Industrial restructuring	*Karl SOUKUP*	02 29 67442
3. R&D, innovation and risk capital	*Wouter PIEKE*	02 29 59824/02 29 67267
4. Environment and Energy	*Jorma PIHLATIE*	02 29 53607/02 29 69193
DIRECTORATE H		
State aid II: Network industries, liberalised sectors and services	***Loretta DORMAL-MARINO***	02 29 58603/02 29 53731
1. Post and others services	*Joaquin FERNANDEZ MARTIN*	02 29 51041
Deputy Head of Unit	*Daniel BOESHERTZ*	02 29 66437
2. Financial services	*Jean-Louis COLSON*	02 29 60995/02 29 62526
3. Telecommunications and Media	*Eric VAN GINDERACHTER*	02 29 54427
Deputy Head of Unit	*Sandro SANTAMATO*	02 29 93447
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1. State aid policy	*Alain ALEXIS*	02 29 55303
2. Strategic support and decision scrutiny	*Nicola PESARESI*	02 29 92906
3. State aid network and transparency	*Wolfgang MEDERER*	02 29 53584/02 29 65424
4. Enforcement and monitoring	*Dominique VAN DER WEE*	02 29 60216

Reporting directly to the Commissioner

Hearing officer	*Serge DURANDE*	02 29 57243
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 DG's home page on the World Wide Web at http://europa.eu.int/comm/competition/speeches/

Speeches by the Commissioner, 1 May 2006 — 31 August 2006

12 July: **Press conference on imposing penalty payments on Microsoft — introductory remarks** — Neelie KROES — Brussels (European Commission)

7 July: **Aktuelle Herausforderungen in der Wettbewerbspolitik** — Neelie KROES — Bonn, Germany (Bundeskartellamt)

6 July: **Competition policy in a Lisbon context — the State of Play** — Neelie KROES — Berlin, Germany (German Bundestag — Europaausschuss)

26 June: **Speech by Commissioner Kroes before the Korean Competition Forum** — Neelie KROES — Seoul, Korea (Korean Competition Forum — Fourth Annual Bilateral Meeting)

23 June: **Competition policy — 2005 review, 2006 outlook** — Neelie KROES — Paris, France (Conference 'Concurrence 2006')

20 June: **Competition Policy: Achievements in 2005, Work in 2006, Priorities in 2007** — Neelie KROES — European Parliament, Brussels

19 June: **Competition law and its surroundings — links and new trends** — Neelie KROES — Vienna (European Commission)

17 June: **Public hearing on preliminary findings of retail banking sector inquiry — opening remarks** — Neelie KROES — Brussels (European Commission)

14 June: **Closing Remarks at Public Discussion on Article 82 (abuse of dominance)** — Neelie KROES — Brussels (DG Competition)

12 June: **Challenges to the integration of the European market: protectionism and effective competition policy** — Neelie KROES — London (Competition Law Association)

6 June: **Tougher competition in retail financial services: a threat or a promise?** — Neelie KROES — Brussels (Eurofi)

Speeches and articles, Directorate-General Competition staff, 1 May 2006 — 31 August 2006

29 June: **The vision and objectives underpinning the liberalisation of the EU telecom sector** — Herbert UNGERER — Brussels (Interdisciplinary Centre for Law and IT (ICRI))

12 June: **Competition in energy Markets — EC's Reaction and Key Views** — Herbert UNGERER — Oslo, Norway (Eurelectric)

8 June: **Intellectual property and competition law: collective management rights in the online world** — Torben TOFT — Conrad Hotel, Brussels (European Commission)

19 May: **Review of Anti Monopoly Law — Blanca RODRIGUEZ GALINDO** — Hanghzou, China (International Seminar on Anti Monopoly Law)

15 May: **Keynote address at the Energy Regulation & Investment Conference** — Herbert UNGERER — Budapest, Hungary (Energy Regulators Regional Association (ERRA))

4 May: **Cartel WG plenary session — opening speech** — Philip LOWE — Cape Town, South Africa (ICN Annual Conference)

Community Publications on Competition

New publications and publications coming up shortly

- ***Report on Competition policy 2005***
- ***Competition policy newsletter, 2007, Number 1***

Information about our publications as well as PDF versions of them can be found on the DG Competition web site:
http://ec.europa.eu/competition/publications

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Press releases
1 May 2006 — 31 August 2006

All texts are available from the Commission's press release database RAPID at: http://europa.eu.int/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. Note: Languages available vary for different press releases.

Antitrust

IP/06/1019 — 19/07/2006 — Competition: Commission requests Italy to comply with EU rules on electronic communications

IP/06/999 — 17/07/2006 — Competition: Commission holds public hearing on competition in retail banking

IP/06/979 — 12/07/2006 — Competition: Commission imposes penalty payment of €280.5 million on Microsoft for continued non-compliance with March 2004 Decision

IP/06/857 — 28/06/2006 — Competition: Commission revises Guidelines for setting fines in antitrust cases

IP/06/808 — 20/06/2006 — Competition: Commissioner Kroes discusses introduction of Chinese competition law with Chinese Government

IP/06/698 — 31/05/2006 — Competition: Commission imposes fines of €344.5 million on producers of acrylic glass for price fixing

IP/06/560 — 03/05/2006 — Competition: Commission fines seven companies €388.128 million for bleaching chemicals cartels

State aid

IP/06/1086 — 03/08/2006 — Financing of aviation and maritime security measures: the Commission takes stock

IP /06/1043 — 20/07/2006 — State aid: Commission requests Belgium to clarify financing of public service broadcaster VRT

IP /06/1042 — 20/07/2006 — State aid: Commission endorses €67 million of public funding for British R&D project led by Rolls-Royce

IP /06/1040 — 20/07/2006 — State aid: Commission refers Italy to Court of Justice for failure to recover illegal state aid

IP /06/1038 — 20/07/2006 — State aid: Commission opens investigation into extension of preferential electricity tariff in Italy

IP /06/1037 — 20/07/2006 — State aid: Commission concludes that two loans to recyclable waste collection company VAOP do not constitute aid

IP /06/1036 — 20/07/2006 — State aid: Commission rejects restructuring aid for Kliq in The Netherlands and orders recovery of €9.25 million

IP /06/1034 — 20/07/2006 — State aid: Commission opens inquiry into state financing of digital terrestrial television (DVB-T) in German Länder of Bavaria and North Rhine-Westphalia

IP /06/1033 — 20/07/2006 — State aid: Commission endorses €2 million restructuring aid to Polish energy company; opens investigation into restructuring aid to Polish metal producer

IP /06/1028 — 19/07/2006 — Commission authorises Germany to grant € 2.5 billion aid to its coal industry for the year 2006

IP /06/1021 — 19/07/2006 — State aid: Commission demands repeal of Luxembourg's preferential tax regime for financial holdings

IP /06/1020 — 19/07/2006 — State aid: Commission authorises aid scheme by the French Agence de l'innovation industrielle for innovation-mobilising programmes

IP /06/1018 — 19/07/2006 — State aid: Commission endorses €206.1 million aid for cluster of nine electronics production facilities in Kobierzyce (Poland)

IP /06/1016 — 19/07/2006 — State aid: Commission endorses €100 million aid for risk capital funds in southern Italy

IP /06/1015 — 19/07/2006 — State aid: Commission adopts Guidelines on state aid to support risk capital investments in SMEs

IP /06/1014 — 19/07/2006 — State aid: Commission refers France to Court of Justice for failure to recover illegal state aid

IP /06/1013 — 19/07/2006 — State aid: Commission prohibits public funding for additional broadband network in Appingedam (Netherlands)

IP /06/953 — 07/07/2006 — State aid: Commission endorses support for green electricity in Austria

IP /06/949 — 07/07/2006 — State aid: Commission endorses public funding to bridge broadband communications gap in Greece

IP/06/939 — 06/07/2006 — State aid: Commission requests Portugal to repeal fiscal exemption on capital gains from privatisation and

IP/06/932 — 05/07/2006 — State aid: Commission endorses financial restructuring plan for Portuguese public broadcaster RTP

IP /06/928 — 04/07/2006 — Investigation into measures to combat the bird flu crisis in Italy

IP /06/925 — 04/07/2006 — State aid: Commission investigates support to Greek shipyard

IP /06/922 — 04/07/2006 — State aid: Commission partially endorses training aid to Ford Genk

IP /06/913 — 04/07/2006 — Commission authorises Poland to grant rescue aid for bus company Przedsiębiorstwo Komunikacji Samochodowej w Olkuszu S.A.

IP/06/894 — 30/06/2006 — State aid: Commission refers Austria to Court for incomplete implementation of financial transparency Directive

IP /06/851 — 27/06/2006 — State aid: 24 Member States accept new regional aid guidelines (2007-2013); Commission opens formal investigation against Germany

IP /06/834 — 23/06/2006 — Commission authorises the Czech Republic to sell shares of its railway catering company to Czech Railways

IP /06/832 — 23/06/2006 — Tramway transport: European Commission authorises rescue aid for Silesian Trams S.A.

IP /06/830 — 23/06/2006 — European Commission approves start-up aid for an air service linking Toulon and London

IP /06/828 — 23/06/2006 — State aid: Commission endorses €92.6 million aid to Hankook for new tyre production plant in Hungary

IP /06/822 — 22/06/2006 — State aid: Commission orders Dutch public service broadcaster NOS to pay back €76.3 million excess ad hoc funding

IP /06/821 — 22/06/2006 — State aid: Commission authorises extension of urban tax-free zones scheme in France

IP /06/819 — 22/06/2006 — State aid: Commission opens formal investigation into aeronautical R&D aid granted by Belgium

IP /06/771 — 12/06/2006 — State aid: Commission decides Nordbrandenburger UmesterungsWerke does not qualify for regional investment bonus for SMEs

IP /06/755 — 08/06/2006 — State aid: Commission endorses public funding to bridge broadband communications gap in Latvia

IP /06/754 — 08/06/2006 — State aid: debt write-off for Slovak alcohol producer declared illegal subsidy

IP /06/746 — 07/06/2006 — State aid and freedom of establishment: Commission reexamines fees paid for the distribution of French savings books and initiates proceedings over special rights to distribute them

IP /06/743 — 07/06/2006 — The European Commission authorizes a State guarantee for the financing of new rail infrastructure in Ireland

IP /06/742 — 07/06/2006 — Flights from the outermost regions: Changes to French social aid scheme for passengers from Réunion cleared by the Commission

IP /06/741 — 07/06/2006 — European Commission authorises Dutch aid to promote the European Train Control System

IP /06/708 — 01/06/2006 — State aid: Commission welcomes phasing out of Spain's tax incentives for investment abroad

IP /06/641 — 17/05/2006 — State aid: Commission endorses media support schemes in Poland, Ireland, France and Denmark

IP /06/640 — 17/05/2006 — State aid: Commission opens investigation into Italian merger incentives for small and micro enterprises

IP /06/638 — 17/05/2006 — State aid: Commission opens inquiry into proposed training grant to Auto Europa; endorses training grant to Webasto

IP /06/637 — 17/05/2006 — State aid: Commission opens investigations into restructuring aid to Slovenian wood manufacturers

IP /06/633 — 16/05/2006 — State aid: Commission endorses French guarantee scheme for financing shipbuilding

IP /06/632 — 16/05/2006 — European Commission approves public financing of infrastructure at City of Derry Airport

IP /06/631 — 16/05/2006 — The European Commission approves social aid scheme for air travel in the Highlands and Islands of Scotland

IP /06/630 — 16/05/2006 — Wittenberg Landkreis: Commission finds financing of bus transport to be compatible with single market

IP /06/629 — 16/05/2006 — Commission accepts changes to two State aid schemes for maritime transport in Finland

IP /06/628 — 16/05/2006 — Commission authorises extension of Mont Blanc Tunnel concession as part of safety improvements

IP /06/627 — 16/05/2006 — The European Commission approves a system for start-up aid for transport services from regional airports in the UK

IP/06/608 — 12/05/2006 — State aid: Commission welcomes phasing out of preferential tax regimes for offshore trading companies in Malta

Merger

IP/06/1143 — 31/08/2006 — Mergers: Commission authorises proposed take-over by Saab of Ericsson Microwave Systems

IP/06/1132 — 28/08/2006 — Mergers: Commission approves acquisition of Avent by Philips

IP/06/1131 — 28/08/2006 — Mergers: Commission approves proposed acquisition of Winterthur by AXA

IP/06/1130 — 28/08/2006 — Mergers: Commission authorises proposed take-over by Thule over CHAAS Holdings, Advanced Accessory Systems and Valley Industries

IP/06/1109 — 21/08/2006 — Merger: The European Commission adopted a « Statement of Objections » regarding the merger project between Suez and Gaz de France

IP/06/1111 — 18/08/2006 — Mergers: Commission clears takeover of Aviall by Boeing

IP/06/1107 — 18/08/2006 — Mergers: Commission clears proposed acquisition of joint control by Belgian cargo handling company Sea-Invest in Dutch cargo handling company EMO-EKOM

IP/06/1104 — 16/08/2006 — Mergers: Commission opens in-depth investigation into Thules' take-over of Schneeketten

IP/06/1100 — 14/08/2006 — Mergers: Commission opens in-depth investigation into Metso's take-over of Aker Kvaerner's pulp machine business

IP/06/1096 — 10/08/2006 — Statement by Commission Spokesperson: Receipt of letter from Spanish authorities on Eon/Endesa merger

IP/06/1093 — 10/08/2006 — Mergers: Commission clears proposed acquisition of BP's Dormagen business by Ineos

IP/06/1077 — 28/07/2006 — Mergers: Commission approves Celsa Group's proposed acquisition of control over Fundia Reinforcing AS

IP/06/1076 — 28/07/2006 — Mergers: Commission authorises Smithfield's proposed acquisition of European processed meat products business of Sara Lee Corporation

IP/06/1062 — 26/07/2006 — Mergers: Commission closes inquiry after China International Marine Containers abandons acquisition of control over the Burg Group

IP/06/1061 — 25/07/2006 — Mergers: Commission approves proposed acquisition of joint control of General Healthcare Group by Apax Partners Holdings Limited and Network Healthcare Holdings Limited

IP/06/1056 — 24/07/2006 — Mergers: Commission approves proposed merger between Alcatel and Lucent

IP/06/1046 — 20/07/2006 — Mergers: Commission clears catering joint venture between LSG and Gate Gourmet in Paris Charles de Gaulle airport

IP/06/1017 — 19/07/2006 — Mergers: Commission approves proposed acquisition of J.M. Huber's on-site paper coating mineral business by Omya, subject to conditions

IP/06/990 — 14/07/2006 — Mergers: Commission clears proposed acquisition of UPC France by Cinven

IP/06/991 — 13/07/2006 — Mergers: Commission approves proposed acquisition of Falconbridge by Xstrata

IP/06/975 — 11/07/2006 — Mergers: Commission approves proposed acquisition of joint control of Pražská plynárenská by E.ON

IP/06/926 — 04/07/2006 — Mergers: Commission approves proposed merger of Canadian mining companies Inco and Falconbridge, subject to conditions

IP/06/921 — 04/07/2006 — Mergers: Commission approves proposed acquisition of control of Ugitech by Schmolz + Bickenbach

IP/06/920 — 04/07/2006 — Mergers: Commission approves proposed acquisition of Carlson Wagonlit by CCI and OEP

IP/06/904 — 30/06/2006 — Mergers: Commission approves proposed acquisition of Ciba's Textile Effects business by Huntsman International

IP/06/892 — 29/06/2006 — Mergers: Commission approves proposed acquisition of Fotovista by DSG

IP/06/877 — 29/06/2006 — Mergers: Commission authorises proposed take-over by Sonae Indústria of Hornitex

IP/06/876 — 29/06/2006 — Mergers: Commission clears drinks distribution joint venture between Scottish & Newcastle and Kuehne + Nagel

IP/06/836 — 23/06/2006 — Mergers: Commission clears Continental's acquisition of Motorola's automotive electronics business

IP/06/809 — 20/06/2006 — Mergers: Commission approves acquisition of Dow's superabsorbent polymers business by Degussa

IP/06/804 — 20/06/2006 — Competition: 2005 Annual Report on Competition Policy

IP/06/802 — 19/06/2006 — Mergers: Commission opens in-depth investigation into merger between Gaz de France and Suez group

IP/06/776 — 13/06/2006 — Mergers: Commission approves acquisition of Athlon by De Lage Landen

IP/06/774 — 13/06/2006 — Mergers: Commission authorises joint venture between Sonae Indústria and Tarkett

IP/06/750 — 07/06/2006 — Mergers: Commission approves acquisition of Pilkington by Nippon Sheet Glass

IP/06/738 — 06/06/2006 — Mergers: Commission approves acquisition of Carmen by Boeing

IP/06/737 — 06/06/2006 — Mergers: Commission approves takeover of BOC by Linde, subject to conditions

IP/06/736 — 06/06/2006 — Mergers: Commission approves acquisition of Tele Pizza by CVC

IP/06/728 — 02/06/2006 — Mergers: Commission clears acquisition of UPC Sweden by Providence/Carlyle

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IP/06/726 — 02/06/2006 — Mergers: Commission authorises creation of joint venture for lactose between Campina and Fonterra

IP/06/725 — 02/06/2006 — Mergers: Commission approves acquisition of Arcelor by Mittal, subject to conditions

IP/06/706 — 01/06/2006 — Mergers: Commission approves acquisition of The Body Shop by L'Oréal

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IP/06/671 — 23/05/2006 — Mergers: Commission approves acquisition of BAA by Ferrovial, Québec and GIC

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IP/06/664 — 19/05/2006 — Mergers: Commission clears, subject to conditions, takeover of Gemplus by Axalto

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IP/06/578 — 04/05/2006 — Mergers: Commission clears acquisition of Hyparlo by Carrefour

IP/06/560 — 03/05/2006 — Competition: Commission fines seven companies €388.128 million for bleaching chemicals cartels

General

IP/06/1050 — 20/07/2006 — Competition: Commission appoints new Chief Economist in the Competition Directorate General

IP/06/1024 — 19/07/2006 — Personnel: the Commission appoints its Deputy Director-General for Competition

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IP /06/596 — 10/05/2006 — Staff: Commission appoints Deputy Director-General for Competition

Cases covered in this issue

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