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Inside:

And main developments and articles on
antitrust — merger control — state aid control

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Inability to Pay – First cases and practical experiences

by Philip Kienapfel and Geert Wils ([1])

1. Introduction

In the *Heat Stabilisers* decision the Commission accepted a claim for inability to pay (hereinafter 'ITP') under point 35 of the 2006 Fining Guidelines and significantly reduced the fine of one company in view of its difficult financial situation. The Commission had rejected ITP claims in all previous cases. Subsequent to *Heat Stabilisers*, the Commission reduced companies' fines on the basis of ITP in three more decisions, namely *Bathroom Fittings*, *Prestressing Steel* and *Animal Feed Phosphates*. These ITP claims were accepted in the midst of an economic and financial crisis of unprecedented magnitude in the history of EU antitrust enforcement.

The purpose of this article is to discuss the ITP provision in the context of the 2006 Fining Guidelines as well as to describe its legal background and implementation in light of recent Commission decisions. It should however be emphasised that ITP assessments continue to be refined with each case and the application of point 35 is an evolving process.

2. A difficult balance between deterrence and the social cost of bankruptcy

According to point 35 of the 2006 Guidelines the Commission may '*in exceptional cases…take account of a company's inability to pay in a specific social and economic context' provided that the fine 'would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'* The thresholds to be met by companies in order to qualify for a reduction under point 35 (and its predecessor under the 1998 Fining Guidelines) have traditionally been high. The wording of point 35 makes it clear that ITP reductions will only be granted exceptionally and this restrictive approach has been confirmed by the Commission's practice. There are a number of reasons why ITP reductions should be limited to the very minimum.

Deterrence is a primary objective of the Commission's fining policy. ([2]) Point 4 of the 2006 Guidelines states that '*fines should have a sufficient deterrent effect, not only to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing behaviour that is contrary to Articles [101 and 102 TFEU] (general deterrence)'.* Any deviation from the level of deterrent fines can distort the attitude of firms in the sense of making it more attractive for them to commit an infringement. With the exception of certain defined mitigating factors as well as reductions granted under the leniency and settlement notices, reducing the fine amount below the deterrent level risks leading to under-enforcement in the area of antitrust. Indeed, a likely adverse effect of a generous ITP policy would be an overall reduction of consumer welfare due to companies' perception of increased opportunity for avoiding or reducing fines.

Furthermore, despite the significant fines imposed in recent years, the Commission's fines rarely reach a level that would jeopardise a company's existence and accordingly require downward adjustment. In particular, the 10 % cap under Article 23(2) of Regulation 1/2003 normally ensures that fines are not excessive since it aims to protect companies against fines '*which could destroy them commercially*.' ([3]) The notion that companies are generally able to absorb fines amounting to 10 % of their turnover has been confirmed during the almost 50 years of application of Regulation 17/62 and Regulation 1/2003. Point 35 therefore normally only comes into play as an *ultima ratio* in those few instances where this may not be the case. ([4])

It must also be borne in mind that the Commission has in principle no legal obligation to take into account the financial situation of a company when setting fines since the fact that a fine brings about the insolvency or liquidation of a company is not prohibited by Community law. ([5]) In fact, it would be misleading to consider that the market structure resulting from a cartel should act as a reference. Some of the market players that are only viable at

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

([2]) See, *e.g.*, Case C-289/04 P - *Showa Denko v Commission*, [2006] ECR I-5859 para. 16.

([3]) Case T-71/03 *etc.*, *Tokai Carbon etc. v Commission*, [2005] ECR II-10, para 389.

([4]) While ITP reductions may also be granted to companies whose fine remains below the 10 % cap, reductions have in the four decisions to date been granted to mono-product companies or companies with a limited product portfolio that were of relatively small size and whose fine reached the 10 % cap.

([5]) Case T-25/05, *KME Germany etc. v Commission*, judgment of 19 May 2010, para. 167 (not yet reported); Case T-62/02, *Union Pigments v Commission*, [2005] ECR II-5057, para. 177.

cartelised price levels may naturally exit to restore the market structure that would have emerged without the cartel, leaving only those players that are efficient enough to be viable at competitive price levels. It would thus be paradoxical for the Commission to be obliged to preserve the cartelised market structure. While the Commission has decided to go beyond its legal obligation and to take a company's financial situation into account under point 35, it will only do so under certain, very narrowly defined circumstances.

Moreover, the EU Courts have repeatedly emphasised that fine reductions granted in view of the precarious financial situation of a company risk conferring '*unjustified competitive advantages to undertakings least well adapted to the market conditions*.' (6) Indeed, one of the adverse consequences of ITP is that fine reductions are more likely to be granted to companies that are inefficient, badly managed or overleveraged whereas soundly managed companies in good financial health have little chance of seeing their fines reduced.

ITP can also exacerbate opportunistic behaviour of companies. The prospect of a fine reduction may incentivise companies to exploit their informational advantage with regard to their current and future ability to pay a fine by artificially creating conditions of insufficient liquidity and distress.

In conclusion, the application of point 35 is a corrective measure that carries the risk of severe drawbacks for consumers in both the short and the long run. The Commission's ITP policy therefore has to carefully balance two opposing objectives. On the one hand, the Commission has to maintain a sufficiently deterrent level of fines — a key instrument to ensure competitive markets and enhance consumer welfare — while, on the other hand, it has to avoid social costs due to bankruptcies of the companies fined. It is only when the social cost of bankruptcy is significant enough, as it arguably has been in the midst of the crisis, that it might counterbalance the drawback of granting a reduction in fines.

3. The Commission's ITP practice under the 1998 and 2006 Fining Guidelines

Under point 5(b) of the 1998 Fining Guidelines, account was to be taken, '*depending on the circumstances*', of a company's '*real ability to pay in a specific social context*.' This assessment was to be made after the fine calculation had been carried out, *i.e.* after application of the 10 % cap and reductions under the leniency notice. As mentioned earlier, no ITP reduction was granted under the 1998 Fining Guidelines.

(6) See, *e.g.*, Case C-328/05 P, *SGL Carbon v Commission*, [2007] ECR I-3921, para. 100.

The Commission's main reason for rejecting an ITP application was that the company's financial situation was not sufficiently critical to warrant a reduction (7) but it also took account of insufficient evidence put forward by the company (8) and/or the lack of a specific social context. (9) In two of the three *Graphite* cases, the Commission rejected the ITP application of SGL Carbon under point 5(b) but granted a reduction of 33 % to take account of the company's precarious financial situation in combination with the fact that a fine had been recently imposed on the same company. (10) Point 5(b) of the 1998 Fining Guidelines also provided that the Commission could take into account '*a specific economic context*'. The economic context constituted a 'stand-alone' ground for reduction which was applied in the *French beef* case when the Commission granted a reduction of 60 % in light of the mad cow disease affecting the beef sector at the time. (11) Under the 2006 Fining Guidelines, the economic context constitutes one of the elements of the ITP test under point 35.

The 2006 Fining Guidelines further clarify the conditions for ITP and provide for more transparency for companies, taking into account Commission experience and Court case law under the previous Guidelines. Point 35 lists five conditions to be met in order for a company to qualify for full or partial reduction of a fine, namely (i) an ITP request by the company, (ii) a risk of bankruptcy, (iii) causality between the risk of bankruptcy and the fine, (iv) loss of asset value and (v) a specific social and economic context. These conditions, some of which are closely intertwined, will be discussed in detail below in light of recent cases.

The number of ITP applications under the 2006 Fining Guidelines has increased from zero in 2007 (three decisions), nine in both 2008 (seven decisions) and 2009 (seven decisions), to 25 in 2010 (five decisions to date). The Commission has in parallel intensified its ITP review, further developed its methodology for assessing these claims and devoted additional

(7) See, *e.g.*, Commission decision of 19 September 2007, COMP/39168 — *Fasteners*, paras. 688 *et seq.*; Commission decision of 20 September 2006, COMP/38121 — *Fittings*, paras. 871 *et seq.*; Commission decision of 3 September 2004, COMP/38069 — *Copper plumbing tubes*, paras. 816 *et seq.*

(8) See, *e.g.*, Commission decision of 19 September 2007, COMP/39168 — *Fasteners*, paras. 681 *et seq.*

(9) See, *e.g.*, Commission decision of 3 September 2004, COMP/38069 — *Copper plumbing tubes*, para. 833.

(10) Commission decision of 17 December 2002, COMP/37667 — *Specialty Graphite*, paras. 556 *et seq.*; Commission decision of 3 December 2003, COMP/38359 — *Electrical and mechanical carbon and graphite products*, paras. 358 *et seq.*

(11) Commission decision of 2 April 2003, COMP/38279 — *French beef*, paras. 180 *et seq.*

resources to the task of examining ITP requests. As mentioned earlier, in *Heat Stabilisers* the Commission for the first time granted an ITP reduction of around 95 % to a company under point 35. A few months later the Commission reduced fines for five companies in *Bathroom Fittings* (three companies by 50 %, two by 25 %), for three companies in *Prestressing Steel* (by 25 %, 50 % and 75 % respectively) and for one company in *Animal Feed Phosphates* (by 70 %). To date, the Commission has granted ITP reductions to ten companies under point 35 of the 2006 Fining Guidelines in 20 decisions. In comparison, the Commission had granted no ITP reductions and only two reductions taking into account the financial situation of a company in more than 80 decisions adopted under the 1998 Fining Guidelines. All successful ITP applicants to date have been relatively small companies, almost all of them mono-product companies and the fine in each case was capped at 10 % of their turnover. It should be noted in this context that the 10 % turnover cap has in practice led to much bigger fine cuts than reductions granted under point 35. In those decisions where the fines reached the 10 % cap for a large number of companies (*Bathroom Fittings*, *Prestressing Steel*), the application of the cap led to significant fine reductions in absolute amounts whereas the adjustments on ITP grounds were small in comparison. This illustrates that the 10 % turnover cap successfully operates as the main instrument for protecting companies from bankruptcy, even in times of severe economic crisis.

4. The conditions of ITP under point 35 of the 2006 Fining Guidelines

4.1. Company's request

Point 35 requires a request by the company, *i.e.* the Commission does not carry out ITP assessments *ex officio*. ([12]) While the request does not immediately need to be accompanied by supporting evidence, the Commission will ask for ample and detailed financial information in due course. The assessment of the financial situation is carried out for all companies close to the time of adoption of the decision and on the basis of up-to-date information, irrespective of when the request was submitted.

4.2. Risk of bankruptcy

At the heart of the ITP analysis is the question whether the fine would irretrievably jeopardise the economic viability of the company. To answer this question, a large amount of financial data is needed. The Commission, by way of standardised requests for information, obtains the company's financial statements (annual reports: balance sheet, income statement, statement of changes in equity, cash-flow statement and notes) in respect of (usually the last five) previous financial years, as well as projections for the current year and the next two years. In addition, the Commission takes into account relations with outside financial partners such as banks, on the basis of copies of contracts concluded with those partners, in order to assess the company's access to finance and, in particular, the scope of any undrawn credit facilities they may have. ([13]) The Commission also includes in its analysis the relations with shareholders as well as the ability of those shareholders to assist the companies concerned financially. By analogy with the assessment of 'serious and irreparable harm' in the context of interim measures, the Commission bases its assessment of a company's ability to pay on the financial situation of the group as a whole. This includes in particular the company's shareholders, irrespective of whether they have been found liable for the infringement. ([14]) The Commission may also take into account the financial ability of minority shareholders to give assistance. ([15]) The Commission's analysis examines the equity and profitability of the companies, their solvency, liquidity and cash flow, to evaluate the risk of bankruptcy. The analysis is both prospective and retrospective but with a focus on the present and immediate future of the company. The analysis is of a dynamic nature and takes into account the consistency of data submitted for the company's past and projected future performance. The analysis also extends to possible restructuring plans and the progress made with them.

The Commission relies on information provided by the company and/or by its shareholders. Full disclosure and prompt delivery of the information requested are therefore essential for ITP assessments. Since the burden of proof for establishing the alleged critical financial situation is on the company, any refusal to supply relevant information may lead to rejection of the ITP request. ([16]) As mentioned earlier, the Commission will carefully compare the company's projections for the future with its past performance and assess the consistency of the data. ([17]) In this respect, audited financial data or

([12]) The company has to '*invoke*' its inability to pay (see, *e.g.*, Case T-62/02, *Union Pigments v Commission*, [2005] ECR II-5057, para. 176).

([13]) Undrawn bank facilities are not included in the balance sheet.

([14]) Case C-335/99 P(R), *HFB v Commission*, [1999] ECR I-8705, paras. 61-62; Case C-364/99 P(R) *DSR-Senator Lines v Commission* [1999] ECR I-8733, para. 49.

([15]) Case T-410/09 R, *Almamet v Commission*, order of 7 May 2010, para. 57 (not yet reported).

([16]) See, *e.g.*, Case T-64/02, *Heubach GmbH v Commission*, [2005] ECR II-5137, para. 164.

([17]) Attempts to mislead the Commission by, *e.g.*, providing incorrect information may result in the application of an aggravating circumstance or in the imposition of a separate fine pursuant to Article 23(1) of Regulation 1/2003.

prospects already approved by the board are of greater evidentiary value. There have been instances where companies that had not made provision for a potential fine invoked the adverse consequences that the fine would have for them because their 'surprised' banks would cut credit lines, thus causing liquidity problems. However, it is the company's responsibility to inform stakeholders such as banks and others of the possible imposition of a fine in a timely manner, *i.e.* following receipt of a statement of objections. The inclusion of an accounting provision for the potential fine amount would also seem appropriate after receipt of the statement of objections. Although accounting provisions do not guarantee the availability of liquid assets to pay the fine, they constitute an important first step in alerting stakeholders and in reducing profit available for dividends and taxes. Finally, it should be noted that the Commission will look very closely at measures that financially weaken a company during the period preceding adoption of the decision, in particular following the sending of the statement of objections. Without there being a need to prove intent to avoid paying a fine, the Commission may take into consideration conscious decisions of the company or its shareholders that weaken the company's ability to pay; such considerations may contribute to the rejection of an ITP request.

The Commission's financial analysis is summarised in the decision, so as to allow each company to review the individual motivation applicable to its ITP application. The information regarding the financial situation of each company is highly sensitive and confidential vis-à-vis the other parties ([18]) but the decision notified to the parties will normally disclose the identity of those companies whose ITP applications were accepted or rejected.

4.3. Causal link between the risk of bankruptcy and the fine

The text of point 35 requires a causal link between the fine on the one hand and the financial distress (i.e. risk of bankruptcy) of the company on the other ('*imposition of the fine…would irretrievably jeopardise…*').

In parallel with the assessment of the company's financial situation with and without a fine, the Commission analyses any indications pointing to the absence of a causal link. Causality may be lacking, *e.g.* (i) if the company's financial distress has been deliberately brought about, (ii) where the company is in such serious financial distress that it would go bankrupt even without the fine or (iii) where the fine is very small in comparison with the overall turnover and assets of the company, in which case the fine cannot be considered to have a decisive impact on the company's financial situation.

4.4. Loss of asset value

According to point 35, a fine reduction may be granted if the fine would '*cause* [the company's] *assets to lose all their value*.' This language originates from Court case law, according to which the fact that a company is liquidated in its existing legal form and hence may adversely affect the financial interests of the owners, investors or shareholders, is not incompatible with Community law since '*it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value*.' ([19]) In other words, not the legal existence of a company or its owners' financial interests should be protected but the value of the company's assets as such, including *e.g.* production facilities and employees. The judgments (and point 35) reflect the fact that the primary focus of modern insolvency/bankruptcy legislation no longer rests on the liquidation and elimination of insolvent companies but aims to 'turn around' and continue their business as a going concern. Bankruptcy or insolvency therefore does not automatically result in asset loss, which must instead be assessed on a case-by-case basis.

The Commission — contrary to the wording of point 35 — does not require a 'total' asset loss. Such literal interpretation of point 35 would likely lead to the systematic rejection of all ITP claims. Assets rarely lose '*all their value*' since they normally retain a certain operational and resale value even in the case of bankruptcy or liquidation. A 'significant' asset loss is sufficient. ([20]) In principle, it is for the company to demonstrate that in the case of insolvency or bankruptcy, the company or its assets would be unlikely to continue as a going concern and hence its assets would exit the market, stand idle, be dismantled or be sold at discounted prices. In practice, the Commission undertakes a forward-looking analysis on the basis of the available evidence and assesses whether there are credible alternatives for the company to continue its business as a going concern '*within a reasonably short period of time*' (*e.g.* an acquisition by a financially strong buyer that continues the business without significant job cuts). In the absence of such alternatives, there is normally '*a sufficiently high risk*' that the company's assets would lose a significant part of their value. ([21])

([18]) Article 28 of Regulation 1/2003.

([19]) See, *e.g.*, Case T-62/02, *Union Pigments v Commission*, [2005] ECR II-5057, para. 177.

([20]) Press release IP/10/790 of 23 June 2010 (*Bathroom Fittings*).

([21]) See, *e.g.*, the recent *Bathroom Fittings* and *Pre-stressing steel* decisions (not yet published).

4.5. Specific social and economic context

The specific social context and the specific economic context are closely intertwined since the economic situation will, for example, be a relevant factor when assessing the possible social consequences of a company's bankruptcy.

The social context already formed part of the ITP test under the 1998 Fining Guidelines. It continues to be an important element of ITP under the 2006 Fining Guidelines since one of the main objectives of ITP is to prevent negative social consequences resulting from the disappearance of a company. Under the 1998 Fining Guidelines the Commission assessed in particular the risk of job losses as a result of a fine. This was confirmed by the EU Courts, which have considered in this respect '*the consequences which payment of the fine would have, in particular, by leading to an increase in unemployment or deterioration in the economic sectors upstream and downstream of the undertaking concerned.'* ([22]) It is for the company to produce information which allows the Commission to assess the specific social context. ([23]) The burden of proof is also on the company to demonstrate that the alleged adverse effects (*e.g.* redundancies) will be caused by the fine and not by other circumstances. ([24]) The likelihood of an increase in permanent unemployment and the resultant social consequences have been the focus of the Commission's assessment of a specific social context in recent cases under the 2006 Fining Guidelines. The Commission examines in particular whether the company's bankruptcy would lead to redundancies in view of, *e.g.*, its individual situation (*e.g.* restructuring plans), but also given the economic situation in the sector concerned and the economic situation in the region or country where the company is located. The current economic crisis with high unemployment rates in many countries renders the existence of a specific social context more likely.

When examining the specific economic context the Commission assesses in particular the economic situation of the sector concerned. ([25]) Elements that may be relevant for a finding of specific economic context include, *e.g.*, overcapacity, falling prices, falling demand or other negative economic indicators. The Commission also takes into account the impact of a general economic crisis on the sector concerned and on the companies affected. In this respect, the Commission considered, *e.g.* in *Bathroom Fittings* and *Prestressing Steel*, that companies in those industries were experiencing severe difficulties resulting from dysfunctional credit markets at the height of the crisis.

5. Conclusion

ITP is a corrective measure that carries risks of severe drawbacks for consumers' welfare in both the short and the long run. Given these adverse effects, the *ultima ratio* nature of this measure must be emphasised. ITP reductions will continue to be granted only on a very exceptional basis and after a careful review of the stringent conditions set forth under point 35 of the 2006 Fining Guidelines. Ten companies have benefited from ITP reductions to date. The Commission has refined its methodology, further expanded and standardised its requests for information and devoted substantial resources to dealing with ITP claims. These measures reflect the importance that the Commission attaches to assessment of the financial situation of companies in distress and illustrate the considerable efforts made by the Commission to strike the right balance between its antitrust enforcement mandate and the need to avoid severe social costs that may result from companies' bankruptcies triggered by fines.

([22]) See, *e.g.*, Case C-308/04 P, *SGL Carbon AG v Commission*, [2006] ECR I-5977, para. 106; Case T-236/01 *etc., Tokai Carbon v Commission*, [2004] ECR II-1181, para. 371 and Case T-62/02, *Union Pigments v Commission*, [2005] ECR II-5057, para. 176.

([23]) Case T-62/02, *Union Pigments v Commission*, [2005] ECR II-5057, para. 176.

([24]) Case T-25/05, *KME Germany etc. v Commission*, judgment of 19 May 2010, para. 170 (not yet reported).

([25]) This was also the case under the 1998 Fining Guidelines. In *FNCBV,* the General Court confirmed that the Commission had been correct when reducing the fine by 60% in view of the specific economic context, given that the beef sector was marked by a serious crisis following the mad cow disease outbreak (Cases T-217/03 and T-245/03, *FNCBV and others. v Commission*, [2006] ECR II-4987, para 351; the General Court increased the reduction to 70%).

The Commission's *GDF* and *E.ON Gas* decisions concerning long-term capacity bookings

Use of own infrastructure as possible abuse under Article 102 TFEU

by Ricardo Cardoso, Sandra Kijewski, Oliver Koch, Patrick Lindberg and Károly Nagy (1)

1. Introduction

The Commission's commitment decisions of December 2009 and May 2010 in the *GDF* and *E.ON Gas* cases dealt with foreclosure concerns on the French and German gas markets. Both cases are noteworthy in several respects: not only are they part of a remarkable series of energy antitrust decisions adopted under Article 102 TFEU in the wake of the Energy Sector Inquiry (2) (nine major energy decisions since 2007 (3) but a closer look at the theory of harm also shows that *GDF* and *E.ON Gas* involve some novel and innovative elements that further develop the theory of refusal to supply under Article 102 TFEU (4).

All nine above-mentioned abuse cases in the energy sector concern types of anticompetitive behaviour (such as '*primary/secondary capacity hoarding*', '*strategic underinvestment*', '*capacity withholding*' or '*capacity degradation*' (5) that involve complex legal and economic issues. The *GDF* and *E.ON Gas* decisions relate to a particularly interesting theory of harm, namely anticompetitive effects resulting from *long-term capacity booking practices*. Both decisions clarified that there can be limits on the extent that dominant companies can reserve infrastructure capacity on a long-term basis (6).

2. The facts: long-term bookings preventing entry

One main finding of the Commission's Energy Sector Inquiry was that the lack of transport capacities in Europe, mainly caused by the incumbents' own bookings, prevented competitors from gaining access to the pipelines necessary to reach their gas customers (7). The Commission therefore decided to open a number of 'ex-officio' antitrust investigations to address this issue (8).

The *E.ON Gas* and *GDF* cases tackled the problem that almost the entire capacity on their gas networks was booked, on a long-term basis, by E.ON's and GDF's own supply businesses, leaving virtually no room for third party transport (9).

The Commission's investigation concerning GDF, the leading gas supplier in France and owner of the largest gas transmission networks in France via its subsidiary GRTgaz, showed that the vast majority of the available capacities at the main entry points into the French gas transmission network had been booked on a long-term basis by a single customer — the sales business of GDF, the dominant gas supplier in France. Since these capacities were essentially reserved until 2019 by GDF, competitors had very few chances to acquire the transport capacities necessary for successful market entry and there were

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

(2) See DG Competition, Final Report on Energy Sector Inquiry, 10.1.2007 ('Sector Inquiry Report'), http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part1.pdf.

(3) Despite being concluded by way of a commitment decision, all nine cases were comparably complex, not only in terms of the pursued theory of harm, but also in terms of fact-finding, the assessment of possible justifications and, last but not least, the interplay with national regulation.

(4) See, for energy cases based on an alleged 'refusal to supply', also Cases COMP/39.315 — *ENI* and COMP/39.402 — *RWE Gas Network Foreclosure*.

(5) See e.g. the article on the RWE Case in CPN 2009, No 2, pp. 32 *et seq.* (http://ec.europa.eu/competition/publications/cpn/2009_2_7.pdf).

(6) See in detail Cases COMP/39.316 — *GDF Suez*, decision of 3 December 2009 (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39316) and COMP/39.317 — *E.ON Gas*, decision of 4 May 2010 (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39317).

(7) In fact, the Sector Inquiry had already found that the newly created third party access rights and non-discrimination rules, intended to open up the incumbents' transmission networks, often had only a limited effect, as vertically integrated gas companies could successfully prevent access to their pipelines, using various foreclosure strategies: see the Sector Inquiry Report, pp. 79 *et seq.*

(8) See Cases COMP/39.315 — *ENI*, COMP/39.402 — *RWE*, COMP/39.316 — *GDF Suez* and COMP/39.317 — *E.ON Gas*.

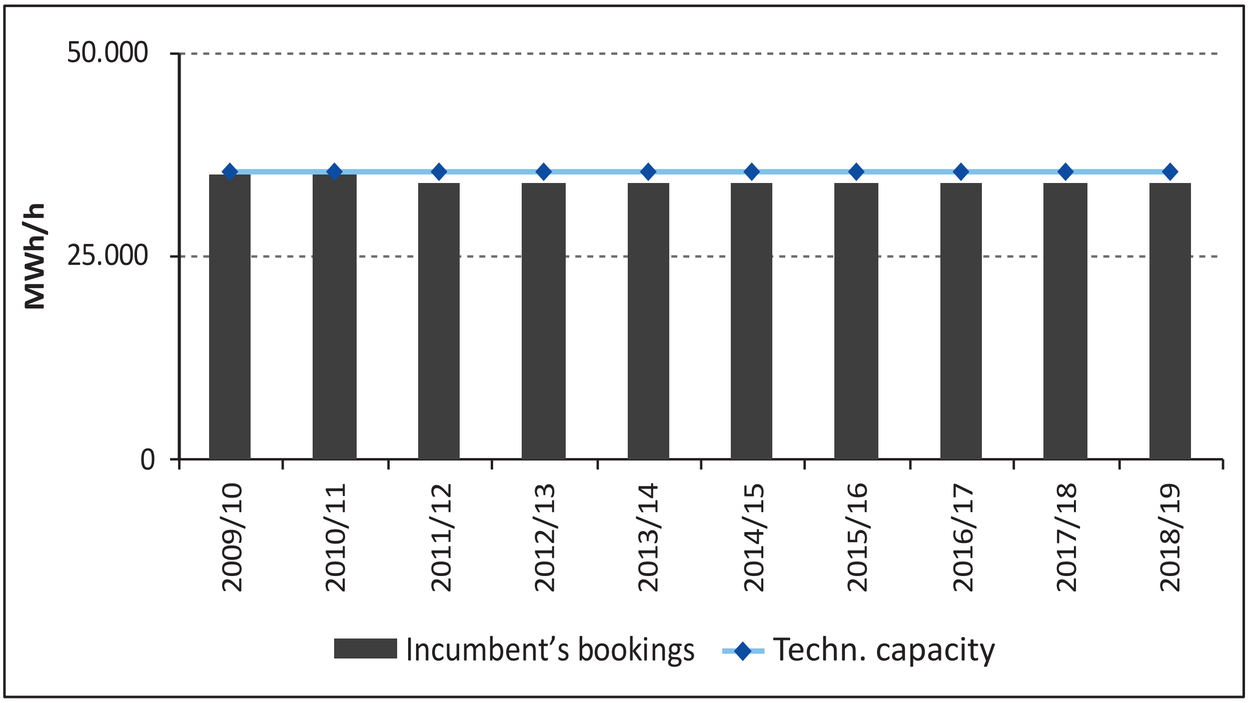
(9) See in this context also the Sector Inquiry Report, pp. 74 *et seq.*, and Case COMP/39.402 — *RWE*, paragraph 24.

no prospects for this situation to change in the foreseeable future [10].

A similar pattern could be found in the *E.ON Gas* case. E.ON is a leading European energy company active in the production, transport and supply of electricity and gas at European level. In Germany, E.ON is the largest supplier of natural gas and operates the largest German gas transmission network. The Commission's investigation also found that E.ON had reserved the bulk of capacities [11] on its L- and H-gas [12] networks for its own supply business.

The lack of free capacity contrasted with steady and significant unsatisfied demand by transport customers and was one of the main reasons for the very limited success of new entrants in the gas markets in France as well as within the E.ON network area. The following chart shows a typical booking situation that illustrates the tight capacity position [13]:

Typical booking situation in long-term capacity booking cases



(10) It should be noted that the *GDF* decision addressed not only long-term capacity booking concerns, but also other foreclosure concerns related to two of GDF Suez's liquefied natural gas (LNG) terminals, *Fos Cavaou* and *Montoir de Bretagne*. The Commission found that GDF Suez decided on the maximum import capacity and the procedures for allocating this capacity at the *Fos Cavaou* LNG terminal in a manner that may have foreclosed competitors from access to gas import capacities (by way of example, GDF Suez did not carry out — despite significant third party demand — an open, transparent and non-discriminatory procedure to allocate capacity at the new *Fos Cavaou* terminal, e.g. an 'open season' procedure). The Commission also found evidence that GDF Suez may have strategically limited its investments in additional import capacity at the *Montoir de Bretagne* LNG terminal (according to the Commission's preliminary assessment, GDF Suez decided, following an open season procedure, not to develop any additional import capacity at the *Montoir de Bretagne* terminal despite evidence that the extension of capacity there would have been sufficiently profitable).

(11) Only 'firm' and 'freely allocable' entry capacities were taken into account in the calculation: see paragraphs 11, 14 and footnote 39.

(12) Low-calorific gas ('L-gas') and high-calorific gas ('H-gas') are two gas qualities which differ in terms of energy content and which are usually transported in separate gas networks.

(13) The line illustrates the technically available capacity while the black bars show the extent to which the capacities were already booked by the incumbents.

3. Legal assessment: refusal to supply

The behaviour to which the Commission objected foreclosed competitors from access to the gas supply markets dominated by GDF and E.ON respectively.

In both cases the Commission found that the incumbents' gas networks could be classed as *essential facilities* (14). An essential facility is a network or other type of infrastructure to which access is indispensable to compete on a given market. Although undertakings normally have the right to choose their trading partners freely, it is a well-established concept under EU law (15) that holders of an 'essential facility' can be required under competition law in certain circumstances to grant access to this facility.

In line with the approach taken by the Commission in previous decisions, a refusal to grant access to an essential facility is likely to constitute an abuse under Article 102 TFEU if (i) access is objectively necessary to be able to compete effectively on a downstream market, (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market and (iii) the refusal is likely to lead to consumer harm. In cases where regulation already imposes an obligation to supply on the dominant undertaking and/or where the incumbents erected their gas transmission networks in a period during which their market position was largely protected by a regional monopoly granted by the State (as with gas pipelines) such detailed analysis may not be necessary (16).

The Commission took the view that the gas transmission networks of GDF and E.ON could be classed as an *essential facility* since access to them was objectively necessary to carry on business in the gas supply markets within the respective grid areas (17). In fact, the Commission had already previously considered gas networks as being natural monopolies. Transport capacity on a transmission grid is a necessary input for gas suppliers to transport gas to their (potential) customers. Competing gas suppliers wanting to supply customers in the grids of the gas incumbents had no alternative than to use the gas networks' entry points to reach customers within these networks. The Commission rejected all claims that the transport infrastructure could be reproduced by competitors, inter alia because of the high investment costs, the planning risk and the duration of the construction of high-pressure pipelines (18).

In both cases the Commission found that GDF and E.ON not only controlled the markets for gas transport (via their affiliated TSOs), but that both companies also held a *dominant position* on various national gas import and supply markets supplied by their grids, which they could maintain or reinforce by foreclosing access to the transmission grid.

The refusal to supply — GDF's and E.ON's long-term capacity bookings and GDF's behaviour relating to its two LNG terminals at *Fos Cavaou* and *Montoir de Bretagne* — was in all cases found to be likely to *eliminate competition* and, given the importance of the pipelines for underdeveloped supply competition, there could be no doubt as to the risk of consumer harm.

The decisions found, finally, that there was no obvious *objective justification* for the alleged anticompetitive behaviour, according to the Commission's preliminary assessment (19).

Although the concept of anticompetitive long-term contracts is well established in antitrust law, it is worth noting that the main competition concern in both cases is markedly different from previous cases involving anticompetitive long-term contracts (such as the 'classic' beer cases (20) or the Commission's recent energy cases concerning long-term supply contracts (21). While it is common ground in European competition law that long-term *supply* contracts can be a means to foreclose competitors from their customer base (22), the GDF and E.ON investigations did *not* concern such long-term *supply* contracts with

(14) See Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings ('Article 82 Guidance Paper'), OJ C 45, 24.2.2009, p. 7, at paragraph 76.

(15) See e.g. Case IV/34.689 — *Sea Containers v Stena Sealink* — interim measures (OJ L 15, 18.1.1994, p. 8) and Case IV/33.544 — *British Midland v Aer Lingus* (OJ L 96, 10.4.1992, p. 34). See also Article 82 Guidance Paper, paragraph 76. It may be noted that the United States has drastically limited the scope of application of the essential facilities concept since the Supreme Court's famous '*Trinko*' judgment: see: http://www.fcc.gov/ogc/documents/opinions/2004/02-682-011304.pdf.

(16) See Article 82 Guidance Paper, paragraph 82: '*In certain specific cases, it may be clear that imposing an obligation to supply is manifestly not capable of having negative effects ... This could ... be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anticompetitive foreclosure ...*'

(17) See in this respect also the judgment of the Court in Case C-7/97 *Oscar Bronner* [1998] ECR I-7791, paragraph 46.

(18) See in this context also e.g. Case COMP/39.402 — *RWE*, paragraph 15; Case COMP/39.316 — *GdF Suez*, paragraph 27; BNetzA, decision of 5 December 2008 — BK4-07-106 (no competition on E.ON's transmission grid).

(19) It should be noted that both decisions — as commitment decisions under Article 9 of Regulation 1/2003 — only summarised the alleged anticompetitive behaviour. It was, therefore, not necessary for the Commission to discuss the issue of objective justifications in detail.

(20) See e.g. the 'beer' case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935.

(21) Cases COMP/37.966 — *Distrigaz* and COMP/39.386 — *EDF*.

(22) See e.g. Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935 or Case COMP/37.966 — *Distrigaz*.

downstream customers, but reservations of *transport capacity* by the integrated company on its own transmission infrastructure. Thus, in these cases it was not the (downstream) customer base that was foreclosed, but the access of third parties to GDF's and E.ON's transport infrastructure. It may also be noted that, unlike in the case of long-term *supply* contracts, the long-term *capacity* contracts were concluded within the same company, i.e. the TSO and the gas supply branch of GDF and E.ON, which played a role for the choice of legal basis in the cases (23).

4. Remedies: release of capacity bookings

In order to allay the Commission's competition concerns, both GDF and E.ON decided to offer commitments to the Commission under Article 9 of Regulation 1/2003. The market test of the commitment proposals confirmed that they were suitable to entirely resolve the identified competition issues without being disproportionate.

The remedies that were considered adequate by the Commission to solve the issue of long-term capacity bookings consisted in a *significant reduction of the capacity bookings* of GDF and E.ON in their respective networks. In both cases, it was agreed to reduce the booking share of GDF and E.ON to a maximum of 50 % on their H-gas networks (24). Since such large reductions of long-term bookings require extensive preparation and time, e.g. for contractual rearrangements or capacity increasing measures (25), the remedy consists of two steps: in a *first step* ('Immediate Release'), GDF and E.ON will release significant capacities (around 10-15 % of the total capacity) at the most important entry points already at short notice (at the latest with effect as of October 2010/2011); in a *second step* ('Final Reduction'), GDF and E.ON will further reduce their overall share in the bookings of long-term entry capacity in the relevant networks to a maximum of 50 % by 2014 and 2015 respectively. GDF and E.ON also committed not to exceed these thresholds for ten years thereafter.

The release has to be carried out according to the national rules for capacity allocation (with some supplementary specifications). Due to the complexity of these network-related remedies, in each case a trustee will supervise the implementation.

Although not involving a business divestiture, the remedies are of a structural nature insofar as the release is irrevocable and the future booking situation will not remain dependent on the behaviour of GDF or E.ON (26).

5. Conclusion

The *GDF* and *E.ON Gas* cases (together with other commitment decisions in the energy sector) are a good illustration of the fact that commitment decisions under Article 9 of Regulation 1/2003 not only allow the Commission to solve a competition problem in a fast and efficient manner (27), but can also contribute to developing the Commission's antitrust case law further and to providing useful guidance on its interpretation of competition rules, notably with regard to Article 102 TFEU and the concept of refusal to supply. Since access to energy infrastructure remains a major barrier to competition in European energy markets, the Commission will continue its enforcement activities in this sector.

(23) Article 101 TFEU, for example, does not usually cover agreements within the same company. In foreclosure cases concerning integrated TSOs and shippers belonging to the same parent companies, the application of Article 101 TFEU is therefore not evident. It may, however, be argued that TSOs and shippers in *unbundled* companies should be considered as separate companies also under competition law (pursuant to the Gas Regulation the transport business has to be legally unbundled from the gas supply business — see e.g. Article 9 of Directive 2003/55 of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC).

(24) Due to the different characteristics of the market for low-calorific gas, a slightly different target was chosen for L-gas in the E.ON case: see Case COMP/39.317 — *E.ON Gas*, paragraph 69; on the different remedy for low-calorific gas in the *GdF Suez* case, see Case COMP/39.316 — *GdF Suez*, paragraphs 85 *et seq.*

(25) In both cases, the reduction of the own booking share could also be achieved by expanding the available capacity, e.g. through investments in additional capacities.

(26) It should be noted that, as the anticompetitive foreclosure in the *GdF* and *E.ON* cases resulted from the booking practices, a divestiture of GDF's and E.ON's gas transmission networks (as was considered an adequate remedy in the *RWE* and *ENI* cases) would not have resolved the competition problems identified, since the network would have remained fully booked and therefore inaccessible for competitors, even if the network was owned by another undertaking.

(27) For a more detailed discussion of the use of commitments in antitrust cases, see Koch/Gauer: 'Energy liberalisation and competition law — the Commission's recent antitrust case practice', in: Simon Hirsbrunner, Dirk Buschle, Christine Kaddous (eds.): *European Energy Law/Droit européen de l'énergie*, Brussels, Bruylant, Paris, L.G.D.J., Basel, Helbing & Lichtenhahn, forthcoming. See for a decision under Article 7 of Regulation 1/2003 e.g. Case COMP/39.401 — E.ON/GDF.

The new competition framework for vertical agreements in the motor vehicle sector

by John Clark, Stephan Simon and Axel Bierer [1]

On 31 May 2010, the Commission adopted a new legal framework for vertical agreements in the motor vehicle sector. This new structure, comprising Regulation 461/2010 [2] and its accompanying sector-specific Guidelines, replaces block exemption Regulation 1400/2002 [3] and has been designed to reflect the differing intensities of competition on the markets for the distribution of motor vehicles, for spare parts, and for the provision of repair and maintenance services. The sector-specific Regulation and Guidelines, which will be valid for 13 years until May 2023, supplement Regulation 330/2010 [4] and the Guidelines on Vertical Restraints [5].

In 2002, when the Commission last reviewed the rules applicable to the sector [6], one option would have been to apply the general rules, in the form of Regulation 2790/1999 [7]. At that time, it decided not to take this course, in particular because the car sales markets were seen as problematic following a series of prohibition decisions. The Commission instead opted for a regulation that was based on Regulation 2790, but had both higher thresholds for exemption of certain types of distribution [8] and a longer and stricter set of hardcore clauses and conditions.

Application of the general rules to the market for distribution of new motor vehicles

The Commission's latest review of the rules applicable to the sector began in earnest in 2008, with the publication of an Evaluation Report [9], which showed that competition on the vehicle sales markets was strong. Prices in real terms had been steadily falling, and product range expansion meant that there were increasing numbers of vehicles in each market segment. The strict 2002 regime for those markets therefore no longer appeared to fit the economic context, and the rules imposed an unnecessary straitjacket that injected extra costs into the distribution chain and inhibited contractual and commercial freedom. Meanwhile, the general rules set out in Regulation 2790/1999 had been applied successfully to vertical agreements in other sectors for a decade.

In the light of the Commission Communication of summer 2009 [10], it came as no surprise that the Commission decided that the general rules could be successfully applied to agreements for motor vehicle distribution. Article 2 of Regulation 461/2010 duly provides that Regulation 330/2010 is to apply to the primary market, but with a three-year transition period to allow parties to adapt. Detailed clarification has also been given in the form of Commission Guidelines which will allow the parties to dealer agreements to assess their compatibility with Regulation 330/2010 and with Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The move to the general rules has several consequences for firms entering into vehicle distribution agreements.

Although the general regime will not mean that firms have to change the distribution model commonly used in the sector since, like Regulation 1400/2002, Regulation 330/2010 exempts quantitative selective distribution, it will, however, entail a lowering of the exemption threshold for such agreements from 40 % to 30 %, meaning that more manufacturers in more

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

(2) Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

(3) Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.

(4) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

(5) Guidelines on Vertical Restraints (2010/C 130/01).

(6) The block exemption at the time was set out in Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L 145, 29.6.1995, p. 25–34.

(7) Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336/21, 29. 12. 1999.

(8) 100 % for qualitative selective distribution, and 40 % for quantitative selective distribution agreements for the sale of new vehicles.

(9) Commission Evaluation Report on the Operation of Regulation (EC) No 1400/2002 Concerning Motor Vehicle Distribution and Servicing — http://ec.europa.eu/competition/sectors/motor_vehicles/documents/evaluation_report_en.pdf.

(10) Communication from the Commission — The Future Competition Law Framework applicable to the motor vehicle sector — COM(2009) 388 final.

Member States will have to individually assess their dealer contracts. In a few more cases, they may well come to the conclusion that quantitative selection may not benefit from Article 101(3) TFEU and that they will have to open their distribution networks to all prospective dealers that meet quality criteria. However, this should be balanced against the fact that market shares tend to have evened out across car manufacturing countries in recent years, with carmakers losing market share on their home markets, and gaining it in other Member States, thereby gradually reducing the number of instances where a given manufacturer may face antitrust scrutiny.

Another change is that the new rules will not contain any requirements as regards contractual protection of dealers. As a condition for exemption, the previous block exemption required contracts to contain certain clauses relating to the transfer of dealerships between distributors of the same network, notice periods for contract termination, contract duration and arbitration ([11]). Evaluation showed that these provisions had not achieved their aim of making markets work better and may even have made access to distribution networks more difficult for newcomers. Moreover, they encroached on areas that normally fall within the ambit of national contract laws, and led to confusion and wasted enforcement resources. In view of the ineffectiveness of these contractual clauses, their abolition is unlikely to lead to any change in the relationship of dependence between dealers and their suppliers, which is in any event due to the widespread use of quantitative selective distribution systems rather than to the effect of block exemption provisions.

This is not to say that the Commission is entirely neutral as regards the contractual framework between dealers and suppliers; clearly, if contract terms are applied in a less-than-transparent manner, there is more room for unwritten forms of pressure to be put on dealers to refrain from pro-competitive activity, such as granting discounts, or selling to foreign consumers. The Guidelines therefore explain that when a competition authority assesses an individual case, it will be easier for a car manufacturer to prove that it has not placed undue pressure on dealers if its contractual relations with them have been transparent. One means of achieving this is by applying a Code of Good Practice such as that put forward by the European and Japanese car manufacturers' associations ACEA and JAMA ([12]).

A further consequence affects dealers who sell the brands of more than one manufacturer. It should firstly be borne in mind that by setting a low threshold of 30 % ([13]) for the definition of single-branding obligations, compared to 80 % under the general regime, Regulation 1400/2002 made it possible for dealers with contracts conforming to the block exemption to sell two additional brands. Secondly, the Regulation contained detailed rules aimed at favouring a particular form of multi-branding which at the time seemed promising – the sale of different brands within the same showroom. In the event, however, the rules proved unnecessary, as inter-brand competition remained strong. They were also ineffective, as there was little growth in the kind of in-store multi-branding that they were intended to promote. Worse, the specific rules were counter-productive, in that carmakers reacted to the threat that generalised multi-branding might pose for brand identity and corporate image by increasing the level of investment required from their dealers, while at the same time reducing their own contribution to investment in distribution. The result was an overall increase in distribution costs, estimated at up to 20 %.

Overall, and in retrospect, the old rules placed emphasis on the benefits of multi-branding, but without giving due credit to the advantages that single-branding may bring in the form of loyalty and an alignment of the investment incentives for dealers and manufacturers. The general rules, on the other hand, represent a more balanced approach, which will allow manufacturers greater freedom to organise their networks as they see fit and, in particular, to strike the right balance between single- and multi-brand dealerships.

Under the new regime, single branding ([14]) may be used, subject to three main limits. Firstly, aligning the legal framework with that applicable to other sectors will allow only manufacturers with a market share of less than 30 % to impose single-branding obligations within the scope of the block exemption. Above this threshold, they must have regard to detailed considerations set out in the Guidelines, including the percentage of dealers on the market in question that are subject to non-compete obligations. Secondly, under the general rules set out in Regulation 330/2010, suppliers with a market share of below 30 % may impose single-branding obligations for a maximum of five years, following which dealers must be free to terminate the tie. Thirdly, single-branding obligations specifically designed to exclude newcomers

([11]) See Article 3 of Regulation 1400/2002.
([12]) http://www.acea.be/images/uploads/files/20100906_BER_code_of_conduct.pdf.

([13]) See Article 1(1)(b) of the Regulation.
([14]) Single-branding obligations are defined in Article 1(1)(d) of Regulation 330/2010 as 'any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market'.

or smaller brands that are currently sold in existing multi-brand outlets will not be exempted.

The Guidelines also explain two safety valves in the general regime that can be used to act against single-branding obligations that have a negative impact on competition. On the one hand, if the widespread use of single-branding obligations leads to competing brands being shut out from the market, competition authorities may withdraw the benefit of the block exemption for individual car manufacturers. On the other hand, if single-branding obligations cover more than 50 % of a given market, the Commission may adopt a regulation declaring the block exemption inapplicable to agreements containing such obligations.

The practical impact of the new rules on multi-branding is likely to be limited, given in particular the low take-up of the same-showroom model that Regulation 1400/2002 sought to promote. On the one hand, dealers and manufacturers will continue to agree on multi-branding where it makes economic sense – at remote locations, or in areas with low population density. On the other hand, multi-brand groups will also continue to operate because they enjoy significant bargaining power in their relations with vehicle manufacturers. This is obvious if one considers that many of them sell several manufacturers' brands, and that in theory Regulation 1400/2002 would have allowed manufacturers whose brands made up less than 30 % of such a dealer's total purchases to obstruct further multi-branding. In reality, however, there are few instances where manufacturers have sought to block such expansion, partly because multi-brand groups protect brand identity, and also because they are often obligatory contractual partners. The only real effect of the change is likely to be to reduce upward pressure on dealership standards, as manufacturers feel less threatened by the potential for dealers to display vehicles of their brands in a higgledy-piggledy manner.

The motor vehicle sector has left an indelible print on one area of competition law in particular – the issue of parallel trade and territorial protection. In the 1990s, several vehicle manufacturers saw market partitioning as a logical way to attempt to gain market share on other manufacturers' turf, while protecting their home market, leading the Commission to intervene in three major cases ([15]). One problem is that vehicles of different specification are often supplied in various Member States, and the resale value of a 'foreign-spec' car may be lower, deterring consumers from buying abroad – the availability of right-hand-drive vehicles on the Continent is a case in point. Previous block exemptions contained a specific measure known as the 'availability clause' to ensure that dealers could obtain foreign-spec vehicles for sale to consumers from other Member States. The new legal framework does not contain a specific reference to such a clause, but the Guidelines explain that, in line with the case law of the European Courts ([16]), failure to make such vehicles available will be seen as a limit on sales, and a hardcore restriction under Article 4(1)(b) of Regulation 330/2010.

A final issue concerns the exemption of location clauses in selective distribution systems, the end of which had provoked so much polemic when Regulation 1400/2002 was adopted. By aligning the rules with the general regime, location clauses will be exempted if a supplier has a market share below 30 %. However, the Guidelines explain that above this level, it is possible that location clauses will not be able to benefit from an exception under Article 101(3) TFEU.

The aftermarkets – completing the reform of 2002

Competition in the maintenance and repair markets occurs between authorised repairers that belong to the manufacturers' official networks and between them and independent workshops. For several reasons, competition on these markets is not particularly strong. For one thing, the carmakers' authorised networks have high market shares – often in excess of 50 %. For another, carmakers have a stranglehold over two of the inputs necessary to compete effectively – technical repair information and certain spare parts, known as captive parts, which can only be obtained from the vehicle manufacturers. This is an important market for consumers, since car ownership is a major part of overall expenditure, and repair and maintenance costs currently account for around 40 % of the total cost of owning a car.

It might therefore seem odd that in 2002, the Commission plumped for a regime that exempted the qualitative selective agreements commonly used on those markets up to a market share of 100 %. However, it has to be borne in mind that the prior block exemption, Regulation 1475/95, went so far as to exempt *quantitative* selection of authorised repairers

([15]) Commission Decision of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733—VW) (1) Official Journal L 124, 25.04.1998, pp. 60–108; Commission Decision of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653—Opel) (notified under document number C(2000)2707) Official Journal L 59, 28.02.2001, pp. 1–42; Commission decision of 10 October 2001 relating to a proceeding under Article 81 of the EC Treaty and Case COMP/36.264—Mercedes-Benz) SEP et autres / Automobiles Peugeot SA (case COMP/36623) Summary version of the decision in all languages. Official Journal L173, 27.06.2006, p. 20.

([16]) Judgment of 28 February 1984, joined cases 228 and 229/82 Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v Commission ECR (1984) Q2 1129.

without market share limit, and even excluded agreements with stand-alone repairers (17) from the block exemption. It is therefore clear that although the reform was not total, the 2002 regulation went a long way towards 'normalising' the Commission's approach to the automotive aftermarkets, by aligning the market share threshold for the exemption of quantitative selection with that in Regulation 2790/1999 – 30 % – and by making it plain that at higher market share levels, vehicle manufacturers should bring robust evidence of real efficiencies if they wished their service and spare parts distribution agreements to benefit on an individual basis from Article 81(3), as it then was. The number of authorised repairers increased greatly, with resulting benefits for the owners of younger cars, who tend to use authorised garages in order to maintain a 'full dealer service record' and thereby maintain the residual value of their vehicles.

In order to counterbalance the 100 % exemption of authorised repair agreements, the Commission included a series of hardcore clauses in Article 4 of Regulation 1400/2002 relating to the distribution of spare parts and to the dissemination of technical repair information to independent operators. The latter (18) proved problematic – the notion of technical information was set in stone instead of following technological progress, and there was an exception allowing suppliers to withhold information relating to safety and security (Recital 26). In practice, the presence of a hardcore provision had little deterrent effect and the Commission was compelled to bring cases against four car manufacturers that withheld technical information (19). In the meantime, regulatory provisions were being put in place to oblige manufacturers to release technical information on new models; EURO 5/6 Regulation 715/2007 obliges manufacturers to provide such information on cars launched after September 2009 and Regulation 595/2009 will do the same as regards heavy vehicles from 2013. The approach of coupling a broad exemption with a hardcore list had other disadvantages, in that it made it more difficult for the Commission to act in respect of novel forms of restriction. One such problem, which has become more prevalent since 2002, involves the misuse of warranty terms to exclude independent repairers from doing any work on vehicles during the warranty period and to mandate the exclusive use of carmaker-branded 'original' spare parts.

When deciding on a replacement regime for Regulation 1400/2002, the Commission also had regard to how competition on the markets had developed, and to the current economic background. Unlike car prices, the cost of the average repair job has actually risen over the past few years. Consumers particularly feel the effect of rising repair costs during the present crisis, as they are more price-sensitive and also drive older vehicles that require more frequent maintenance. If anti-competitive practices bring about price rises, this is likely to lead to cars being driven in an unsafe and unreliable condition. It is therefore particularly important to ensure that independent repairers are not excluded from the market – these operators increase choice for consumers, particularly the owners of older cars, and keep the price of repairs competitive by putting pressure on car manufacturers' authorised repair networks.

There were therefore many reasons for the Commission to move away from its previous approach, while at the same time keeping the beneficial elements of the 2002 reform. The main plank of the reform is the alignment of the thresholds for exemption with the single 30 % threshold of the general regime. At a stroke, therefore, the Commission has effectively removed the exemption from the vast majority of authorised repair agreements, implying that these will have to be self-assessed. Lowering the market share threshold will make it easier for the Commission and National Competition Authorities to deal directly with issues such as refusal to release technical information, which have threatened to exclude independent repairers from the markets. By making a clear link in the Guidelines with the EURO 5/6 Regulations, the new framework ensures consistency and allows the notion of technical information to evolve in line with technical progress. Additional guidance is given on issues such as misuse of warranties. In contrast to the approach under Regulation 1400/2002, which relied on a limited list of defined hardcore restrictions, the new regime will also make it easier to deal with new types of restrictions as and when they arise.

The motor vehicle spare parts markets are notoriously difficult to define, and are also very important from the consumer's point of view, for reasons of both safety and cost. There is also a lack of transparency as to the origin of parts and their quality. Many consumers, for instance, believe that a part marked with a carmaker's logo will have been made by that firm, whereas in reality, the majority of such parts are manufactured by third-party producers that also supply the aftermarket under their own brands. There are also numerous examples (20), some apocryphal,

(17) In other words, within the framework of the block exemption, only car dealers could operate authorised repair workshops — in the language of the time, there was a forced sales-service link. See Recital 4 of Regulation 1475/95.

(18) Article 4(2) of Regulation 1400/2002.

(19) Daimler/Chrysler, Fiat, Toyota and General Motors (see IP/07/1332).

(20) See, for instance, http://www.motor.com/MAGAZINE/Articles/012004_04.html.

of parts manufactured in developing countries that are unsafe for use. Because of the difficulty of defining relevant markets and the consequent uncertainty as regards market shares, the Commission decided to retain three of Regulation 1400's sector-specific hardcore clauses. These concern restrictions placed by car manufacturers on a) the sale of original spare parts by authorised repairers to independent garages, b) the ability of independent manufacturers of spare parts to supply to authorised or independent repairers, and c) spare parts' manufacturers' ability to put their trade mark or logo on their products.

The new Guidelines also make reference to a point which is particularly thorny from the point of view of parts producers – the use of 'tooling arrangements' to prevent a producer from selling directly to the aftermarket. In such a system, the vehicle manufacturer contributes or invests in a tool or part of a tool, and then forbids the parts producer from using it to produce parts for aftermarket supply. The Guidelines clarify the extent to which a carmaker can rely upon the 1978 subcontracting notice to argue that tooling arrangements fall outside Article 101(1) TFEU.

Because of the obvious consumer benefits of the reform and the minimal risk that the change in the rules could entail disruption for stakeholders, the new legal framework will apply to the aftermarkets as from 1 June 2010 – i.e. three years before it applies to vehicle distribution agreements.

Conclusion

The new framework represents a more proportionate approach to the competition problems that may arise on the different markets in the motor vehicle sector. While on the primary market it gives car manufacturers greater freedom to organise their networks and to determine the conditions for selling their products, it also makes it easier for competition authorities to deal with problems on the less competitive aftermarkets. Moreover, the new rules should result in less waste of resources, allowing enforcers to better channel their efforts towards practices that result in real consumer harm. Market players therefore need to be on their guard to ensure that their agreements are in line with this new structure, and the extensive clarifications given in the Guidelines should help in this respect.

The European Court of Justice confirms approach in De Beers commitment decision

by Harald Mische and Blaž Višnar (1)

Introduction

On 29 June 2010, the Grand Chamber of the European Court of Justice ('ECJ') (2) set aside the General Court's ('GC') judgment of 11 July 2007, (3) which had annulled the 2006 Commission Decision that rendered commitments binding on De Beers. (4) The commitments by De Beers, the world's largest producer of rough diamonds, implied phasing out De Beers' systematic purchases of rough diamonds from the Russian Alrosa Company Ltd (hereafter: 'Alrosa'), the second largest producer of rough diamonds, which had raised concerns under Article 102 TFEU. Alrosa appealed the 2006 Commission Decision as a directly affected third party. It argued that the commitments were disproportionate to the competition concerns and deprived Alrosa of its most important customer. It also claimed that its rights of defence had been infringed.

This is the first ECJ judgment dealing with the application and interpretation of Article 9 of Regulation 1/2003 (5) (hereafter 'Article 9'). The ECJ found serious legal errors in the GC's judgment, reversed it and dismissed Alrosa's appeal as unfounded. In its judgment, the ECJ shed light on how to apply the principle of proportionality in the context of Article 9, in particular when the protection of third parties' interests is at stake. It clarified the scope of the right of third parties to be heard. Lastly, it confirmed the Commission's application of Article 102 of the Treaty on the Functioning of the European Union ('TFEU') (formerly Article 82 of the EC Treaty) to this case.

This article briefly summarises the Commission investigation into De Beers' purchase relationship with Alrosa and the 2006 commitment decision. Then, after summarising the main findings of the GC related to Alrosa's pleas in law, it examines the ECJ judgment. Certain aspects of the ECJ judgment may be clearer if read in conjunction with the opinion of Advocate General Kokott's ('AG Kokott'). Her opinion, dated 17 September 2009, is included in the discussion. Lastly, the article highlights some conclusions to draw from the ECJ judgment.

De Beers-Alrosa purchase relationship and the 2006 Commission decision[6]

In 2006, the Commission decision rendered binding De Beers' commitments to end its decades-long purchase relationship with Alrosa (and its legal predecessors). This relationship had started in 1959, but was only unearthed in 2001 during a merger investigation by the Commission. In March 2002, after further investigation, De Beers and Alrosa notified their five-year Trade Agreement concluded in 2001 for clearance or exemption under Article 101(3) TFEU (formerly Article 81(3) of the EC Treaty). The Trade Agreement provided that De Beers would buy the vast majority of Alrosa's rough diamonds destined for export from Russia and thereby continue its *de facto* exclusive distribution of Alrosa rough diamonds sold on the world market.

In January 2003, the Commission issued a statement of objections to De Beers under Article 102 TFEU. In parallel, the Commission issued a statement of objections to De Beers and Alrosa under Article 101 TFEU. Pending the Commission's proceedings, De Beers purchased an amount of Alrosa's rough diamonds more or less corresponding to the amount agreed in the Trade Agreement under a so-called 'willing-buyer-willing-seller' arrangement.

According to the Commission's preliminary analysis in the statement of objections, the product market covered the full range of rough diamonds suitable for cutting and polishing for the jewellery industry, on which De Beers was dominant. For much of the 20th century, De Beers had, as a 'custodian', controlled over 80 % (7) of the world

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

(2) Judgment in Case C-441/07 P *Commission v. Alrosa* of 29 June 2010, which followed Advocate General Kokott's opinion of 17 September 2009.

(3) Judgment of the General Court in Case T-170/06 *Alrosa v. Commission* of 11 July 2007 (through expedited procedure pursuant to Article 76a(1) of its Rules of Procedure).

(4) 'De Beers' refers to the De Beers group of companies including City West and East limited and De Beers Centenary Aktiengesellschaft, which are under the control of De Beers SA.

(5) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L68, 8.3.2004, p. 1).

(6) With respect to the Commission commitment decision see also Mische/Višnar, 'De Beers: commitments to phase out diamond purchases from the most important competitor', Competition Policy Newsletter No 2, 2006, pp. 30-32.

(7) In 2003, its share was lower than that.

supply of rough diamonds in all ranges, and thus acted as a price leader. It had always supplemented the production of its own mines by entering into joint ventures, purchasing diamonds from its competitors and buying up diamonds on the open market. Its market position and strategies even inspired case studies in textbooks on industrial organisation. ([8])

The Commission investigation revealed that De Beers had established its long-standing purchase relationship with Alrosa in order to regulate the volume, assortment and prices of rough diamonds sold on the world market. The rationale behind the planned purchases under the Trade Agreement appeared to be the same and an important factor contributing to De Beers' future market-maker role. In its preliminary assessment, the Commission took the view that De Beers' purchases hindered Alrosa from competing fully with De Beers and from acting as an alternative and independent supplier on the rough diamond market. In its preliminary assessment, such practices constituted a recourse to methods different from those of normal competition, and therefore an abuse of dominant position.

After receiving the statement of objections, De Beers and Alrosa extensively discussed with the Commission various forms of commitments with the aim of addressing the competition concerns. On 12 September 2003, Alrosa unilaterally offered to gradually reduce its sales of rough diamonds to De Beers and stop sales in 2013. It later withdrew these commitments.

In December 2004, De Beers and Alrosa jointly offered commitments entailing that De Beers would gradually reduce, over a period of five years, the amount of rough diamonds purchased from Alrosa to USD 275 million a year by 2010. Subsequently, in June 2005, the Commission market tested these commitments by inviting interested third parties to submit their observations. ([9]) The Commission received 21 observations. The vast majority argued that only a complete phasing-out of De Beers' purchases could allay the competition concerns.

On 27 October 2005, the Commission advised De Beers and Alrosa of the results of the market test and provided a summary of the submissions from third parties. The Commission informed De Beers and Alrosa that, at this stage of the proceedings, closing the investigation through an Article 9 decision would require a commitment to completely phase out De Beers' purchases from Alrosa. In view of the time elapsed since the statement of objections was issued and the need to accelerate the procedure, such commitments would have to be proposed before the end of November 2005. De Beers met this deadline and proposed phasing out its purchases to address the competition concerns raised in the Article 102 TFEU proceedings. Following further technical improvements, it submitted a final version of its commitments on 25 January 2006.

De Beers committed to gradually reducing its purchases of rough diamonds until 2008 to a maximum of USD 400 million. As of 2009, it would stop purchasing Alrosa diamonds altogether.

Still in November 2005, the Commissioner responsible for competition policy met Alrosa to inform it of De Beers' proposal and to hear its views as to its willingness to submit a corresponding amended commitment proposal. Alrosa failed to do so and instead requested access to the market test submissions. On 26 January 2006, the Commission granted Alrosa access to the non-confidential versions of the third party submissions and again invited it to submit its views on De Beers' amended commitment proposal. Alrosa did so in its reply of 6 February 2006.

On 22 February 2006, the Commission rendered De Beers' commitments binding through a decision pursuant to Article 9 as they were found to address the Commission's concerns under Article 102 TFEU. It then closed the proceedings.

Alrosa appealed this decision on 29 June 2006. The main arguments of its appeal, of the GC's 2007 annulment of the Commission decision and of the ECJ's subsequent reversal of that judgment are set out and analysed below.

The Grand Chamber of the ECJ set aside the GC's judgment of 2007 and confirmed the 2006 Commission decision

Alrosa raised three pleas before the GC. In two pleas, Alrosa claimed infringement of Article 9, which would not allow commitments to which an undertaking has not voluntarily subscribed to be made binding on it, *a fortiori* for an indefinite period. Secondly, Alrosa cited the excessive nature of commitments that were made binding, in breach of Article 9, Article 102 TFEU, freedom of contract and the principle of proportionality. Its third plea cited infringement of the right to be heard.

The GC annuled the Commission decision on all three pleas, whereas the ECJ set aside the GC judgment. It followed AG Kokott's opinion, and rejected all pleas put forward by Alrosa.

([8]) See Cabral, Luís, Introduction to industrial organisation (2000), pp. 132; Church, Jeffrey, Industrial Organisation — Strategic Approach (2000), pp. 120.

([9]) Through a Notice pursuant to Article 27(4) of Reg. (EC) 1/2003 published in the OJ C 136, 3.6.2005, p. 32-33.

Findings related to Article 9, the principle of proportionality, Article 102 TFEU and freedom of contract

Main substantive findings of the GC

On 11 July 2007, in a ruling issued under an accelerated procedure, the GC held that the contested decision was impaired by a manifest error of assessment, and disproportionate: '*It [was] clear from the circumstances of the case that other, less onerous, solutions than the permanent prohibition of transactions between De Beers and Alrosa were possible in order to achieve the aim pursued by the Decision, that their determination presented no particular difficulties of a technical nature and that the Commission could not relieve itself of the duty to consider such solutions.*' ([10])

The GC interpreted the principle of proportionality under Article 9 by referring to remedies that can be adopted as part of a prohibition decision pursuant to Article 7 of Regulation 1/2003 (Thereafter 'Article 7'). It held that the Commission cannot make binding commitments that go further than such remedies. The Commission would infringe the law by making binding under Article 9 proposed commitments that address its concerns, if interests of third parties are affected and less onerous commitments exist. Before making binding commitments, it should investigate less onerous solutions. The principle of proportionality '*required in this case that there should be an appraisal in concreto of the viability*' of intermediate commitment solutions, even if not offered by De Beers. ([11]) De Beers had not, in fact, offered any such intermediate commitment solutions.

In its judgment, the GC applied a full judicial review, thereby rejecting discretion. It reasoned that Article 9 decisions would not be prospective in nature like merger decisions; instead, the commitments only concern existing practices and thus are subject to a full judicial review. The GC considered that the Commission had not carried out a complex economic assessment. ([12]) The GC did not accept the Commission's arguments that De Beers' commitments essentially extended to the future and that compliance of the commitments with competition law had to be assessed in view of future market conditions, which obviously fluctuate.

The GC carried out a full review and ruling under an accelerated procedure without analysing evidence of the file, and evaluated a number of alternative solutions, which in its view were manifestly less onerous. The Court stated that it would have been less onerous and appropriate to '*prohibit the parties from entering into any agreement allowing De Beers to reserve to itself the whole, or even a material part, of Alrosa's production.*' ([13]) The GC moreover concluded that '*the joint commitments proposed in December 2004 by De Beers and Alrosa, which the Commission admittedly was under no procedural obligation to take into account, either in its decision or in its statement of reasons, none the less represented a less onerous measure than the measure which it decided to make binding.*' ([14]) In its findings, the GC did not consider the negative outcome of the market test.

The GC found that '*the Commission is never obliged under Article 9(1) of Regulation No 1/2003 to decide to make commitments binding instead of proceeding under Article 7 of that regulation. It is therefore not required to give the reasons for which commitments are not in its view suitable to be made binding, so as to bring the proceedings to an end.*' ([15]) However, the GC also held that the Commission cannot simply change its assessment of the viability of commitments. In its view, the Commission was required, and had '*failed to explain in what way the joint commitments did not address the concerns expressed in its preliminary assessment*'. ([16]) Any change in assessment had to be based on new facts. ([17])

On the interpretation of Article 102 TFEU, the GC ruled that '*the Commission cannot require an undertaking in a dominant position to refrain from making purchases [from its direct competitor] which allow it to maintain or to strengthen its position on the market*'. ([18]) Moreover, '*even if it were the case that ad hoc sales between De Beers and Alrosa allowed De Beers to maintain or strengthen its role as market-maker, such a result would not, of itself contravene the competition rules.*' ([19])

The ECJ quashed the GC's substantive findings and rejected Alrosa's pleas

The Commission appealed these findings. First it submitted that the GC misinterpreted and misapplied Article 9 and the principle of proportionality in the context of that provision.

Secondly, the Commission argued that, in examining whether the commitments were proportionate, the GC misinterpreted Article 102 TFEU, ignored the proper scope of judicial review, distorted the content of the contested decision and the factual record, and failed to give adequate reasons at several stages of the judgment.

Accepting the Commission's arguments on the first point, the ECJ held that Article 9 was fundamentally

(10) T-170/06, paragraph 126.
(11) T-170/06, paragraph 156.
(12) T-170/06, paragraphs 110 and 125.
(13) T-170/06, paragraph 128.
(14) T-170/06, paragraph 132.
(15) T-170/06, paragraph 130.
(16) T-170/06, paragraph 129.
(17) Or be the result of incorrect information, T-170/06, paragraph 194.
(18) T-170/06, paragraph 146.
(19) T-170/06, paragraph 152.

different from Article 7. Article 9 was introduced in the interest of procedural economy to ensure that competition rules are applied effectively. Commitments provide a more rapid solution to the identified competition problems.

The ECJ rejected as incorrect the GC's proposition that applying the principle of proportionality would have the same effect in relation to Article 9 compared to Article 7. It held that applying the principle of proportionality in the context of Article 9 is confined to requiring the Commission to verify that the commitments address the expressed competition concerns and that the undertaking had not offered less onerous commitments that adequately address those concerns. Thus, under Article 9, the Commission is not required to seek less onerous solutions than the commitments offered. Therefore, in this case, the Commission had to ascertain only whether the joint commitments offered in proceedings initiated under Article 101 TFEU were sufficient to address the concerns identified in the proceedings initiated under Article 102 TFEU. In view of the results of the market test, the Commission was entitled to conclude that the joint commitments were not appropriate. However, when assessing the commitments, the Commission must take into consideration the interests of third parties.

The ECJ ruled that the GC erred in holding that Regulation 1/2003 would prohibit the Commission from adopting a decision under Article 9(1), if that decision were disproportionate to the infringement, if established under Article 7(1). ([20]) The ECJ found that the aim of Article 7 is to put an end to an identified *infringement* and Article 9 aims to address the Commission's *concerns* following its preliminary assessment. Under Article 9, the Commission is not required to make a finding of an infringement, but only to examine the commitments offered by the undertaking concerned. Therefore there would be no reason why any proposal going beyond a potential Article 7 measure should automatically be regarded as disproportionate under Article 9. On the contrary, undertakings offering commitments consciously accept that their concessions may go beyond what the Commission could itself impose on them under Article 7 following a thorough examination. In return, closing the procedure allows undertakings to avoid a potential finding of a competition law infringement and a resulting fine.

The ECJ defined the scope of the Commission's discretion and rejected the GC's view of the standard of review by clarifying that judicial review is limited to reviewing whether the Commission's assessment is manifestly incorrect. Consequently, it rejected the GC's discussion of other options for commitments, as the GC had failed to reach a finding that the Commission committed a manifest error of assessment or that its conclusions were manifestly unfounded. It held that the GC breached law, because it '*examined other less onerous solutions for the purpose of applying the principle of proportionality, including possible adjustments of the joint commitments.*' ([21]) It '*expressed its own differing assessment of the capability of the joint commitments to eliminate the competition problems identified by the Commission, before concluding […] that alternative solutions […] were less onerous.*' ([22]) The ECJ concluded that '*by doing so, the General Court put forward its own assessment of complex economic circumstances and thus substituted its own assessment for that of the Commission, thereby encroaching on the discretion enjoyed by the Commission instead of reviewing the lawfulness of its assessment. That error of the General Court in itself justifies setting aside the judgment under appeal.*' ([23])

In view of these findings, the ECJ did not need to examine the remaining legal arguments, namely the GC's interpretation of Article 102 TFEU. However, the ECJ implicitly followed Advocate General Kokott's analysis. Had the GC been correct in its interpretation, De Beers could not possibly have infringed Article 102 TFEU. As a result, the Commission would have erred in raising those competition concerns under Article 102 TFEU, which it had identified in its preliminary assessment and committed a manifest error in accepting corresponding commitments. It is therefore interesting to take a closer look at AG Kokott's opinion on the applicability of Article 102 TFEU to De Beers' practices.

AG Kokott argued that it was '*certainly not unreasonable for the Commission to take the view that a continuing supply relationship between Alrosa and De Beers could lead to abuse of the dominant position held by De Beers.*' ([24]) In her view, the GC had erroneously disregarded De Beers' position as a producer and its competitive relationship with Alrosa. She explained, '*if both undertakings are active on the same market as producers, it is not as a rule consistent with normal competitive behaviour for one of them regularly to buy up the production of the other… Article 82 EC precludes behaviour by an undertaking in a dominant position if its purpose is to strengthen that dominant position and abuse it. There is reason to fear precisely such abuse if an undertaking in a dominant position buys up the production of another producer active on the same market. That other producer is then not required to develop its own distribution system and to compete with the dominant undertaking. This may*

([20]) Under Article 7, the Commission may impose on the undertakings concerned any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

([21]) Case C-441/07, paragraph 65.
([22]) Case C-441/07, paragraph 66.
([23]) Case C-441/07, paragraphs 67 and 68.
([24]) AG Kokott's opinion, paragraph 235.

have detrimental effect for the market structure and ultimately also for consumers… There is a danger that … the dominant undertaking influences sales and thus ultimately also prices… Such behaviour has nothing to do with the protection of the legitimate interests of the dominant undertaking, which is lawful in principle… the Court completely failed to address the dual role of De Beers as the world's largest producer and largest buyer on the market for rough diamonds'. ([25])

AG Kokott also dismissed the GC's considerations on auctions. The GC had erroneously '*simply stated*' that with auctions, there was '*no risk of abuse on the part of the seller*', although, in AG Kokott's opinion, it was not possible on this basis to rule out abusive bidding such as predation by the dominant undertaking as the buyer. She criticised that '*the judgment under appeal does not contain any indication that the Court of First Instance had given even the slightest consideration to this question*', even though it had reasons to do so, ([26]) because such conduct constitutes an abuse within the meaning of Article 102 TFEU. ([27])

AG Kokott opined that De Beers only exercised its (negative) freedom not to conclude contracts, and that the Commission decision merely defined the limits of contractual (positive) freedom which follow, for all economic operators, from the directly applicable competition rules. ([28]) On the duration of the commitments, AG Kokott argued that the Commission was not required to apply a time limit in view of the possibility of the case being re-opened under Article 9(2)(a). ([29])

The ECJ overruled the GC's judgment and dismissed Alrosa's plea, claiming an infringement of its right to be heard

The GC found that Alrosa had to be given rights of an undertaking concerned within the meaning of Regulation 1/2003 for 'the proceedings as a whole', i.e. not only the proceedings under Article 101 but also those under Article 102 TFEU, in the latter of which Alrosa was not formally an undertaking concerned. The GC based itself on the following considerations. First, although it was not the dominant undertaking under investigation pursuant to Article 102 TFEU, Alrosa was the contracting partner of De Beers in the context of a long-standing bilateral trading relationship, which the decision brought to an end. Second, the Commission would have treated the proceedings under Article 101 and 102 TFEU always *de facto* as a single set of proceedings. Third, Alrosa was involved in both sets of proceedings. Fourth, the decision expressly referred to Alrosa, and last, was liable to adversely affect it. ([30]) From this, the GC derived a number of rights for Alrosa, namely that it should have been informed of, and been given the chance to comment on, the essential facts on the basis of which the Commission required new commitments. ([31]) The Court ruled that Alrosa did not have the opportunity to fully exercise its right to be heard on the individual commitments proposed by De Beers, because the third-party observations were supplied to Alrosa only at the same time as De Beers' final commitments. Alrosa was therefore unable to give an effective reply and propose new joint commitments with De Beers. ([32])

The Commission appealed the GC's ruling based on a number of reasons, including that the GC misinterpreted the extent of Alrosa's right to be heard and that it gave no reasons for finding that this right would have been infringed.

The ECJ found that the GC misinterpreted the concept of 'undertaking concerned' within the meaning of Regulation 1/2003 by comparing Alrosa's legal position in the proceedings relating to Article 102 TFEU with that of De Beers. The ECJ ruled that Alrosa could not have the status of 'undertaking concerned' in the proceedings related to Article 102 TFEU concerning De Beers' unilateral practices and therefore only had the less extensive rights of an interested third party. ([33])

According to the ECJ, the GC '*based its reasoning on the incorrect proposition that the Commission was required to give reasons for rejecting the joint commitments and to suggest to Alrosa that it offer new joint commitments with De Beers.*' ([34]) The ECJ held that the Commission did not have to give Alrosa the opportunity to prepare new joint commitments together with De Beers. In addition, Alrosa did not have the right to comment on the outcome of the market test before De Beers submitted individual commitments.

Consequently, the ECJ dismissed Alrosa's plea related to its rights to be heard as unfounded.

Conclusions

The ECJ's judgment clarified the interpretation and application of Article 9, in particular with respect to the principle of proportionality and the rights of interested third parties to be heard.

In the context of Article 9, the principle of proportionality requires the Commission only to ascertain that commitments as offered by undertakings concerned address the competition problems it has

([25]) AG Kokott's opinion, paragraphs 120-122.
([26]) AG Kokott's opinion, paragraphs 129.
([27]) AG Kokott's opinion, paragraphs 128 and 130.
([28]) AG Kokott's opinion, paragraphs 225-241.
([29]) AG Kokott's opinion, paragraphs 217-220.
([30]) T-170/06, paragraphs 176, 177, 186, 187 and 191.
([31]) T-170/06, paragraph 196.
([32]) T-170/06, paragraphs 201 and 203.
([33]) Case C-441/07, paragraphs 88 and 91.
([34]) Case C-441/07, paragraph 95.

identified and that these commitments in any case do not manifestly go beyond what is necessary. The Commission does not have to compare the commitments offered with measures it would itself have imposed in an infringement decision, and to reject as disproportionate any commitment which goes beyond those measures. Undertakings which offer commitments consciously accept that the concessions they offer may go beyond what the Commission could impose on them in an Article 7 decision. However, undertakings benefit from a commitment decision by avoiding the risk that the Commission finds an infringement and imposes a fine. The rationale of Article 9 commitment decisions is procedural efficiency. It is meant to provide an effective future remedy to identified competition problems.

Third parties, in particular trading partners of presumably dominant undertakings, are often affected by a change in conduct resulting from commitments of such undertakings. However, there is no breach of the principle of proportionality if the Commission accepts proposed commitments without seeking to identify less onerous solutions, which would also address its competition concerns. Otherwise, the Commission would be forced to investigate all other solutions to its competition concerns. The Commission is not obliged to find the least onerous solution. This important clarification of the Commission's obligations in applying Article 9 is key to procedural efficiency and effectiveness, which is precisely the legislative purpose of the commitment procedure. The ECJ's judgment recognises and protects this.

In appeals against commitment decisions, interested third parties have to demonstrate an error of law or a manifest error of assessment or breach of the principle of proportionality. The principle of proportionality is only breached if commitments go manifestly beyond what is necessary to address the concerns expressed by the Commission in its preliminary assessment.

With respect to the right to be heard, interested third parties are not addressees of the preliminary assessment or the statement of objections in Article 102 TFEU proceedings. Consequently, they benefit only from rights accorded to interested third parties and not from rights of concerned parties. The ECJ's judgment confirms the careful balance of Regulation 1/2003 between an efficient procedure and protecting the rights of parties concerned and of interested third parties.

The ECJ also implicitly confirmed that an undertaking may not strengthen its dominant position through abusive behaviour inconsistent with normal competition. In this case, the ECJ thereby maintains the economic rationale of prohibiting abuse of dominant position under Article 102 TFEU, and strengthens, to the benefit of consumers, the Commission's work to enforce it. This case has shown that an abuse of dominant position may exist when dominant companies strengthen their position by buying up their competitors' output, at least when such purchases are significant for competition.

British Airways, Iberia and American Airlines: airline cooperation and consolidation under review by the Commission

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1. Introduction

On 14 July 2010, the Commission adopted two decisions in relation to air transport services. The first decision, in antitrust Case COMP/39.596 *BA/AA/IB,* made binding the commitments offered by British Airways ('BA'), American Airlines ('AA') and Iberia ('IB') in relation to their cooperation on transatlantic routes. The second decision, in merger Case COMP/M.5747 *IB/BA,* cleared a concentration between BA and IB in Phase I without remedies.

The present article discusses the main issues raised in these investigations and highlights developments in the Commission's approach towards competition analysis and remedies in the passenger air transport sector.

2. British Airways/American Airlines/ Iberia antitrust case

2.1. Background

BA, AA and IB concluded a set of agreements establishing cooperation on all routes served by these airlines between Europe and North America ('transatlantic routes'). In particular, the parties agreed to coordinate prices, capacity, schedules, marketing and sales, as well as to share revenues. On 8 April 2009, the Commission opened formal proceedings pursuant to Article 101 TFEU.

All three parties are members of the **one**world alliance, which is one of the three global airline alliances, the other two being the Star alliance and the SkyTeam alliance. The level of cooperation between members of each of these alliances ranges from a relatively low degree of cooperation, involving for example the sharing of frequent flyer programmes ('FFPs') or lounge access, to highly integrated arrangements, such as setting of common prices and revenue sharing. The latter types of cooperation have developed partly in response to existing regulatory barriers which prevent cross-border mergers between airlines at international level (2). The Commission's investigation concerned only the close transatlantic cooperation between BA, AA and IB, and not the looser forms of cooperation with the other members of the **one**world alliance.

The Commission decision of 14 July 2010 is a commitment decision on the basis of Article 9 of Regulation No 1/2003. In its decision, the Commission concluded that the commitments offered by BA, AA and IB met the competition concerns that it had expressed in its preliminary assessment of the case, which was contained in the Statement of Objections that was addressed to the parties on 29 September 2009. The sections below describe the Commission's competition concerns as expressed in its preliminary assessment and the commitments that the parties offered to meet those concerns.

2.2. Relevant markets

Point of origin/point of destination' (O&D) versus network-wide market

The Commission examined a recurrent question in recent airline cases, namely whether the relevant markets in these cases should be defined at the level of airline networks rather than at the level of individual city pairs.

From a demand side perspective, passengers usually wish to travel between specific cities. Accordingly, a price increase on a flight to Palermo will not generally make a passenger fly to Paris instead. Hence, passengers are concerned by competitive conditions on a particular route, which is not substitutable by other routes. On the other hand, some full-service airlines consider that they compete on the basis of their networks of flights, since larger networks allow airlines to offer more destinations and to persuade more passengers to travel via their hub airports. However, these supply-side considerations are secondary for the definition of the

(1) The authors would like to thank the other members of the case teams, in particular members of the Chief Economist Team Miguel de la Mano, Mario Marinello, Szabolcs Lőrincz, Manuel Godinho de Matos and José Enrique Elías Cabrera. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

(2) Mergers involving non-EU airlines are hampered by nationality clauses in bilateral air services agreements due to which a merging airline risks losing valuable air traffic rights. Furthermore, some countries maintain explicit foreign ownership and control restrictions. Thus, the United States limit foreign ownership of its airlines to 49 % and foreign control to 25 %. Similarly, non-EU citizens may own only up to 49 % of EU airlines. Mergers between EU carriers are possible thanks to EU liberalisation measures.

relevant market [3]. For a passenger wishing to travel on a specific route where a transaction results in monopoly prices, it would be of little relief if the same transaction strengthened the network of the parties *vis-à-vis* their competitors. Since competition assessment deals first and foremost with the effect of the transaction on consumers, demand-side considerations are key for the purposes of market definition.

The Commission thus provisionally concluded that O&D city pairs were the relevant method to define the market in the present case. This market definition does not negate the importance of networks in the airline industry. The Commission took network considerations into account in its competitive analysis, in particular when assessing the strength of the airlines at the relevant hubs, the likelihood of entry by a competitor in the light of its overall network presence and the competitive constraint imposed by one-stop flights over the airport hubs of competing airlines and airline alliances.

Premium versus non-premium passengers

The Commission's investigation identified the existence of two distinct groups of passengers with different travel needs on transatlantic routes. While one group of passengers selects the flights primarily on the basis of price ('non-premium passengers'), the other group of passengers selects trips on the basis of a combination of factors such as shorter trip duration, ticket flexibility, price and, given the length of the flight, travel comfort ('premium passengers') [4]. Premium passengers are usually less price sensitive than non-premium passengers. The Commission's conclusion was based on qualitative and quantitative evidence collected throughout its investigation. In particular, an analysis of the correlation of fares within the various fare classes on transatlantic flights revealed that fares for restricted Economy tickets are not correlated with fares for flexible Business tickets. Moreover, a passenger survey conducted at London Heathrow airport indicated that premium passengers share common travel preferences, which differ from the travel preferences of non-premium passengers, particularly as regards the time when the ticket was booked (which is generally closer to the time of departure of the flight) and the length of stay at destination (which is generally shorter and includes fewer stays over the weekend). Furthermore, premium passengers appeared to be much more likely to simply switch airlines in the case of a price increase rather than reduce their travel comfort or the flexibility of their travel by switching to a lower fare class. The Commission therefore took the preliminary view that services provided by airlines to these two groups of passengers belonged to two separate markets.

The Commission used booking classes as a proxy for determining the size of each of these markets. Booking classes are the main indicator which airlines themselves use to distinguish and price differentiate between premium and non-premium passengers. As it was not necessary to determine the precise boundaries of the two markets in this case, the Commission calculated market shares on the basis of the premium market, including all tickets except restricted Economy.

Non-stop versus one-stop flights

Air transport markets may be further segmented on the basis of the distinction between non-stop services and one-stop services. However, the Commission provisionally concluded that, in the present case, it was not necessary to determine whether non-stop flights and one-stop flights were in the same market. The parties' cooperation would restrict competition irrespective of the precise market definition, since on the routes of concern one-stop services were only remote substitutes to non-stop flights. The competitive constraint imposed by one-stop services varied between the routes of concern and depended on several factors, such as passenger type (premium/non-premium) and total travel time. The Commission conducted a detailed assessment of the extent of competitive constraint imposed by one-stop services on each route of concern.

Airport substitution

London is served by five main airports: Heathrow, Gatwick, London City, Luton and Stansted. The Commission's investigation indicated that demand-side substitution and supply-side substitution between transatlantic flights out of Heathrow and the other four London airports was likely to be insufficient to consider that they all belonged to the same relevant market. However, in this case it was not necessary to define the exact boundaries of the market, since such definition did not alter the Commission's competitive assessment. With respect to New York airports, the Commission provisionally considered John F. Kennedy and Newark airports to be substitutable.

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(3) Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13, paras. 13-14.

(4) While in previous cases the Commission used 'time sensitive/non-time sensitive' terminology to define these two groups of passengers, in the present case 'premium/non-premium' distinction was applied to underline the importance of non-time-related considerations, in particular travel comfort, for passengers on transatlantic routes.

2.3 Competitive assessment

In its preliminary assessment, the Commission considered that the extensive level of cooperation resulting from the agreements eliminated competition between the parties and restricted competition by object. In addition, the Commission found that the parties' cooperation also produced anti-competitive effects on specific routes, which were examined in further detail.

Concerns in relation to restrictions of competition between the parties

The Commission provisionally concluded that the agreements restricted competition between the parties and resulted in anti-competitive effects on six hub-to-hub routes, where non-stop services of two of the three parties overlapped. These were five routes between London and U.S. cities (Boston, Chicago, Dallas, Miami and New York), plus the route between Madrid and Miami (together 'routes of concern').

The provisional finding of anti-competitive effects was based on several grounds. First, the Commission's investigation revealed that on the routes of concern the parties were the closest competitors in terms of frequencies, schedules and service quality. Second, the parties' market position was particularly strong as compared to their actual and potential competitors. For example, the parties' market shares on the routes of concern exceeded 50 %. The combination of the parties' operations further strengthened their market position. Third, the parties' position was protected by high barriers to entry, in particular the lack of slots at London and New York airports. Other barriers to entry included the parties' high number of frequencies, extensive FFPs and hub advantage at the end of the routes of concern.

The preliminary finding of anti-competitive effects was also confirmed by the Commission's regression analysis of price concentration, which showed that the parties' agreements would be likely to lead to an increase in fares for both premium and non-premium passengers (5).

It is interesting to note a few peculiarities of the routes examined in the present case, which influenced the Commission's competitive assessment and subsequent evaluation of the commitments offered by the parties. First, the routes of concern were exclusively long-haul routes, which are quite different from short-haul routes. For example, long-haul operations require substantial connecting traffic to fill a plane and make the transatlantic flight viable. Furthermore, unlike many of the routes at issue in certain previous antitrust and merger cases, the long-haul routes which were the subject of the present investigation were quite large in terms of passenger traffic. For example, London-New York is the largest long-haul route in the world in terms of point-to-point passengers. Also, there was a substantial amount of high-yield premium traffic on most of the routes of concern. This made these routes particularly attractive for actual or potential competitors of the parties, if barriers to entry and expansion on these routes were to be lowered.

Concerns of restriction of competition between the parties and third parties

The Commission also provisionally concluded that the agreements had the potential of creating further restrictive effects through the parties restricting access to connecting traffic by their competitors.

As mentioned above, access to sufficient connecting traffic is very important for the viability of transatlantic air transport services. The parties that have hubs at one or both ends of the six routes of concern are important providers of connecting traffic to competitors operating on these routes. They can provide competitors with access to connecting passengers by concluding standard industry interline or special pro-rate agreements (6). The agreements would add the parties' increase in market power on the routes of concern to their strong presence on short- and medium-haul routes connecting to their hubs. The Commission's preliminary view was that this would enable the parties to restrict their competitors' access to connecting traffic travelling over these routes, for example by restricting the terms of

(5) The main goal of that analysis was the statistical measurement of the strength and sign of the historical association between price (fare) and market concentration. In particular, the logarithms of ticket prices were regressed on the number of independent competitors (as a measure of market concentration), and other controlling factors, such as average frequency, aircraft size, slot concentration at origin and destination cities, GDP, population, and time effects. Separate models were set up for the fares of the restricted economy and the fully flexible business booking classes. The estimation used standard panel data estimators (fixed effects, first differences, GMM fixed effects and first differences, and the Arellano-Bond estimator).

(6) Under an interline agreement, other airlines can issue tickets including a segment that they operate themselves as a well as a segment operated by the parties. For example, a competitor can issue a ticket for a Manchester-London-New York itinerary, where the Manchester-London segment is operated by BA and the London-New York segment by the issuing competitor itself. The parties subsequently charge the issuing airline for the segment that they operate. The issuing airline and the parties can choose to divide the fare that is collected from the passenger on the basis of standard industry rules set within the framework of the International Airline Travel Association ('IATA'). They can also opt to set the terms and conditions for interlining by a tailor-made, more advantageous agreement ('special pro-rate agreement').

interline or special pro-rate agreements or by refusing to enter into such agreements altogether. The Commission provisionally concluded that a reduction in connecting passengers from the parties had the potential to significantly undermine the viability of competitors' transatlantic services on the routes of concern, thereby foreclosing the markets for these competitors.

The Commission's preliminary view was that the potential for negative effects arising from such practices would depend on route-specific factors. For each of the routes of concern, the Commission considered in detail the parties' market power and the potential negative effect that would result from a restriction of their competitors' access to connecting traffic. In particular, the Commission assessed the importance of connecting traffic for competitors' operations on the routes, the scope of competitors to attract connecting traffic from other interline or alliance partners if faced with a reduction in connecting traffic from the parties, and the potential that a reduction of connecting traffic from the parties had to restrict overall competition on the route of concern.

In the light of these factors, the Commission provisionally concluded that the potential for negative effects was most likely on the London-Chicago and London-Miami routes. The Commission's investigation confirmed that the operations of competitors on those routes were particularly dependent on connecting traffic provided by the parties, so that a reduction of access to connecting traffic had the potential of significantly undermining the viability of competitors' operations and the state of overall competition on those routes.

2.4 The commitments

General description

The parties offered a set of commitments aimed at addressing the competition concerns identified, primarily by removing barriers to entry and expansion for other airlines to operate on the routes of concern ([7]). Having analysed the proposed commitments and having market tested them, the Commission concluded that the commitments met the competition concerns as expressed in its preliminary assessment.

Slot commitment

On four of the six routes of concern, the parties proposed to make slots available at either London Heathrow or London Gatwick airports – at the competitor's choice – to allow competitors to operate one additional daily service on each of London-Dallas and London-Miami, two additional daily services on London-Boston, and three additional daily services on London-New York. The number of slots to be made available on a route of concern was to be reduced by any competitive service on this route that was added without making use of the slots released under the commitments ([8]). Thus, in line with this clause, the three new services recently launched by Continental Airlines and Delta Air Lines on London-New York mean that there are currently no slots available on this route. However, after adoption of the commitment decision, slots were available on the three other routes. Having applied for slots under the commitments, Delta started new services on London-Boston and London-Miami on the basis of these slots in March 2011.

Under the commitments, the Commission selects the entrant which would offer the most effective competitive constraint imposed on the relevant route. Competitors may choose to offer compensation for the requested slots. However, compensation is not a factor in the Commission's competitive assessment of applicants' requests for slots: it would only be taken into consideration if two or more applicants were deemed to impose a similarly effective competitive constraint.

The slot commitment essentially follows the precedents set in previous antitrust and merger cases in the airline sector. However, it deviates from the precedents in five principal respects.

Compensation

Unlike in previous antitrust and merger cases in passenger air transport, the current commitments do not preclude compensation for the release of slots. This is in line with the Commission's current position on slot exchanges involving monetary and other consideration ([9]). The Commission took into account the specific situation at London Heathrow, where an active secondary market for slots has existed for many years. This airport is highly congested and the value of traded slots reaches several millions of euros. In these circumstances, it was considered disproportionate to exclude the possibility of compensation proposed by the parties, given that it had

([7]) See the final commitments at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_3882_2.pdf.

([8]) Similar clauses were included in commitments in previous merger cases, see for example Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004), para. 1.2.3 of the commitments; Case COMP/M.3770 *Lufthansa/Swiss* (OJ C 204, 20.8.2005), para. 1.2.2 of the commitments; and Case COMP/M.3940 *Lufthansa/Eurowings* (OJ C 18, 25.01.2006), para. 2.1.2 of the commitments.

([9]) See Commission's Communication COM(2008)227 final on the application of Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, as amended, 30.4.2008, page 6.

no negative impact whatsoever on the effectiveness of the commitments.

'Anti-gaming' provisions

Contrary to precedent, the commitments restrict a competitor from receiving slots from the parties if it already holds slots at the airport and fails to operate them without a *bona fide* reason. Given the high value of slots at the relevant airports, this provision was included to prevent competitors from 'gaming', i.e. receiving slots under the commitments even though the competitor already has unused slots which it can operate to offer a competitive service.

Slots for non-stop services

Unlike in previous remedy packages concerning long-haul routes where released slots could be used for one-stop services ([10]), the slots in the present case are generally available only for non-stop services on the routes of concern. However, exceptionally, on the London-Dallas and London-Miami routes the slots will become available also for one-stop services as of the IATA summer season 2013, in the event that no competitor has used them up to operate a non-stop flight. This provision was included in particular to encourage competitors to apply for slots for non-stop services on these routes as early as possible.

Reduced time window

In previous air transport cases, the parties undertook to make available slots within +/- 90 minutes of the time requested by the applicant for long-haul routes ([11]) and between +/- 30 ([12]) and, recently, +/- 20 ([13]) minutes for short-haul routes. The reasoning was that precise timing is less important on long-haul than on short-haul routes, both because peak times are longer and the constraints of aircraft rotation are much lower on long-haul routes. However, two elements in the present case led the parties to improve the commitments and reduce the time-window to +/-60 minutes. First, multiple daily services are offered at London Heathrow on transatlantic routes, which makes it more important to obtain a slot at a precise time. Furthermore, obtaining a slot at a precise time may be important to a carrier with a hub at the other end of the route in order to meet its connection banks at that hub.

Restrictions on slots per hour

The commitments in some previous merger cases included provisions that excluded an obligation either to release slots at certain hours ([14]) or to release more than a certain number of slots in a given hour ([15]). This was due to either environmental regulations in force or to ensure the viability of the merged entity's hub-and-spoke system. The present commitments exclude an obligation to release any arrival slots before 6:20 a.m. and more than three slots between 6:20 and 8:20 a.m. The Commission concluded that these restrictions were proportionate did not undermine the effectiveness of the commitments.

Fare combinability and SPA commitments

The parties also offered to conclude fare combinability agreements with competitors on the routes of concern. These agreements provide for the possibility for competitors to offer a return trip comprising a non-stop transatlantic service provided by that competitor, and a non-stop service in the other direction by the parties, thus increasing the number of frequencies the competitor is able to offer.

Finally, the parties committed to enter into special prorate agreements ('SPAs') with competitors on the routes of concern. Such agreements allow interested airlines to attract connecting traffic from the parties on favourable commercial terms. SPAs would be available for any airline that wishes to launch new services on the routes of concern, in particular by using slots to be released by the parties. This should give these airlines a further incentive to enter or expand their operations on these routes. In addition, SPAs would be available for existing services of competitors on London-Miami and London-Chicago, in order to address the Commission's specific concerns in relation to the availability of connecting traffic for existing competitors on these routes.

([10]) See, for example, commitments in Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004) and Case COMP/M.3770 *Lufthansa/Swiss* (OJ C 204, 20.8.2005).

([11]) Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004), para. 1.3.1 of the commitments; Case COMP/M.3770 *Lufthansa/Swiss* (OJ C 204, 20.8.2005), para. 1.3.2 of the commitments.

([12]) Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004), para. 1.3.1 of the commitments; Case COMP/M.3770 *Lufthansa/Swiss* (OJ C 204, 20.8.2005), para. 1.3.2 of the commitments; Case COMP/M.3940 *Lufthansa/Eurowings*, para. 2.2.2 of the commitments; Case COMP/M.5364 *Iberia/Clickair/Vueling*, para. 1.2.2 of the commitments.

([13]) Case COMP/M.5335 *Lufthansa/SN Airholding*, para. 1.3.4 of the commitments; Case COMP/M.5440 *Lufthansa/Austrian Airlines*, para. 1.2.2 of the commitments.

([14]) Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004), para. 1.3.11 of the commitments.

([15]) Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004), para. 1.3.12 of the commitments; Case COMP/M.3770 *Lufthansa/Swiss* (OJ C 204, 20.8.2005), para. 1.3.11 of the commitments; Case COMP/M.5440 *Lufthansa/Austrian Airlines*, para. 1.1.3 (iii) of the commitments.

3. Iberia/British Airways merger case

3.1 Background

The merger between BA and IB was agreed on in April 2010, notified to the Commission in June 2010, and ultimately unconditionally cleared on 14 July 2010 on the basis of the EU Merger Regulation.

Unlike the BA/AA/IB alliance case, which related to transatlantic long-haul routes, the merger investigation focused to a significant extent on the assessment of two short-haul routes: London-Madrid and London-Barcelona, where both parties provide non-stop services ([16]). In addition, the Commission investigated the impact of the merger on a number of short- and long-haul routes ([17]).

3.2 Relevant markets

Many of the considerations on market definition mentioned above in the context of the antitrust case apply in a similar manner on short-haul routes, such as London-Madrid and London-Barcelona. However, since travel comfort is a much less determining factor in passengers' decisions with regard to the choice of a carrier on short-haul routes, the Commission has traditionally distinguished time sensitive passengers from non-time sensitive passengers (instead of premium/non-premium passengers) to reflect the level of time flexibility of short-haul passengers. More specifically, and similarly to its previous merger cases dealing with short-haul destinations, the Commission found that time sensitive passengers tend to travel for business purposes, require significant flexibility with their tickets (such as cost-free cancellation and changing of the departure time, etc.) and are prepared to pay higher prices for this flexibility. Non-time sensitive customers travel predominantly for leisure purposes or to visit friends and relatives, book well in advance, do not require flexibility with their booking and are generally more price-conscious ([18]).

One further distinctive element of the merger case at the level of product market definition, again due to the short-haul character of the London-Madrid and London-Barcelona routes, was that the Heathrow, Gatwick and City airports were found to be interchangeable with respect to both time sensitive and non-time sensitive passengers. This conclusion, which is consistent with an earlier antitrust decision of the Commission involving the same parties ([19]), was reached *inter alia* in view of the available transport infrastructure between these airports and central London, the strong correlation between fares charged by the parties for flights to the same destinations from different London airports, and the existence of an adequate level of conveniently-timed frequencies and cheaper airfares at London Gatwick.

3.3 Competitive assessment

In assessing the effects of the merger, an important aspect was that easyJet has become a well-established player on both the London-Madrid and London-Barcelona routes, holding nearly a third of all slots at London Gatwick. In addition, easyJet maintains a base at Madrid and was, at the time of the decision, in negotiations to open a base at Barcelona's El Prat airport. Other players who are active on Heathrow/Gatwick-Madrid or Heathrow/Gatwick-Barcelona routes with an established base or hub presence at these airports are the Sky Team alliance-carrier Air Europa and the low cost carrier Ryanair. The Commission's market investigation showed that all these players placed strong competitive constraints on the merging parties.

Another relevant element of the competitive assessment was that IB and BA were already cooperating intensively pre-merger by way of a revenue- and profit sharing joint venture on the UK-Spain bundle of routes. This cooperation was exempted by the Commission in 2003 in the abovementioned antitrust exemption decision, subject to undertakings such as the release of slots to competitors on both routes. easyJet availed itself of these remedies and thus expanded its market presence on both routes - a position that would not be materially altered after the merger if the merging parties were to request slots back from easyJet ([20]). As a consequence, given the low amount of residual competition possibly eliminated by the transaction through the cooperation between the parties pre-merger, as well as the

([16]) On London-Madrid, both parties operating non-stop services while on London-Barcelona, IB markets seats as a marketing carrier on BA-operated flights by way of code-sharing.

([17]) On these routes one merging party offers a non-stop connection while the other party offers a one-stop connection, or both parties offer one-stop connections.

([18]) Case COMP/M.5440 *Lufthansa/Austrian Airlines*; Case COMP/M.5335 *Lufthansa/SN Airholding*; Case COMP/M.5364 *Iberia/Vueling/Clickair* (OJ C 72, 26.03.2009); Case COMP/M.3280 *Air France/KLM* (OJ C 60, 09.03.2004); Case COMP/M.3770 *Lufthansa/Swiss* (OJ C 204, 20.8.2005).

([19]) Case COMP/D2/38479 British Airways/Iberia/GB Airways.

([20]) The situation was different in case COMP/M.5440 *Lufthansa/Austrian Airlines,* where the merging parties had transferred slots on the route Frankfurt-Vienna to their competitor Niki with a view to complying with Article 101 TFEU. As result of the merger, Niki would have had to hand these slots back and would thus effectively have had to exit the route. In consequence, the merger between Lufthansa and Austrian Airlines was cleared subject to remedies *inter alia* for this route.

competitive strength of the parties' competitors, the Commission concluded that the merger does not give rise to competition concerns on any of these routes.

Similarly, as regards all other short- and long-haul routes affected by the merger, the Commission's investigation showed that the merged entity will continue to face sufficient competition from other carriers active on these routes, and therefore passengers will have adequate alternatives to fly on these routes after the merger. More specifically on the UK/Spain-North American routes, the assessment focused on the merger-specific effects of the transaction, taking into consideration the close cooperation that will exist between the merged entity and AA as a result of their transatlantic cooperation mentioned above.

4. Conclusion

In both the *BA/AA/IB* antitrust case and the *IB/BA* merger case, the Commission adopted decisions on 14 July 2010not to oppose the transactions. Whereas in the antitrust case this decision was subject to commitments under Article 9 of Regulation 1/2003, the merger decision was unconditional. As described above, the factual circumstances and the extent of competition concerns in each case were very different, which explains the difference in the final decisions, despite the fact that the same two EU carriers were involved in both transactions. As these two cases demonstrate, the Commission is vigilant in monitoring observance of EU competition rules in the air transport sector, and only intervenes in transactions that raise genuine competition concerns.

The Bathroom fittings and fixtures cartel

by Liane Wildpanner and Caroline Teyssié (1)

Introduction

On 23 June 2009, the Commission adopted a prohibition decision against 17 manufacturers of bathroom fittings and fixtures producers. The Decision found that Masco (including the Hansgrohe and Hüppe sub-groups), Grohe, Trane, the former Ideal Standard group (which notably included Trane and Wabco), Hansa, Roca (including Laufen), Duravit, Dornbracht, Sanitec, Villeroy & Boch, Duscholux, Kludi, Artweger, Cisal, Mamoli, RAF, Teorema and Zucchetti had operated a single and continuous cartel in the bathroom fittings and fixtures sector. The Commission imposed a total amount of fines of more than EUR 622 million on them for infringing Article 101 of the TFEU and Article 53 of the EEA Agreement.

The cartel covered six Member States: Germany, Austria, Italy, France, Belgium and the Netherlands. The cartel meetings took place in 13 national trade associations and bilateral meetings were held between the undertakings concerned. The anti-competitive conduct covered the time period 1992 – 2004. (2)

Products concerned

The infringement concerned the following three product groups:

- Taps and fittings, including pillars, single and double head mixers and thermostatic taps and mixers;
- Shower enclosures, including shower cubicles and bath screens;
- Ceramics or 'ceramic sanitary ware', including WCs and cisterns, washbasins, pedestals, bidets, urinals, sinks and shower trays.

The anti-competitive conduct affected sales to wholesalers, which accounted for most sales made by the manufacturers. The wholesalers sold the products either directly to end consumers or, to a larger extent, to plumbers, who again sold to end consumers. Prices for the products were typically adjusted each year. A smaller share of sales were made to do-it-yourself outlets (DIY outlets), for which an infringement of competition rules could not be established. In the year 2004, the value of the three product groups was estimated at EUR 2 888.7 million.

Procedure

The case was opened on the basis of an immunity application made by Masco under the Commission's 2002 Leniency Notice on 15 July 2004. The Commission obtained further evidence from inspections that took place in November 2004 at the premises of several addressees of the Decision in Austria, Belgium, Germany, Italy and the Netherlands. Following those inspections, the Commission received leniency applications from Grohe, Ideal Standard, Hansa, Dornbracht, Roca and Artweger and sent out several requests for information.

A Statement of Objections was issued on 26 March 2007 and on 12-14 November 2007 an Oral Hearing took place. On 9 July 2009, the Commission sent a letter of facts to the undertakings. The Commission adopted the Decision on 23 June 2010.

The cartel

Content of coordination

The anti-competitive conduct of the undertakings included regular coordination of annual price increases within the framework of meetings of 13 national industry associations. During the meetings, the undertakings would communicate to each other in a round-table discussion their yearly planned price increases expressed in percentages, in most cases before the increases were communicated to customers. In certain cases, coordination included additional pricing elements, such as setting minimum prices and rebates. Furthermore, the infringement covered the coordination of pricing on several other occasions connected to specific events, such as the increase of raw material costs, the introduction of the Euro and the introduction of road tolls. Additional disclosure and exchanging sensitive business information supported and facilitated the overall price coordination scheme.

Single and continuous infringement

The Commission found in its Decision that the cartel constituted one single and continuous infringement (SCCI) for the three product groups in the above-mentioned six Member States.

(1) The authors would like to mention the substantial contribution of previous case handlers, including Ms Iona Hamilton, Mr Andreas Klafki and Mr Dimitrios Loukas. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

(2) The duration of the participation of the specific undertakings within this time frame varied.

Several features of the cartel served as a basis for this legal qualification of the infringement, including the following:

- All products covered by the cartel are generally considered as general bathroom equipment and are referred to as 'products before the wall' ('*Produkte vor der Wand*');
- One central group of undertakings participated in the cartel in several Member States;
- So-called 'umbrella associations' covered all three product groups and 'cross-product' associations, in which coordination covered two product groups;
- Many of the multinational undertakings had central pricing mechanisms, with headquarters controlling the pricing. This centralised system (and the ensuing two-way flow of information between parents and national subsidiaries) facilitated the coherent organisation of the cartel across Member States and product groups;
- A common method of distribution for all product groups (via wholesalers);
- The cartel followed the same recurring pattern and used the same mechanisms (in particular systematic exchange of annual price increases at regular meetings of associations), for all Member States and product groups concerned;
- A high volume of trade flows between the Member States concerned could be established for most products;
- The cartel arrangements continued (following the same design) even when some members withdrew.

As a second step, the Commission established the extent of each participant's awareness of the overall scope of the cartel. In terms of product scope, this was established mostly on the basis of the undertakings' participation in cartel meetings of umbrella or cross-product associations. In terms of geographic scope, the parties' awareness was established using various factors, such as their geographical presence in several Member States, the high volume of trade flows, central pricing mechanisms and the fact that they continued to meet the same competitors in meetings in several Member States. ([3]) As a result, out of the 17 groups of undertakings concerned, 8 were held liable for the SCCI in all six countries (i.e. Masco, American Standard, Grohe, Hansa, Duravit, Duscholux, Sanitec and Villeroy & Boch), as the fact that they were aware or could not reasonably have been unaware of the overall scheme of the infringement was established. The remaining undertakings were held liable for the SCCI only for countries in which they were active in the cartel, because their awareness of the overall geographic scope of the cartel could not be established. ([4])

Remedies

The Decision adopted by the Commission ordered all addressees to put an end to the infringement, to the extent that it was still ongoing, and to refrain from repeating any act or conduct with the same or equivalent object or effect. It also imposed fines on these undertakings. However the undertakings that participated in the anti-competitive arrangements in the Netherlands were not fined for their participation in that country as the part of the infringement covering that territory could not be established for the period after 31 December 1999 and was therefore limited.

Calculating the fines

In accordance with the 2006 Guidelines on fines, ([5]) the Commission calculated the basic amount of the fine as a proportion of the value of sales of bathroom fittings and fixtures products made to wholesalers by each undertaking in the relevant geographic area in the last full business year of the infringement (i.e. 2003 for most companies), ([6]) multiplied by the number of years and months of participation in the infringement ('variable amount'), taking into account the duration of participation of each individual undertaking in the infringement. An additional amount, also calculated as a proportion of the value of sales, was applied for the purpose of deterring horizontal concerted practice consisting of price fixing ('entry fee').

To establish the proportion of the value of sales to be taken into account, the Commission may look at

([3]) See in this regard Joined Cases T-109/02, T-118/02 etc. Bolloré SA and Others v Commission [2007] ECR II-947, paragraph 247: '*It must be said at the outset that where participants in cartel meetings have contacts with their (equally) large international competitors active in other Member States for a very long period of time, it is scarcely conceivable that, while participants rubbed shoulders with competitors participating in the entire territory of the cartel in the cartel meetings, they were unaware of the broader geographic scope of the arrangements.*'.

([4]) Those undertakings are Roca (held liable for Austria and France), Dornbracht and Kludi (held liable for Austria and Germany), Artweger (held liable for Austria), and the Italian undertakings Cisal, Mamoli, RAF, Teorema, Zucchetti (all held liable for Italy, where coordination as set out in the Decision only covered taps and fittings and ceramics).

([5]) Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

([6]) For the purpose of calculation of fines, the relevant geographic area covered the countries in which the undertakings directly participated in the cartel arrangements.

a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope and implementation of the infringement. (7) In this case, the Commission decided to apply a starting percentage of 15 %, in particular in view of the nature of the infringement. (8) The entry free was also set at 15 %. (9)

No aggravating or mitigating circumstances were found applicable in this case. The 10 % turnover limit provided in Article 23(2) of Regulation 1/2003 was reached for all but two undertakings. The fines were adjusted accordingly.

Application of the 2002 Leniency Notice

The 2002 Leniency Notice was applied to this case. (10) Masco was granted full immunity from fines and the fines for Grohe and Ideal Standard were reduced by 30 %. The leniency applications made by Hansa, Roca, Dornbracht and Artweger were rejected for not having provided significant added value compared to the information already in the Commission's possession. Ideal Standard also benefited from the application of point 23, last paragraph, of the 2002 Leniency Notice. (11) As a result, the Commission did not take into account the facts relating to ceramics in Belgium and taps and fittings and ceramics in France when setting the fine for Ideal Standard, since they were previously unknown to the Commission.

Ability to pay a fine

Ten undertakings cited inability to pay under point 35 of the 2006 Guidelines on fines. (12) The Commission considered these claims and analysed the financial situation of those undertakings and the specific social and economic context.

In assessing the undertakings' financial situation, the Commission examined the companies' recent and current financial statements as well as their projections for subsequent years. The Commission considered a number of financial ratios measuring the companies' solidity, profitability, solvency, and liquidity as well as their equity and cash flow situation. In addition, the Commission took into account relations with external financial partners, such as banks, and relations with shareholders. The analysis also looked at restructuring plans.

The Commission assessed the specific social and economic context for each undertaking whose financial situation was found to be sufficiently critical. In this context, the impact of the global economic and financial crisis on the bathroom fitting sector was taken into account. The Commission concluded that the fine would cause the assets of the five undertakings to lose significant value. As a result, the fines of three companies were reduced by 50 % and those of another two by 25 %.

(7) See paragraph 22 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

(8) See paragraphs 21 and 23 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

(9) See paragraph 25 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

(10) Commission notice on immunity from fines and reductions of fines in cartel cases, OJ C 45, 19.2.2002, p. 3.

(11) Point 23, last paragraph, of the 2002 Leniency Notice provides that 'if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fines to be imposed on the undertaking which provided these elements'.

(12) Paragraph 35 of the 2006 Fining Guidelines provides that 'in exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that the imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value'.

Reduced fines outside the scope of the Leniency Notice: The Power Transformers case

by Gerald Berger, Markus Schmillen ([1])

Introduction

On 7 October 2009, the Commission adopted a decision relating to a proceeding under Article 101 TFEU (formerly Article 81 of the EC Treaty) imposing fines of EUR 67.6 million on European and Japanese producers of power transformers.

This case is a good example of how the Commission rewards cooperation to combat cartels by considerable reducing fines, even where cooperation is not covered by the scope of the Leniency Notice. Based on a thorough analysis of cooperation by the two parties, the Commission concluded that an 18 % reduction of fines outside the Leniency Notice was justified for both. In so doing, the Commission encouraged and rewarded cooperation in the 'fight against cartels'.

The decision was addressed to nine legal entities belonging to seven undertakings. From 9 June 1999 until 15 May 2003 the addressees participated in a single and continuous infringement. They agreed to share markets under a 'Gentlemen's Agreement' between European and Japanese producers of power transformers to respect each others' home markets and to refrain from selling in these markets.

The Product

The anti-competitive behaviour concerns power transformers with a voltage range of 380 kV and above. A power transformer is a major electrical component whose function is to reduce or increase the voltage in an electrical circuit. A high level of tension is required in the transmission of electrical current to minimise energy loss. The level of tension produced by power stations is such that if electricity were transported at this level, energy loss would be substantial. It is therefore necessary to raise the tension levels of electricity produced by power stations before the electrical current is transported over long distances. The tension level is then lowered once the current nears the place of consumption, so that it can be used by the end user.

Power transformers are sold as stand-alone equipment or as part of turnkey power substations. The decision did not cover power transformers sold as part of gas insulated switchgear based substations, the sales of which were subject to the Commission Decision in Case COMP/F/38.899 — *Gas Insulated Switchgear*. ([2])

Procedure

The decision was based on leniency applications by Siemens and Fuji, cooperation by AREVA T&D and Hitachi, evidence collected during inspections and replies to several requests for information.

The Statement of Objections was adopted on 20 November 2008 and the Oral Hearing took place on 17 February 2009. The Advisory Committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 18 September and 2 October 2009 and the Commission adopted the decision on 7 October 2009.

The 'Gentlemen's Agreement'

The parties to the infringement concluded a so-called 'Gentlemen's Agreement' to respect each others' home markets. This was an oral agreement between the Japanese and the European manufacturers of power transformers that each group would refrain from entering the other group's market, namely that the Japanese members would not sell power transformers in Europe and the European members would not sell power transformers in Japan. The infringement lasted from 9 June 1999 until 15 May 2003.

The object of the 'Gentlemen's Agreement' was to prevent, restrict or distort competition. It constituted a typical home market protection rule, limiting the commercial freedom of the Japanese and European parties with respect to operations in each other's territories. By adhering to the agreement, the parties deliberately gave up one of the most important parameters of competition, namely the acquisition of market share.

To make the agreement work, the parties organised meetings once or twice a year. The meetings took place in Europe and Asia, namely in Malaga, Singapore, Barcelona, Lisbon, Tokyo, Vienna and Zurich and they served to confirm compliance with the agreement. Each member of the cartel was assigned a secret code.

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

([2]) Decision adopted on 24 January 2007, see OJ C 5, 10.01.2008, p. 7.

Remedies

Under the 2006 Guidelines on Fines, (3) when determining the basic amount of fine to be imposed on each undertaking, the Commission referred to 'the value of sales', (4) i.e. 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 European Economic Area (EEA).

However, given the nature of the 'Gentlemen's Agreement' (namely that Japanese producers do not sell in Europe and European producers do not sell in Japan), the Commission concluded, in accordance with the first paragraph of point 18 of the 2006 Guidelines on Fines, that the undertakings' sales in the EEA did not adequately reflect the weight of each undertaking in the infringement.

Point 18 second paragraph of the 2006 Guidelines on Fines states that, for the purpose of setting the basic amount of fine, the Commission may assess the total value of sales of goods to which the infringement relates in the geographic area, determine the share of sales of each undertaking party to the infringement on that market and apply this to the aggregate sales within the EEA of the undertakings concerned.

In this case, the Commission, in accordance with the case-law, took account of the effective economic capacity of each party to the infringement and of the real impact on competition of each undertaking's unlawful conduct. The aim was to take a balanced approach and ensure deterrence. As the parties are major global active producers of power transformers, their agreement not to sell in each others' home markets meant that their global competitive potential, i.e. not only sales in Japan and the EEA or both combined, was not applied for the benefit of the EEA market. (5) The Commission therefore decided to use the undertakings' global sales of power transformers as the basis for calculating the fines. The reason was that the territory covered by the infringement was wider than the EEA and that all cartel members were major producers of power transformers on the global market. Thus only the parties' global market shares was a proper evaluation of their capacity to affect free competition and better reflected the relative weight of each undertaking in the infringement.

The Commission also relied on point 37 of the 2006 Guidelines on Fines, which allows it to depart from the general methodology given the particularities of a case or the need to achieve deterrence, and concluded that any other approach would not make for a sufficient deterrent.

In line with this conclusion, sales were calculated for the undertakings on the basis of their global market share applied to sales of all undertakings inside the EEA, i.e. by multiplying the size of the EEA market by their global market share.

Another element used to determine the basic amount of the fine is the reference year. The Commission typically uses the value of sales made by the undertakings during the last full business year of their participation in the infringement. However, in this case the Commission used the sales figures for 2001 instead of 2002. This was due to the fact that on 1 October 2002, the Japanese producers Hitachi, Fuji and Toshiba transferred their respective power transformer businesses into joint ventures.

Point 13 of the 2006 Guidelines on Fines allows for deviations from the general principle that the sales of the last full business year of the infringement are taken for determining the basic amount of the fine. In this case, creation of the joint ventures distorted the sales figures of the Japanese parties for the year 2002.

The basic amount of the fine was calculated as a proportion of the value of sales made by each undertaking in 2001 ('the variable amount'), multiplied by the number of years of the infringement, plus an additional amount calculated as a proportion of the value of sales ('entry fee'). Taking into account the nature of the infringement, the combined market share of all undertakings concerned, the geographic scope of the infringement and implementation, both the variable amount and the entry fee were set at 16 %.

As the infringement lasted for almost four years, the variable amount was multiplied by 4. Recidivism was an aggravating circumstance for ABB (one previous cartel decision taken into account) leading to a 50 % increase in the fine.

Siemens was granted full immunity from fines since it was the first company to come forward with information about the cartel under the Commission's 2002 Leniency Notice. (6) The fine for Fuji was reduced by 40 % because it provided evidence which represented 'significant added value' with respect to the evidence already in

(3) Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 (OJ C 210, 1.9.2006, p. 2).

(4) Point 12 and 13 of the 2006 Guidelines on Fines.

(5) See Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission,* [2005] ECR II-10, paragraphs 185-188.

(6) Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.9.2002, p. 3).

the Commission's possession. (7) The leniency applications by ABB, AREVA T&D and Hitachi were rejected for failure to fulfil the criteria of the 2002 Leniency Notice.

The Decision also concluded that there were exceptional circumstances to justify granting Hitachi and AREVA T&D an 18 % reduction of the fine for effective cooperation outside the 2002 Leniency Notice. This reduction did not apply to AREVA T&D's former parent company ALSTOM.

The Decision

The duration of the infringement for all addressees except for Siemens Aktiengesellschaft Österreich is from 9 June 1999 to 15 May 2003. For Siemens Aktiengesellschaft Österreich, the duration is from 29 May 2001 to 15 May 2003.

The following fines were imposed:

- ABB Ltd: EUR 33.7 million
- ALSTOM (Société Anonyme): EUR 16.5 million, of which AREVA T&D SA is jointly and severally liable for EUR 13.5 million
- Fuji Electrics Holdings Co., Ltd: EUR 1.7 million
- Hitachi Ltd: EUR 2.5 million, of which Hitachi Europe Ltd is jointly and severally liable for EUR 2.5 million
- Siemens AG: EUR 0, of which Siemens Aktiengesellschaft Österreich is jointly and severally liable for EUR 0
- Toshiba Corporation: EUR 13.2 million.

ALSTOM, AREVA T&D and Toshiba appealed the decision.

(7) Point 21 and 22 of the 2002 Leniency Notice.

Mergers: main developments between 1 May and 31 August 2010

by John Gatti ([1])

1. Introduction

The Commission received 91 notifications between 1 May and 31 August 2010. This represents an increase of 12 % on the previous four months and 21 % on the corresponding period in 2009. The Commission adopted a total of 90 first phase decisions, of which 85 were unconditional clearances. Decisions adopted under the simplified procedure accounted for 45 of the first phase total or 50 %. Five first phase decisions were conditional clearances. There were no decisions adopted under Article 8 after an in-depth second phase investigation. One decision was taken under Article 4(4) to refer a case with an EU dimension back to a Member State while Member States accepted 9 requests from parties for cases to be referred to the Commission and refused none under Article 4(5). Finally, the Commission referred four cases to Member States following requests made under Article 9. These included one complete and three partial referrals.

2. Summaries of decisions taken in the period

2.1. Decisions taken under Article 6(2)

SNCF/LCR/Eurostar

The Commission approved on 17 June the proposed creation of the 'New Eurostar' joint venture by the French incumbent railway operator SNCF and London Continental Railways (LCR) of the UK.

SNCF provides rail passenger and freight transport services in France and other European countries. It also operates railway infrastructure facilities, including train stations and maintenance depots.

LCR is a state-owned UK railway company that controls the high speed railway infrastructure between the Channel Tunnel and London. It owns and operates stations (including London St Pancras) and the UK Eurostar operations through its subsidiary EUKL.

Eurostar is currently the sole provider of passenger rail services between London and Paris and London and Brussels. It is run through a cooperation agreement between SNCF, EUKL and the Belgian national railways SNCB. Each railway company owns its assets and has responsibility for the operation of the service on its respective national territory. Through the proposed transaction, 'New Eurostar' will become a stand-alone independent joint venture, controlled by SNCF and LCR, operating the Eurostar service throughout France, the UK and Belgium. SNCB will hold a non-controlling stake in the joint venture.

The Commission's investigation found that the proposed transaction, as initially notified, would have raised competition concerns, as it could render market entry on the two routes more difficult, and might therefore perpetuate Eurostar's dominant position. International rail passenger services have been liberalised since 1 January 2010. This should lead to more services being offered and more competitive prices. To be able to provide additional services, it is important that incumbents and new operators have access to the existing infrastructure.

To address the Commission's concerns, SNCF, LCR and SNCB offered commitments designed to ensure effective access for new entrants to international station services (including ticket counters, passenger information and the non-Schengen security-controlled station areas) at, among other stations, Paris Nord, London St Pancras and Brussels Midi, and access to light maintenance services at depots in France, the UK and Belgium that are currently controlled by the three railways. The parties further committed to release a certain number of Eurostar pathways to new entrants if they cannot obtain them through the normal allocation procedure carried out by the rail infrastructure managers.

The Commission found that the proposed remedies lower barriers to entry for new providers and thereby contribute to securing the benefits of the liberalisation of international passenger rail services for consumers. The Commission therefore concluded that the transaction, as modified by the proposed commitments, would not raise competition concerns.

DFDS/Norfolk

On 17 June the Commission approved the acquisition of Norfolk, a ferry and cargo shipping provider in the North Sea, by DFDS of Denmark. The approval is conditional upon the conclusion by DFDS of a space charter agreement on routes between the UK and Denmark.

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

DFDS and Norfolk operate sea transport networks mainly in western and northern Europe. Their main activities are trailer shipping (known as roll-on/roll-off or 'Ro-Ro'), passenger sea transport, sea terminal services and freight forwarding.

The proposed transaction mainly affects the market for Ro-Ro shipping between Scandinavia and the UK. The markets for passenger shipping services and unitised freight services between western Europe and the UK were also examined but the Commission found that the presence of other large competitors would safeguard competition in these markets.

DFDS and Norfolk's combined position in the Ro-Ro shipping market between Scandinavia and the UK is particularly strong. There would have been a quasi monopoly, post-merger, on the UK-Denmark corridor, where pre-merger Norfolk was active via a space charter agreement concluded with DFDS. A space charter agreement is an agreement whereby one party purchases a certain proportion of the space available on vessels of another company.

To protect competition on these routes, DFDS proposed to conclude a space charter agreement with a competitor on similar terms to the current agreement with Norfolk for vessels operating between Denmark and the UK and to transfer customers. This will allow a competitor to market the space to Norfolk's current customers and others. This remedy will maintain the current market situation on the Scandinavia/UK Ro-Ro market. The Commission therefore concluded that the remedy would remove the competition concerns initially identified in its investigation.

Teva/Ratiopharm

On 3 August the Commission approved the proposed acquisition of the German generic pharmaceutical company Ratiopharm by Teva, Israel. The decision is conditional upon the divestment of 15 products in the Netherlands and one in Hungary. The Commission had concerns that the parties' high combined market shares for these products, together with their overall post-merger strength in the Netherlands, could have harmed competition on these markets.

Teva is an international company headquartered in Israel which is active in the development, production and marketing of generic and proprietary pharmaceutical products, biopharmaceuticals and active pharmaceutical ingredients (APIs). It also has a small pharmaceutical wholesaling business. Ratiopharm is an international company active in generic and biosimilar pharmaceuticals with a significant presence in a number of EU Member States.

The Commission's investigation found that competition concerns could be ruled out in the large majority of the affected pharmaceutical markets, as other generic companies would continue to constrain the parties.

In the Netherlands the combined entity would be the clear market leader. The Commission found that competition concerns would arise for a number of finished pharmaceuticals, though not on the Dutch generics market overall. The products concerned are used to treat conditions such as anaemia, hypertension, asthma and gout and to control inflammation and pain.

The Commission also found that the very high combined market share for the painkiller tramadol in Hungary, together with the existence of a strong originator brand for Teva, would raise concerns.

Possible competition concerns as a result of vertical issues in the upstream pharmaceutical ingredient market and, in Hungary, the downstream wholesaling market could be ruled out, as the parties would not be strong enough in the market to exploit such relationships to the detriment of competition. Horizontal concerns in biopharmaceuticals and products under development were ruled out after a case-by-case analysis.

To address the Commission's concerns, Teva offered to divest the Ratiopharm products concerned, together with Ratiopharm's entire distribution business in the Netherlands, in order to ensure that any entrant would be able to continue to compete as vigorously with these products as Ratiopharm had before the merger.

In view of these commitments, and following a market test, the Commission concluded that the transaction as modified would no longer raise competition concerns.

Novartis/Alcon

On 9 August the Commission approved the proposed acquisition of Alcon by Novartis, both pharmaceutical companies based in Switzerland. The decision is conditional upon Novartis' commitments to divest several products in the ophthalmological pharmaceutical and consumer vision care areas in the European Economic Area (EEA) or in specific Member States.

Novartis is a global pharmaceutical company that develops, distributes and markets medical products which include: prescription and over-the-counter medicines (including ophthalmological products), human vaccines and animal health products. Novartis is also active in consumer vision care (non-pharmaceutical eye care) products. Alcon is a global pharmaceutical company with a strong focus on the development, manufacturing and distribution of ophthalmological pharmaceuticals and surgery equipment as well as consumer vision products.

The Commission investigated a large number of ophthalmological pharmaceutical markets and consumer vision care markets across the EEA. It found that competition concerns arose in a number of such markets because of the high combined market shares for certain products, the fact that Novartis' and Alcon's products are close competitors and the presence of barriers to entry. The markets in question are: ophthalmological anti-infective, anti-inflammatory/anti-infective combinations, anti-allergics, decongestants, antiseptics, mydriatics and cycloplegics, diagnostic agents, non-steroidal anti-inflammatories, injectable miotics, anti-glaucoma products, artificial tears, and multipurpose solutions for contact lenses. Depending on the product in question, competition concerns arose in a varying number of Member States.

To address the Commission's concerns, Novartis offered to divest a number of businesses across the EEA in the product areas concerned. In view of these commitments, and following a market test, the Commission concluded that the transaction would no longer raise competition concerns.

Deutsche Bahn/Arriva

The Commission approved the proposed acquisition of rail and bus operator Arriva plc of the UK by Deutsche Bahn on 11 August. The decision is conditional upon Deutsche Bahn's commitment to divest Arriva Deutschland, which includes the entire rail and bus business of Arriva in Germany.

Deutsche Bahn is the incumbent rail and bus operator in Germany. Its activities include rail and bus passenger transport services, freight services, logistics services and the operation of railway infrastructure and stations in Germany and in a number of other European countries. Arriva is a European rail and bus operator with activities inter alia in the UK, Denmark, Germany, the Netherlands, Poland and Sweden.

The Commission's investigation focused on the rail and bus passenger transport markets as well as rail freight markets in several EU Member States, in particular Denmark, the UK and Germany. The Commission found competition concerns on the German rail and bus markets. Deutsche Bahn as the rail incumbent and largest bus operator enjoys very high market shares and Arriva Deutschland has become, in spite of high barriers to entry, one of the major competitive forces in the German rail and bus markets.

To address the Commission's concerns, Deutsche Bahn offered to divest Arriva Deutschland, which includes the entire Arriva rail and bus business in Germany. These commitments fully remove the overlap and received positive feedback in the market test. The Commission therefore concluded that the modified transaction no longer raised competition concerns.

2.2. Decisions taken under Article 9

Eurovia/Tarmac

On 10 June the Commission approved part of the proposed acquisition of the aggregates business of Tarmac, belonging to the UK-based Anglo American group, by Eurovia, belonging to the French Vinci group. The Commission found that Eurovia's acquisition of the German and Polish activities of Tarmac would not significantly impede effective competition in the European Economic Area (EEA). At the same time, the Commission referred the part of the proposed acquisition relating to Tarmac's activities in France and the Czech Republic to the French and Czech competition authorities respectively, at their request. After a preliminary investigation, the Commission found that the proposed transaction would threaten to significantly affect competition in the aggregates, asphalt mix and civil engineering/road works markets in France and the Czech Republic. Those aspects of the transaction will now be examined by the French and Czech competition authorities under national law.

Eurovia is a subsidiary of the Vinci group, active in road works and maintenance, urban development, rail infrastructure development, special road-related services and production of materials, including aggregates and asphalt. The Tarmac subsidiaries concerned by the transaction are active in the production and sale of aggregates.

On 12 February, Eurovia, Anglo American and Tarmac concluded an agreement by which Eurovia would acquire Tarmac's aggregates activities in Germany, Poland, France and the Czech Republic. The markets concerned either horizontally or vertically by the transaction are aggregates, asphalt mix and civil engineering, where Eurovia is active.

With regard to markets in Poland and Germany the Commission considered that the proposed transaction would not bring about any sizeable overlap of activities. Consequently, the Commission concluded that it would not give rise to competition concerns.

France and the Czech Republic requested the Commission to refer those parts of the merger concerning the French and the Czech markets to their respective competition authorities, claiming that the transaction threatened to significantly affect competition in their respective territories.

The Commission's preliminary market investigation confirmed that the proposed transaction would lead to significant overlaps in the markets for aggregates in France and the Czech Republic. Most market players raised concerns that the transaction could adversely affect competition in the Czech Republic and in France. Those concerns focused not only on the horizontal overlap in the markets for aggregates but also on vertical effects, due to the potential impact of the transaction in the downstream markets for asphalt mix and civil engineering (including road works). The French and Czech competition authorities are in the Commission's view the best placed to investigate the effect of the transaction on their respective national markets. The Commission therefore referred the assessment of the French and Czech parts of the transaction to the French and Czech competition authorities.

Univar/Eurochem

On 19 July the Commission approved part of the proposed acquisition of the chemical company Eurochem by Univar. The Commission found that Univar's acquisition of the Belgian and Dutch activities of Eurochem would not significantly impede effective competition in the European Economic Area (EEA). At the same time, the Commission referred the part of the proposed acquisition relating to Eurochem's activities in France to the French competition authority at its request.

Univar, which is controlled by CVC Capital Partners, and Eurochem are both active in the distribution of commodity and specialty chemicals. CVC also controls both Taminco and Evonik, which produce and supply certain chemicals. Commodities are widely available, low-priced chemicals such as alcohols, caustic soda and hydrochloric acid that are used by a wide variety of customers. Specialties are high-priced products distributed in small quantities to selected customers active in particular in the coating, cosmetics and personal care, food and feed, pharma and healthcare markets.

With regard to the markets for the distribution of commodity and specialty chemicals in Belgium and the Netherlands, the Commission's investigation concluded that the horizontal overlaps would not give rise to competition concerns.

France asked the Commission to refer the part of the concentration concerning the French markets for the distribution of chemicals to the French competition authority, claiming that the proposed transaction would threaten to significantly affect competition in France.

The Commission's investigation confirmed that the proposed transaction would lead to significant overlaps in the distribution markets in France. For commodities, most market participants raised concerns that the transaction could have an adverse effect on competition, in particular in western France. It would lead to a reduction in the number of national players from three to two and would remove a significant competitive constraint on Univar and its main competitor Brenntag. Following a market test of the remedies offered by the parties, the Commission concluded that they were not sufficient to allay these concerns.

The French competition authority was, in the Commission's view, the best placed to investigate the effect of the transaction on the French markets. The Commission therefore referred the assessment of the French part of the transaction to the French competition authority.

CDC/VeoliaEnvironment/Transdev/Veolia Transport

On 12 August the Commission referred the part of the proposed acquisition that relates to the activities of Veolia Transport and Transdev in France and the Netherlands respectively to the French and Dutch competition authorities, at their request. Following a preliminary examination, the Commission found that the transaction would lead to substantial overlaps in the companies' activities, particularly on the public passenger transport markets in France and the Netherlands. These aspects will therefore be examined by the French and Dutch competition authorities on the basis of their national competition law. At the same time, the Commission approved the proposed merger of Veolia Transport's and Transdev's activities in territories outside France and the Netherlands.

The proposed merger arose because the French companies Veolia Environnement and la Caisse des Dépôts et Consignations ('CDC') intended to merge their transport subsidiaries (Veolia Transport and Transdev respectively) to create a new entity, Veolia Transdev. Following this transaction, Veolia Environnement and CDC would acquire joint control of Veolia Transdev.

Veolia Transport provides public passenger transport services and delegated international management of local, regional and national transport networks involving all types of vehicles (bus, train, underground train, tram, etc.).

Transdev is an urban and interurban public transport operator of trains, trams, underground trains, buses, coaches, trolley buses, river shuttles, car sharing schemes and public bicycles, mainly in Europe.

The Commission's preliminary investigation confirmed that the proposed merger would lead to substantial overlaps of activities on public passenger transport markets in France and the Netherlands. The Commission found that many market participants were fearful that the concentration could affect competition on national and/or local markets in the two countries. Their fears relate to the overlap of the companies' activities on the various public transport markets in France (urban and interurban public transport and transport in the Ile-de-France region) and the Netherlands (liberalised public transport market and market for licensed taxis).

The Commission believes that the French and Dutch competition authorities are best placed to examine the impact of the merger on their respective national markets and has therefore referred the case to them for an assessment of the French and Dutch parts of the transaction.

As regards the EEA component of the merger, excluding France and the Netherlands, the Commission concluded that, particularly with regard to scheduled international passenger transport by coach, there are no competition concerns since there will be a significant number of suppliers on those markets after the merger.

Lidl/Plus Romania/Plus Bulgaria

On 28 June the Commission referred the assessment of the acquisition of Plus Bulgaria and Plus Romania by the German retailer Lidl to the competition authorities of Bulgaria and Romania, at their request.

Plus Romania and Plus Bulgaria are daily consumer goods retailers. Lidl is buying them from German retail group Tengelmann. Lidl itself is a German discount chain that belongs to the Schwarz group, a German retailer operating more than 9 000 stores in 23 countries in Europe, including Romania and Bulgaria.

Bulgaria and Romania requested the Commission to refer the parts of the merger concerning the Bulgarian and Romanian markets to their respective competition authorities, arguing that the transaction affects competition in their domestic markets.

The Commission's preliminary investigation confirmed that the proposed transaction would affect competition in several local markets for daily consumer goods in Bulgaria and Romania. It believes that the Bulgarian and Romanian competition authorities are well placed to investigate the effect of the transaction on their respective local markets. These markets will now be examined by the Bulgarian and Romanian competition authorities under national law. The deal posed no competition problems in any other EU countries.

Yes, we can (prohibit) – The *Ryanair/Aer Lingus* merger before the Court

by Oliver Koch [1]

1. Introduction

In two judgments handed down on 6 July 2010, the General Court upheld the Commission's June 2007 decision to prohibit the planned merger between Ryanair and Aer Lingus (Case T-342/07) and dismissed Aer Lingus's appeal against the Commission's decision not to order Ryanair to sell its minority share in Aer Lingus subsequent to the prohibition (Case T-411/07). Both judgments are of general interest for European merger control practice [2].

2. The Court's *Ryanair* decision (T-342/07)

The Court's ruling upholding the Commission's prohibition decision [3] had been awaited with interest, not only because it was only the second such decision since 2003 and the only prohibition since 2007 [4], but also because the Court had to deal for the first time with some important issues of substantive merger assessment, such as how to treat efficiencies in merger control and how to use econometric data.

2.1 The Commission's prohibition decision and *Ryanair's* appeal

The Commission's prohibition decision concerned the proposed acquisition of Aer Lingus by Ryanair, both based in Ireland. The Commission found that the acquisition would have led to overlaps on more than 30 routes from/to Ireland with very high market shares. The effect would, the Commission felt, have been to reduce choice for consumers, leaving them exposed to a high risk of price increases. During the investigation, Ryanair submitted a number of commitment proposals. These were rejected by the Commission because they did not do enough to allay the identified competition concerns. The acquisition of Aer Lingus by Ryanair would in several respects have been different from previous airline merger cases. The main thing was that it would have combined the two overwhelmingly largest airlines at a single airport (Dublin, where they would together have accounted for some 80 % of European short-haul traffic), with both of them following a 'point-to-point' and 'no-frills' business model [5].

The decision is remarkable in several respects, not only for pure length (514 pages for the non-confidential version [6]), but also for the investigative methods used by the Commission to underpin its arguments (e.g. large-scale customer surveys carried out by external consultants for the Commission and, for the first time in a prohibition decision, extensive use of quantitative data analysis).

In November 2007, Ryanair filed an application for annulment of the decision with the General Court of the European Union. The firm claimed that there were manifest errors throughout the decision, including the Commission's assessment of the competitive relationship between Ryanair and Aer Lingus (first plea), of entry barriers (second plea), an allegedly mistaken 'route-by-route' analysis (third plea), errors in the assessment of efficiencies (fourth plea) and, finally, errors in the way the submitted commitments had been analysed (fifth plea).

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(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author. The author wants to thank the other members of the Ryanair case team (Hubert Beuve-Mery, Richard Gadas, Miguel de la Mano, Kay Parplies, Enrico Pesaresi and Oliver Stehmann) for their useful comments on an earlier draft of this article.

(2) It may also provide guidance for any further attempts to take over Aer Lingus; see in this context Ryanair's second notification of an intended acquisition of Aer Lingus of 8 January 2009 (subsequently withdrawn).

(3) COMP/M.4439 — *Ryanair/Aer Lingus (available under*: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4439).

(4) See also the prohibition decision in case COMP/M.3440-ENI/EDP/GDP, upheld by the General Court in 2005. It should, however, be noted that several mergers were abandoned in Phase II of the investigation over recent years before the Commission reached the point of issuing a prohibition decision.

(5) For a more detailed description of the decision see the article in the Ryanair Competition Policy Newsletter 3/2007, page 65.

(6) Compared to prohibition decisions of around 20 pages in length in the early 90s, e.g. Case No IV/M.490 — Nordic Satellite Distribution. The length of the decision in a seemingly 'simple' horizontal overlap case is, on the one hand, the result of the extremely high standard the Courts have imposed on merger control decisions (e.g. CFI, case T-310/01, '*Schneider*', (2002) ECR, II-4071 — obligation to analyse markets individually in multi-market cases — and cases T-342/99, '*Airtours*' (2002) ECR, II-2585 and T-5 & 80/02, '*Tetra Laval*' (2002) ECR, II-753; — obligation to address all arguments by parties, 'convincing' evidence). It is also the result of the Commission having to react to the increased use by the merging parties of quantitative data analysis and econometric studies.

2.2 The findings of the General Court

Close scrutiny — no 'hands off' approach in analysing merger decisions

In its very detailed 122-page ruling, the General Court took a careful look at Ryanair's arguments, ultimately rejecting *all five pleas* and following the Commission in every one of the 40 sub-pleas.

What is striking is the *great level of detail* of the General Court's analysis, addressing almost every single argument put forward by Ryanair, even where it would not have been strictly necessary for the outcome of the decision [7], and not shying away from discussing such technical and complex subjects as efficiencies and quantitative data. In that respect it follows the approach of all main judgments since '*Schneider*', '*Airtours*' and '*Tetra*', which paved the way for a more careful re-examination of merger decisions by the General Court [8]. The Court had occasionally been criticised for going too far in its examination of merger decisions, but in this case it clearly restricted its assessment to verifying whether the Commission had established the facts it needed to argue its case, whether it had disregarded any important argument by the applicant, whether its arguments were valid and logical, and whether the procedural rights of the applicant had been honoured.

Court backs the Commission's assessment: a sound and solid prohibition

The Court fully endorsed the Commission's conclusion that the merger would significantly impede competition. In a somewhat 'classic' approach, which may have raised a few eyebrows among proponents of a purely effects-based approach [9], the Court reiterates at the very beginning of its judgment that

'although the importance of market shares may vary from one market to another, (...) very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. (...). That may be the situation where there is a market share of 50 % or more (...) [10]*.'*

The Court then rejects Ryanair's claim that the Commission had 'automatically' argued from high market shares to a significant impediment of competition. It expressly acknowledges the Commission's careful analysis of the effects of the merger, stating that

'the Commission took care to carry out an in-depth analysis of the conditions of competition by taking account of factors other than just market shares, such as the effects of the concentration on competition between Ryanair and Aer Lingus, the reactions which could be expected from customers and competitors and the actual situation on each route affected by the concentration [11]*'.*

As in earlier judgments [12] on merger decisions, the *Horizontal Merger Guidelines* again played an important role in the ruling, with the Court measuring the decision carefully against the assessment structure set out in these guidelines.

As regards the Commission's assessment of *closeness of competition*, the Court agreed that closeness of competition by no means requires competitors to share all major elements [13].

Another important finding — one that is regularly discussed in merger decisions — concerns the *likelihood of entry* as a mitigating factor in the assessment. The Court made it clear that

'the mere threat of an entry (...) is not sufficient. (...). What counts is the prospect of an entrant which offsets the anti-competitive effects specifically established in the contested decision (...). [14]*'*

For the first time, the General Court also had to *verify detailed efficiency claims,* which were ultimately rejected by the Commission. The Court dedicated no fewer than 80 paragraphs of its judgment to assessing efficiencies. Its role as a Court was,

(7) See e.g. the detailed analysis of the Commission's assessment of Ryanair's efficiency claims (paragraphs 386-446), where the Court still examined Ryanair's arguments on the merger-specific nature and the consumer benefit of the efficiencies, despite the fact that it had already confirmed that the claimed efficiencies were not verifiable and had to be rejected for this reason. See also the Court's assessment of the substance of the remedies *('for the sake of completeness'*, see paragraph 506) despite the finding that the remedies had never been formally submitted und could be rejected simply on these grounds.

(8) See e.g. rulings in case T-282/06 'Sun chemicals' (2007) ECR, II-2149 and case T-151/05 'NVV', (2009) ECR, II-1219.

(9) See in this context also the new US Horizontal Merger Guidelines, which expressly state that merger analysis should start with the effects of a merger and not with defining markets and establishing market shares. The Guidelines are available under: http://www.ftc.gov/os/2010/08/100819hmg.pdf.

(10) See paragraph 41 of the judgement; this formula has already been used in previous merger judgements, e.g. case T-282/06 'Sun chemicals', (2007) ECR, II-2149, at paragraph 135 and case T-210/01 'General Electric' (2005) ECR, II-5575, at paragraph 115. The Court also commented on a possible 'de minimis' argument (very small competition effect), stating that: *'The creation of a dominant position which would have the effect of significantly distorting genuine competition on one of those routes is itself sufficient to make the transaction incompatible with the common market (...)'* — see paragraph 326 of the ruling.

(11) See paragraph 42 of the ruling.

(12) See e.g. case T-282/06 '*Sun chemicals*' (2007) ECR, II-2149 and case T-151/05 '*NVV*' (2009) ECR, II-1219.

(13) See paragraph 77-94 of the ruling.

(14) See paragraph 239 of the ruling.

of course, limited to deciding whether all the arguments put forward by Ryanair on efficiencies had been addressed properly by the Commission and whether the Commission's reasoning was logical and consistent, without going into the question of whether there actually were efficiencies ([15]).

Finally, the Court confirmed that the Commission was right to reject the *remedies* proposed by Ryanair at different stages of the procedure. It is noteworthy that, while the Court had in other judgments accepted certain deviations from strict formal and procedural rules under certain circumstances (e.g. concerning deadlines in the case of 'late remedies' ([16])), it set clear limits to the parties' freedom to disregard procedural rules in this judgment. It confirmed that the Commission was right to reject the remedies proposed on the last day of the deadline for Phase II remedies because of their *formal shortcomings*. These shortcomings included an unclear and contradictory formulation of some key parts of the remedies offer. It also confirmed the Commission's view that the unsigned 'Draft Commitments' Ryanair had sent to the Commission more than four weeks after the remedies deadline had expired could be disregarded by the Commission since these 'late' remedies had never been formally submitted. These findings are particularly important for future remedies negotiations with the Commission since they emphasise the importance of the formal recommendations in the Remedies Notice and clarify the limits to any deviations from the standard format of commitment texts and other formal shortcomings of remedies proposals ([17]).

Confirmation of the Commission's approach to airline mergers

The ruling also confirmed the Commission's analytical framework for airline mergers. The '*easyjet*' judgment of 2006 had endorsed the Commission's practice of analysing the effects of airline mergers on the basis of *individual routes* on which the two companies' activities overlap and not on bundles of routes or by countries ([18]). The *Ryanair* ruling also agreed with the *analytical framework for deciding the substitutability of different airports* formulated by the Commission, and fully endorsed the Commission's approach in this regard on all 35 routes under consideration ([19]).

Furthermore, it confirmed the Commission's approach with regard to *remedies in airline cases*, one of the most contentious issues in airline mergers. It followed the Commission in distinguishing between mergers involving players from different airports and mergers of companies operating from the same airport. The Court found in particular that *slot remedies* were not the appropriate remedy in the latter case, stating that

'(...) it must be pointed out that, unlike previous mergers in the passenger air transport sector (such as those which were at issue in Air France/KLM and Lufthansa/Swiss), the Commission could not be satisfied in the present case that mere slots would ensure access to a route. This is not a transaction involving active operators which have a home airport in different countries. Ryanair and Aer Lingus operate from the same airport, Dublin Airport, where they have significant advantages which could not easily be countered by competitors ([20]).'

On the use of qualitative and quantitative evidence in merger decisions

Finally, the ruling clarified important aspects of the Commission's investigative powers, notably concerning the use and presentation of information gathered in the market investigation, and of quantitative data compiled by the Commission as evidence in merger decisions.

Faced with the problem of a multitude of 'anonymous' customers, the Commission had, for the first time, commissioned a *passenger survey* from an independent consultancy. The Court dismissed Ryanair's claim that the survey was not designed accurately and only addressed 2500 customers at a single airport (Dublin). The Court accepted the use of survey data in the decision and acknowledged that there was insufficient time to carry out a larger survey on a broader scale ([21]).

The Court also rejected Ryanair's claim that the Commission had *used information from the market investigation 'selectively'*, giving more weight to some questions while neglecting other information. The ruling accepted that in complex investigations it is normal if not all the evidence points into the same direction. Accordingly, it acknowledged the Commission's right to weigh the importance and relevance of the information it had gathered:

'It seems perfectly conceivable that the responses of passengers or competitors to some questions will be more relevant

([15]) See paragraphs 386-446 of the ruling.
([16]) CFI, case T-87/05 *'EDP v Commission'* (2005) ECR II-3745 *EDP v Commission*; paragraphs 28/163, and Case T-212/03 *'MyTravel'* (2008) ECR II-1967, paragraph 448.
([17]) While the Commission had, in its decision, still analysed the substance of the remedies proposal, the Court found that such analysis was not necessary anymore since the remedies could be rejected purely on formal grounds.
([18]) See case T-177/04 *'Easyjet'* (2006) ECR, II-1931.
([19]) See paragraphs 95-115 and 319 et seq of the ruling.
([20]) See paragraph 522 of the ruling.
([21]) See paragraphs 207-213 of the ruling.

or more convincing than the responses given to other questions. The Commission can thus not be accused of having acted incoherently or unreasonably on the sole ground that it attached less importance to the responses which it considered to be less relevant (22).'

Last but not least, the ruling examined and accepted the Commission's extensive use of *quantitative evidence and econometric studies* in the decision. The decision, indeed, refers frequently to quantitative evidence, notably to different regression analyses, and to a price correlation analysis and other forms of quantitative data analysis (23). While it rejected Ryanair's claim that there should be 'priority' for 'technical evidence' resulting from the various econometric studies (24), it principally acknowledged that econometric studies can, together with other factors, be relevant factors in analysing the anti-competitive effects of the merger (25). While not going so far as to 're-calculate' the results of the various studies, the Court took a very close look at all the arguments put forward by Ryanair against the validity of the econometric data. It ultimately found that none of Ryanair's arguments concerning the use of economic evidence in the various parts of the decision were well-founded, stressing in particular that the Commission had made very *careful and transparent* use of econometric studies and quantitative data. Ryanair had also claimed that different aspects of the quantitative analyses pointed in a different direction to the findings of the 'qualitative' market investigation, which should have led to the conclusion that the qualitative evidence was wrong. The Court dismissed this claim, stressing that however limited the specific evidence value of certain studies may be, and even if their results were only partly conclusive, they could still be used as *supportive arguments* pointing in the same direction as the remaining body of the evidence (26). The Court noted in this respect that economic studies were *only used by the Commission to complement* and not to substitute for the findings gathered in the Commission's market investigation.

(22) See paragraph 215 of the ruling; see also paragraph 266. The Commission had itself explained its approach to the market investigation in the prohibition decision (paragraph 38): *'The fact that single pieces of evidence (answers to questions, result of econometric studies) may not support a certain conclusion, cannot as such put into question the Commission's assessment, since the Commission cannot base its decision on one single piece of evidence, but must collect as many pieces of evidence as possible, analyse all available facts and opinions and weigh all the available evidence when deciding on the compatibility of a transaction with the common market.'*.

(23) See in detail the article on the use of economic evidence in the Ryanair decision, CPN 3/2007, page 65 ff.

(24) See paragraph 132 and 133 of the ruling.

(25) See, in particular, paragraphs 115/116 and 139-195 of the ruling.

(26) See paragraphs 156, 162 et seq of the ruling.

3. The Aer Lingus appeal: no obligation to divest a minority shareholding post-merger

The second ruling (Case T-411/07) concerned an appeal by Aer Lingus against a separate Commission decision concerning Ryanair's right to keep its minority shareholding in Aer Lingus.

In 2006, following the privatisation of Aer Lingus by the Irish government, Ryanair had acquired a 19.16 % stake in the company. Ryanair subsequently acquired further shares and by 26 November 2006 held 25.17 % of the share capital. Following the Commission's prohibition decision, Ryanair further increased its stake to 29.4 %.

Aer Lingus had asked the Commission directly after the prohibition decision to order Ryanair to *fully divest its remaining minority shareholding* in Aer Lingus pursuant to Article 8(4) of the Merger Regulation. It also requested the Commission to take a position as to the applicability of national competition law with respect to the remaining minority shareholding (27). The Commission rejected the requests by way of its decision of 11 October 2007. This decision was appealed by Aer Lingus (28).

The appeal touched upon the issue of the treatment of *non-controlling minority shareholdings* under European merger law. While other national jurisdictions make the acquisition of minority shareholdings subject to merger control rules, minority acquisitions are only notifiable under the European Merger Regulation if they confer de facto or de jure *control* of the acquired company to the minority shareholder (i.e. the possibility of exercising *decisive influence* over the activity of the undertaking). In the absence of a *controlling* minority share, minority shareholdings do normally not fall under merger control rules and can only be analysed under Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU).

(27) Aer Lingus submitted that it is unclear whether national competition authorities (e.g. the OFT in the UK or the Bundeskartellamt in Germany) were free to apply their national competition and merger rules to the minority shareholding or whether they might be prevented from doing so because of Article 21(3) of the Merger Regulation (exclusive right to control concentrations with a Community dimension for the Commission). It argued that the Commission had already in its 6(1)(c) decision confirmed the existence of a concentration with Community dimension and that the Community dimension cannot 'fall away' after the merger.

(28) Aer Lingus had also asked the Commission to adopt *interim measures* pursuant to Article 8(5) of the Merger Regulation, which was rejected by the Commission. The subsequent request for interim measures to the Court was dismissed by order of the President of the Court of 18 March 2008.

In its appeal, Aer Lingus argued that not ordering Ryanair to divest its entire minority shareholding would have significant negative effects on competition and that the Commission's interpretation of merger rules would lead to a 'serious lacuna' in merger control. It also pointed to previous cases in which the Commission had asked for the remaining shareholding to be fully divested after a prohibition decision [29].

The General Court dismissed Aer Lingus's appeal. It confirmed that the Commission *was right to reject Aer Lingus's claim* and that the Commission could not order Ryanair to divest its non-controlling shareholding in Aer Lingus under current EU merger rules. It stated that

'the concept of concentration cannot be extended to cases in which control has not been obtained (...). The Commission is not granted such a power under the merger regulation.'

The Court found that Ryanair's acquisition of a minority share can neither be regarded as 'full' nor as 'partial' implementation of a concentration [30] and hence the Commission has no power under Article 8(4) of the Merger Regulation to order Ryanair to divest its minority share. The Court endorsed the Commission's position that the situation in this case was different from previous cases such as the 'Tetra' or 'Schneider' mergers, since in those cases the transaction had been implemented by the parties, while this was not the case for Ryanair.

The General Court also analysed Aer Lingus' claims that Ryanair's minority shareholdings might have come close to a form of *de facto control* over Ryanair. The Court found that Aer Lingus had established no controlling or anti-competitive effect of the minority shareholding: Ryanair could not gain access to confidential strategies through its rights to ask for meetings with Aer Lingus' management, nor could Ryanair block important decisions just because of its right to ask for extraordinary general meetings. Also Ryanair's limited voting rights did, according to the Court, *'not have a significant impact on the company* [31]*'*.

The Court finally found that the Commission's refusal to take a position on the applicability of national merger rules under Article 21(3) of the Merger Regulation did not constitute a failure to act under Article 265 TFEU (ex-232 EC). It is interesting to note that the Court not only confirmed that the Commission was not obliged to take such a position, but expressly took the view that the Member States remain free to apply their national competition law to Ryanair's minority shareholding since there was no concentration with a Community dimension [32].

The decision not only provides *important clarifications* as to the interpretation of Article 3 (concentration) and 8(4) (dissolution order) of the Merger Regulation; it also makes it clear that any form of control of minority shareholdings is excluded under the Merger Regulation unless the shareholding confers de facto control to the acquirer(s). It is perhaps a pity that the Court did not elaborate more on the potentially harmful competition effects of minority shareholdings, and that the judgment is not fully in line with the intention of the Merger Regulation to treat proposed concentrations carried out in different steps 'as a whole' [33]. However, it should be noted that ordering Ryanair to entirely divest its existing shareholding would, in practice, have had a very limited effect, since Ryanair could have immediately re-acquired the minority share without any notification obligations. The discussion on whether this difference vis-à-vis the control regime in many other countries should or should not be changed *de lege lata* remains, in any event, open [34].

[29] See COMP/M.2416 — *Tetra Laval/Sidel* and COMP/M.2283 — *Schneider/Legrand*.

[30] Aer Lingus had argued that Article 8(4) should also cover the dissolution of *'partial implementations'*. While the wording of Article 8(4) does, indeed, not exclude such an interpretation, the Court endorsed the Commission's view that transactions should not be split into different parts, but considered as a whole. Accordingly, Ryanair's minority shareholding cannot constitute a 'partial implementation' (paragraph 84 of the ruling in case T-411/07).

[31] See paragraph 71 of the ruling in case T-411/07.

[32] Aer Lingus had argued that Article 21(3) *might* still remain applicable once the Commission had found that a merger was a notifiable concentration with a Community dimension. The Court is, however, right to point to the fact that the concentration was only 'proposed' and not implemented in the present case (paragraph 91).

[33] See e.g. paragraph 48 of the Jurisdictional Notice: 'The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.' See also recital (20) of the Merger Regulation.

[34] See also the announcement of Vice-President Almunia in a speech of 10 March 2011 to look for solutions to close the 'enforcement gap' in the area of minority shareholdings (SPEECH/11/166).

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

by Koen Van de Casteele [1]

Policy developments

Public consultation on SGEI package

On 12 May the Commission has launched a public consultation on the application of its 2005 Package on Services of general economic interest (SGEI). The Package sets out guidance as to when State funding of SGEIs is compatible with the State aid rules. The package was adopted in July 2005, following the landmark Altmark ruling [2] of the European Court of Justice.

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

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

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

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

Coal regulation

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

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

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

Cases adopted [3]

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

UK pension scheme NEST

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

The scheme was notified to the Commission because of a loan granted by the government to fill

(1) Directorate-General for Competition, unit 03. The views expressed are purely those of the writer. The content of this article does not necessarily reflect the official position of the Commission.
(2) Case C-280/00, *Altmark*, 2003 ECR I- 7747.

(3) This is only a selection of the cases adopted in the period under review.
(4) N 158/2009

the funding gap faced during the early years of the operations of NEST.

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

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

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

The government will hand out the loan at a commercial interest rate. However, NEST will only have to pay the interest corresponding to the Government's cost of borrowing. Under the state aid rules, this difference is considered to be a soft loan and to constitute state aid. The amount of aid, depending on the number of members, will be in the range of £200-379 million (around €245-465 million). However, the Commission concluded that the aid would not overcompensate NEST for providing the public service and was therefore compatible.

Funding mechanism for France Télévisions

On 20 July 2010 the Commission approved the annual funding mechanism for France Télévisions ([5]).

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

([5]) C 27/2009

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

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

New funding system for the Spanish public broadcaster RTVE

On the same day (20 July 2010) the Commission also approved the new tax-based funding system for the Spanish public broadcaster RTVE ([6]), on which it had opened a formal investigation in December 2009. Spain abolished advertising and other commercial activities of RTVE and replaced this source of income by new taxes on TV and telecommunications operators. The Commission had doubts concerning the compatibility of the new taxes with EU law, in particular the rules on electronic communications networks and services. However, the Commission has now concluded that the compatibility of the aid to RTVE is not affected by the legality of the new taxes and that the measure is in line with the state aid rules, because it ensures that RTVE will not be overcompensated for providing public broadcasting services.

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

Banking

Schemes

The Commission has extended until the end of 2010 bank guarantee schemes for credit institutions in Sweden, Ireland, Spain, Denmark, Slovenia, Portugal, Austria, Poland, Germany and Latvia ([7]). The extended schemes feature higher premiums to be paid by banks to the State for guaranteeing the loans they raise on the market. This is to encourage banks to finance themselves without state support and to limit distortions of competition.

([6]) C 38/2009

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

The Commission has further extended liquidity scheme in Hungary, Slovenia and Poland, Lithuanian and Greek support schemes for financial institutions, and Portuguese and Spanish recapitalisation schemes ([8]).

Ad hoc aid

BPP

On 20 July 2010 the Commission concluded that a guarantee granted by the Portuguese State to six banks in Portugal to lend €450 million to BPP at the height of the financial crisis, in December 2008, constituted illegal and incompatible State aid for the period 5/12/2008 – 15/4/2010, given the non-compliance with the obligation to present a restructuring and the low fee paid for the guarantee ([9]).

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

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

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

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

Carnegie

On 12 May 2010 the Commission has granted final clearance to the Swedish aid for the restructuring of Carnegie Investment Bank ([10]).

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

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

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

Ethias

The Commission approved on 20 May 2010 a €1.5 billion recapitalisation provided by Belgium in

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

([9]) C 33/2009 (ex NN 57/2009)

([10]) NN 18/2010

the context of the restructuring of Ethias, a Belgian insurer that ran into severe difficulties in 2008 ([11]).

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

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

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

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

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

Caja Castilla-La Mancha

On 29 June 2010 the Commission has authorised aid for the restructuring of Caja Castilla-La Mancha ([12]).

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

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

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

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

BAWAG

The Commission has authorised on 30 June 2010 a €550 million capital injection provided by Austria in favour of the BAWAG bank and approved a new restructuring plan of the bank ([13]).

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

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

([11]) N 256/2009
([12]) NN 61/2009
([13]) N 261/2010

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

AEGON

On 17 August 2010 the Commission approved the recapitalisation of the Dutch insurance company AEGON [14].

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

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

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

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

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

(14) N 372/2009

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

Real economy cases adopted under the Temporary Framework

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

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

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

Regional aid & regeneration

FIAT Powertrain

The Commission has authorised on 9 June 2010 €16 million of regional investment aid, which the Italian authorities intend to grant to Fiat Powertrain Technologies S.p.A. (FPT), a subsidiary of the Fiat Group, for the production of car transmissions in Verrone (Piemonte), Italy [15]. FPT's existing plant will be equipped with new machinery, heat treatment and assembly lines to produce an innovative transmission unit intended for mid-range vehicles.

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

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

(15) N 27/2010

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

Liebherr-MCCtex Rostock

On 6 July 2010 the Commission authorised €28.7 million of regional investment aid that Germany intends to grant in favour of Liebherr-MCCtec Rostock GmbH for the extension of its production facility for ship and offshore cranes in Mecklenburg-Vorpommern, Germany ([16]). The project involves a total investment of €163.5 million and will create 500 new jobs in a region facing high structural unemployment.

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

Solibro

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

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

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

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

Silico Solar

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

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

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

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

([16]) N 261/2009
([17]) N 641/2009
([18]) N 285/2009

Energy & environment

Nuon

The Commission has authorised The Netherlands to provide a grant of €10 million to Nuon Energy Sourcing NV for a CO_2 capture demonstration project [19].

The project concerns the deployment of a CO_2 capture demonstration facility at Nuon´s Integrated Gasification Combined Cycle (IGCC) power plant in Buggenum. It aims at optimising the energy efficiency of CO_2 capture (pre-combustion technology) for large scale applications in the electricity sector. The Buggenum project will be conducted by Nuon, but also involves academic partners and knowledge-based companies such as Delft University, ECN, KEMA and TNO. Nuon will share the results of the project with the Dutch authorities and through academic partnerships and conferences and professional fora such as CATO2 in The Netherlands.

The development of carbon capture and storage (CCS), which includes the capture of CO_2, is encouraged by the Commission as part of the 2008 climate and energy package for reaching the EU 2020 environmental objectives. The Commission concluded that the state aid measure is an appropriate and proportionate measure necessary to achieve an objective of common interest.

MOL

On 9 June 2010 the Commission adopted a final negative decision concerning an aid granted by Hungary to the national oil and gas company MOL [20].

In January 2009 the Commission had opened an in-depth investigation [21]. The measure under assessment was an agreement between MOL and the Hungarian government dating back to 2005, according to which MOL's mining royalty payments on extracted hydrocarbons remained fixed for the majority of its hydrocarbon mining fields until 2020. An amendment of the Hungarian Mining Act in early 2008 significantly raised the fee, whereas MOL's mining fee obligation remained at the lower levels stipulated in the 2005 agreement.

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

(19) N 190/2009
(20) C 1/2009
(21) OJ C74, 28.3.2009, p. 63

Transport

The Commission has authorised on 26 May 2010 SNCB's plans to restructure its freight activities and convert its freight division into a subsidiary [22].

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

The 2008 Community guidelines on State aid for railway undertakings [23] spell out the conditions under which the freight division of such an undertaking may receive restructuring aid. This detailed approach applies for a transitional period, i.e. only to restructuring operations notified before 1 January 2010.

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

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

Broadband

The Commission has approved the rollout of a public open network (Xarxa Oberta) in the Spanish region of Catalonia [24]. The network will serve the connectivity needs of the regional administrative centres in the region and will be open at wholesale level to electronic communications operators seeking access to it. After a detailed examination, the Commission found the scheme to be in line with

(22) N 726/2009
(23) OJ C 184 of 22.7.2008, p. 13
(24) N 407/2009

its Broadband Guidelines ([25]). The measure will contribute significantly to achieving the objectives of the Digital Agenda and will enhance the possibilities for infrastructure based competition in Catalonia without unduly distorting competition.

Other

Swedish press aid

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

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

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

In June 2009, the Commission made suggestions to Sweden, on how the press aid scheme could be brought in line with EU state aid rules. Having assessed Sweden's subsequent proposals, the Commission found on 20 July 2010 that they adequately reflect the essence of the measures suggested by the Commission ([26]). In particular, the reduced aid intensity for metropolitan newspapers will ensure that the aid is proportionate.

No aid decisions

REITS

The Commission has authorised on 12 May 2010 the introduction of 'Real Estate Investment Trusts' (REITs) in Finland that will be exempted from corporate income tax in order to encourage investment in affordable rental housing ([27]). The proposed measure is modelled on the widespread model of 'Real Estate Investment Trusts'. According to the scheme notified by the Finnish authorities, to benefit from corporate tax exemption REITs will be publicly-listed, no single shareholder will own, directly or indirectly, more than 9,99 %. REITs will only operate in the field of rental accommodation with at least 80 % of their gross income coming from rents. Moreover, REITs will distribute at least 90 % of their annual profits to shareholders as dividends.

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

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

PLZ Hydral

The Commission has closed on 4 August 2010 the formal investigation procedure on state aid to PZL Hydral, a company which was specialised in civil and military aviation hydraulics ([28]). The Commission had concerns that the original restructuring plan, which was based on PLN 150 million of state aid (€36 million) would have infringed state aid rules. Subsequently, Poland substantially modified the plan as a result of the intervention of a private investor who will acquire the remaining business activity (PZL Wroclaw). The investor will provide additional PLN 65 million (€16 million) of investments. This will ensure the future industrial development of this company.

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

Decisions under Article 108 TFEU

The Commission has formally requested France to implement a 2008 judgment of the European Court

([25]) OJ C 235, 30.9.2009, p.7
([26]) E 4/2008
([27]) N 131/2009
([28]) C 40/2008

of Justice declaring that France had failed to recover incompatible State aid awarded in the form of exemptions from corporate tax for takeovers of ailing companies ([29]). The Commission's request takes the form of a letter of formal notice, the first step in infringement proceedings for failure to respect a Court judgment (Article 260 TFEU).

On 16 December 2003, the Commission concluded that tax exemptions foreseen under Article 44 septies of the French General Tax Code were incompatible because they procured selective advantages to certain companies, without objective justification. This provision exempted from corporate tax for a period of two years companies purchased in the course of an insolvency procedure. As the scheme was implemented without receiving EU clearance, France must recover the subsidies thus granted, with the exception of those amounts that could be exempted under the de minimis, SME or regional aid rules.

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

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

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

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

([29]) Case C-214/07, *Commission v. France*

Commission takes negative decision in the *Alcoa* case

by Elisabetta Garofalo and Nicolas Imbert (1)

1. Introduction

Between 2007 and 2009, the Commission had to take decisions in a number of State aid cases concerning preferential electricity tariffs for energy-intensive users. The *Alcoa* case, decided in November 2009, undoubtedly had the highest profile. However, the Commission already determined its position in 2007 with the *Terni* decision (2), which was recently upheld by the General Court.

The general context in which these investigations took place was turbulent. Since its inception in 1996, the liberalisation of the electricity market had raised high hopes. The process was expected to lead to more competition between electricity providers and, ultimately, better prices for both large and small users. However, the expected benefits for consumers had been slow to materialise. On the contrary, electricity prices had risen, sometimes spectacularly, due largely to external factors, such as increases in world oil prices. The price crisis hit energy-intensive users (3) the hardest.

The *Alcoa* case concerned an electricity price subsidy granted by Italy for the most energy-intensive of industrial activities, the production of primary aluminium. In its final decision (4), the Commission concluded that the preferential price enjoyed by Alcoa since 2006 was incompatible operating aid and should be partially recovered. In particular, the Commission held that it did not consider electricity price subsidies given to a particular company to be an appropriate instrument to remedy any alleged imperfections of electricity markets.

The Commission thus confirmed the negative line it already took in 2007 with the *Terni* decision. In the *Terni* case, the Commission found against the preferential tariff granted by Italy to a group of three undertakings (the ex-Terni companies) including steelmaker ThyssenKrupp. In this case, Italy had repeatedly prolonged a tariff which had been originally granted for a period of 30 years as compensation for the nationalisation of Terni's hydro-power plant. The tariff had been prolonged for competitiveness reasons. The Commission found that it constituted incompatible operating aid and ordered its recovery. The final decision was upheld on all points by the General Court (5). This judgment is currently under appeal (6).

2. The main facts of the case

Alcoa had been enjoying a preferential electricity tariff in Italy since 1996, when it took over Alumix, a State-owned aluminium producer that operated two plants in Sardinia and Veneto. Under the original mechanism the Italian State-owned utility ENEL was to supply electricity to Alcoa's plants at a fixed tariff set for ten years, i.e. until December 2005. The Commission approved this mechanism in a decision (the '*Alumix*' decision (7)), regarding the deal as an ordinary business transaction, free of State aid. Considering the specific situation of the electricity market in the regions concerned (in particular the situation of overcapacity in electricity generation in Sardinia, and the inability to find alternative outlets for electricity produced in Veneto) the Commission concluded that ENEL had behaved like a rational market operator in selling electricity to its best customer at a price that covered only the variable cost of electricity production, plus a small contribution to fixed costs.

Over the years, however, Italy modified the original financing mechanism and repeatedly prolonged the tariff. The measure targeted by the investigation had very little in common with the old, non-aid tariff. It had become a subsidy financed through direct payments from the State. Alcoa still purchased electricity from ENEL, but at the ordinary price set in the supply agreement, and the State reimbursed Alcoa the sum required to ensure that the company continued paying de facto the historical tariff, which was less than half the prevailing market price. The resources were raised through a parafiscal levy imposed on electricity consumers in their electricity bills.

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

(2) Case No C36/A/2006 *Terni,* COM/2007/5400/4, OJ L 144, 4.6.2008, pp. 37–54.

(3) These are the largest industrial electricity end-users and can be found in particular in the metals and chemical sectors. For these companies, electricity prices are an important competitiveness factor.

(4) Cases Nos C 38/a/2004 and 36/b/2006 *Alcoa*, OJ L 227, 28.8.2010, pp. 62–94.

(5) Cases T-63/08 *Cementir*, T-64/08 *Nuova Terni Industrie Chimiche*, T-62/08 *Thyssen-Krupp* and T-53/08 *Italy* v *Commission,* OJ C 221, 14.8.2010.

(6) Cases C-448/10, C-449/10 and C-450/10.

(7) Case C 38/1992 *Alumix,* Decision of 4 December 2006, OJ C 288, 1.10.1996, p. 4.

The Commission opened two in-depth investigations into the new tariff arrangement, one in 2004 and one in 2006. In the decision to open proceedings the Commission concluded that, due to the new financing mechanism, the extension of the tariff constituted new operating aid, the compatibility of which was doubtful.

3. Alcoa's challenge against the opening decision

Alcoa challenged the 2006 decision to open the investigation, arguing that the tariff did not constitute aid or should be considered existing aid. Alcoa argued that, despite the changes in the tariff's financing mechanism, which the company dismissed as 'purely administrative', the tariff still complied with the criteria set by the Commission itself in the *Alumix* decision, which according to Alcoa was unlimited in time. Alcoa maintained that the Commission should have applied those criteria before coming to the conclusion that the tariff constituted new aid.

This was an unusual challenge, since a decision to open proceedings is a preliminary act and is therefore rarely appealed, as the parties prefer to challenge a final decision. The action was nevertheless admissible: a finding of new aid — however preliminary — for a measure in the course of being implemented entails independent legal effects for recipients and alters their legal position. In these circumstances, the opening decision is subject to review by the Court.

In its judgment of 25 March 2009 ([8]), the General Court dismissed Alcoa's application. As regards the Commission's preliminary conclusion that the tariff constituted State aid, the Court confirmed that it contained no manifest error of assessment. As regards the classification as new aid, the Court found that Alcoa could not draw from the *Alumix* decision any legitimate expectation that the tariff was an 'existing' measure, because (a) the challenged tariff was not covered by the temporal scope of the *Alumix* decision (10 years), and (b) the modifications in the financing mechanism, far from being 'purely administrative', were of a substantive nature, and therefore the tariff was materially different from the original Alumix mechanism.

Alcoa has appealed the judgment upholding the opening decision ([9]).

4. The assessment

The in-depth assessment confirmed that the Alcoa tariff should be classified as new, unlawful operating aid. Since the conditions for the grant of regional operating aid (contribution to regional development, proportionality, etc.) were not met, there was no legal basis for approval under State aid rules. Operating aid relieves companies of burdens which they would normally have to bear in the course of their business, and puts at a competitive disadvantage EU competitors that do not receive the same subsidy. Operating aid is one the most distortive forms of aid, and is in principle incompatible with the common market.

This conclusion would normally have been sufficient to come to a final position on the compatibility of the tariff.

However, during the administrative procedure the Commission had explored at one stage the idea of a favourable outcome for Alcoa's Sardinian tariff, linked to the introduction by Italy of a pro-competitive remedy. A letter sent in January 2007 suggested that, taking into account the specific situation of the Sardinian electricity market, characterised by insufficient electrical interconnection, it might be possible to authorise a phasing-out of the tariff over a period of two years, provided Italy introduced rapidly a Virtual Power Plant (VPP) mechanism ([10]) in Sardinia. The existence of this proposal prolonged the investigation, as for almost two years Italy did not give its views on the VPP and only took up the idea during the final phase of the procedure, when it was faced with the prospect of a negative decision with recovery.

In the final decision, the Commission considered after a detailed analysis that the VPP could not constitute a basis for declaring the Alcoa tariff compatible with the common market.

The possibility of declaring aid compatible to further the process of liberalisation of the electricity sector had been established in the past with the 'stranded costs' approach ([11]). The stranded costs approach allowed Member States to grant State aid, for a certain period of time, to electricity producers to compensate for the losses incurred as a result of liberalisation, on the ground that the aid was necessary to achieve the liberalisation objective.

However, the differences between the *Alcoa* case and the stranded costs scenario appeared too large for a direct analogy to be applied. In the *Alcoa* case, it could not be concluded that the subsidised tariff had a compensatory function or that it was necessary to allow the achievement of liberalisation as in the stranded costs approach. Even assuming that

([8]) Case T-332/06 *Alcoa* [2009] ECR II-00029.
([9]) Case C-194/2009, pending.

([10]) A Virtual Power Plant programme involves the auctioning of virtual electricity generation capacity to alternative power suppliers.
([11]) Commission Communication relating to the methodology for analysing State aid linked to stranded costs, Commission letter SG (2001) D/290869, 6.8.2001.

insufficient competition on the market could have been one of the causes of high prices in Sardinia, the tariff was granted only to Alcoa. It was also difficult to see why the tariff was necessary to achieve the objective of a better functioning electricity market in Sardinia.

The Commission also examined whether, in the case at hand, there was a liberalisation problem that could be effectively addressed through a remedy such as the VPP.

The Commission did not rule out the possibility that, in exceptional circumstances, a remedy furthering market liberalisation could constitute a basis for the compatibility of a State aid measure. In the *Alcoa* case, however, the Commission came to a negative conclusion after examining the nature of the competition problem on the Sardinian electricity market, the existence of any causal links between that problem and the aid, and the effectiveness of the VPP as a correcting instrument.

Firstly, as regards the nature of the problems in Sardinia, the Commission noted that high prices in Sardinia were caused by a combination of factors, most of which were related to insularity rather than liberalisation. The only discernible competition factor was the duopoly situation, insofar as it might possibly encourage the dominant operators to set high prices.

Secondly, the Commission assessed the existence of a meaningful link between the market situation and the Sardinian preferential tariffs (which benefited Alcoa and, for a few months, three other companies ([12])). The Commission noted that the tariffs had not been introduced to remedy the competition problem identified in Sardinia: as conceded by Italy itself, the objective of the tariffs was to align the electricity prices paid by the beneficiaries on prices prevailing in other European countries. In other words, the aid was granted for competitiveness reasons.

Thirdly, the extent to which the VPP was likely to remedy the lack of effective competition in Sardinia did not appear proportionate to the scale and intensity of aid granted. The effects of the remedy on the Sardinian market appeared to be too limited. The remedy would have an impact only on the behaviour of the dominant operators, but could not improve interconnection or generation costs, nor lead to a change in market structure at the generation level.

([12]) In 2004, Italy had extended the 'Alcoa treatment' to three other energy-intensive undertakings, also located in Sardinia. However, payments of aid to these three undertakings lasted only a few months. After discontinuing payments, Italy notified the tariffs to the Commission. The assessment of these cases (Case C 38/b/2004 and C 13/2006) is still ongoing.

Therefore, the Commission considered that the VPP could not constitute a basis for the compatibility of the Alcoa tariff.

The Commission also weighed up the argument that the Alcoa tariff served the purpose of remedying the alleged shortcomings of the electricity markets, which had not yet delivered competitive prices, and was necessary to prevent the relocation of the company outside Europe.

After noting that Alcoa was not at risk of relocating outside Europe, since it had recently carried out new investments in Iceland ([13]), the Commission made the general statement that the imperfect functioning of electricity markets could not be considered a market failure. The notion of market failure implies that a competitive market alone cannot deliver a socially optimal result, whereas the problem referred to here is that the markets concerned are not sufficiently competitive. The Commission underlined that the solution could only lie in more — and not less — competition, through the creation of a genuinely integrated energy market. Therefore, the Commission considered that, as a matter of principle, *ad hoc* operating aid in the form of artificially low electricity tariffs for selected end-users was not the appropriate instrument to remedy any alleged imperfections of electricity markets.

As regards the objective of preventing the relocation of energy-intensive industries, the Commission did not make general statements of principle, but confirmed the negative stance it took in the Terni decision ([14]), where the argument had also been raised. In Terni, the Commission had noted that there was no precedent in its earlier decisions or in the case-law of the Community courts where such an argument had been accepted as a justification for the grant of State aid, and that there was no need for the Commission to even consider this question since the authorities had not provided any substantiation for such an allegation. In particular, they had not shown that the tariff was necessary and proportionate to prevent that risk.

On this basis, the Commission declared that the Alcoa tariff was incompatible aid and ordered its partial recovery.

5. Recovery

The recovery obligation was partially waived for Alcoa's Sardinian plant on the basis of the principle of sound administration. The decision acknowledged that the excessively long discussions on the possible remedy proposal envisaged in the 2007 Commission's

([13]) Which is part of the EEA.

([14]) Reference in footnote 1; see paragraphs 144 and 145 of the decision.

letter might possibly have influenced the beneficiary's perception of the risk of recovery. In these circumstances, it was recognised that full recovery of the aid for Sardinia would possibly have breached the principle of sound administration. Therefore, the Commission decided to waive recovery for the Sardinian plant for the period subsequent to the 2007 letter. Full recovery was imposed for the Veneto plant, which was not covered by the letter. The amount to be recovered is approximately € 295 million.

6. Alcoa's challenge against the final decision

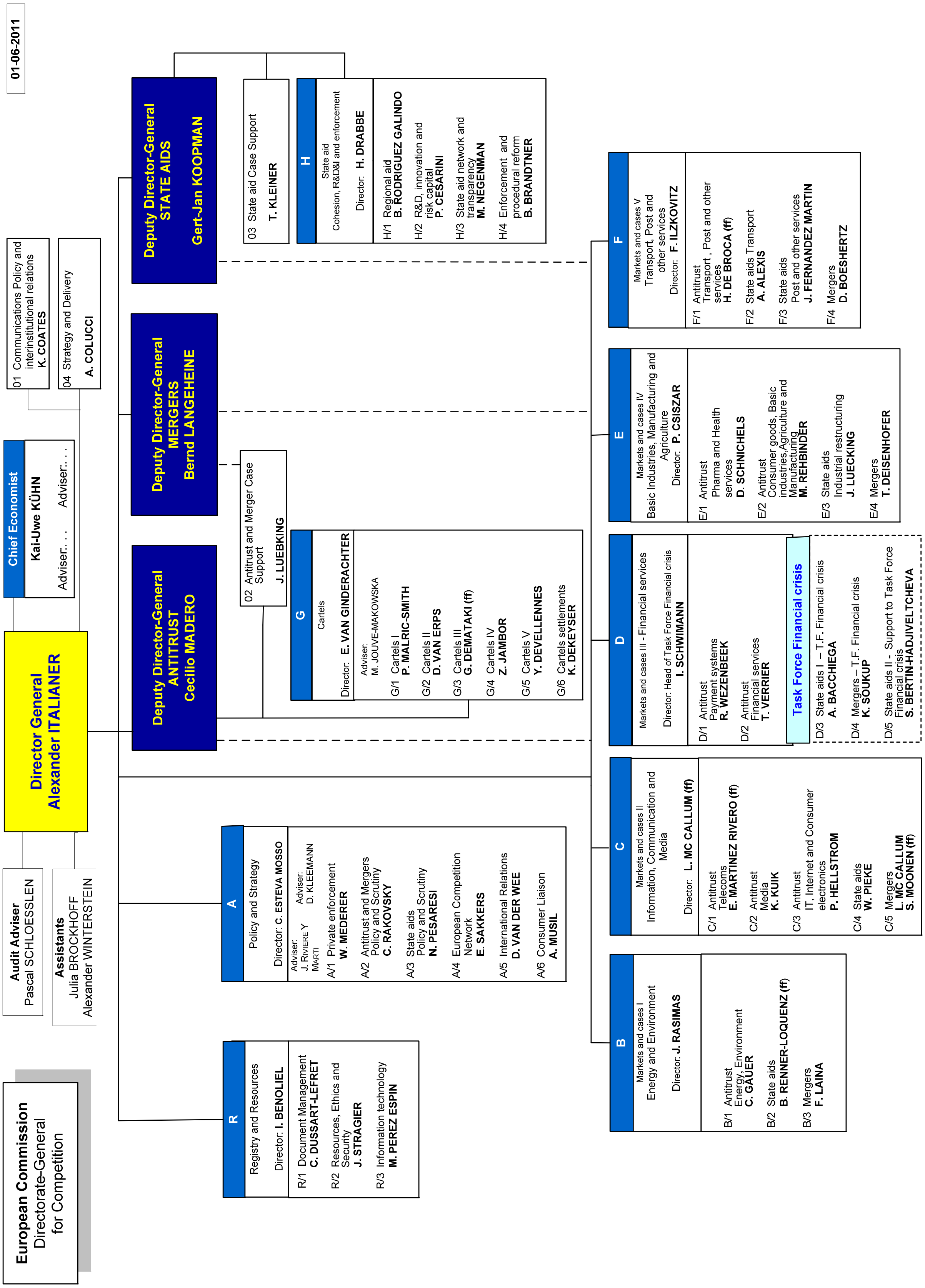
Alcoa has challenged before the General Court the Commission's final negative decision of November 2009 ([15]). The company requested interim measures (suspension of the recovery order), alleging that it would suffer serious and irreparable damage in the event of recovery, because the parent company would not provide any financial help and the Italian plants would be irreversibly closed. The request for interim measures was rejected in July 2010 ([16]). The General Court found, in particular, that the requirement of urgency was not met, since Alcoa belonged to a multinational group which was legally able and financially capable of assisting its Italian subsidiary. The Court also held that, according to the case-law, the group's alleged unwillingness to support its subsidiary was irrelevant and in any event seemed contradicted by facts. For example, during the investigation the group provided the Italian State with a € 700 million parent company guarantee covering the risk of recovery and recapitalised Alcoa. Moreover, there appeared to be no immediate threat of closure of the Italian plants. Alcoa has appealed the judgment on the interim measures before the ECJ ([17]). The case on substance is pending before the General Court.

7. Conclusions

This is an important decision in policy terms because the Commission has confirmed for the second time its refusal to authorise operating aid given in the form of electricity price subsidies in favour of energy-intensive industries based on the alleged 'imperfect state of liberalisation' of the EU electricity market or the threat of relocation outside the EU. State aid control aims generally to prevent this type of aid, which is liable to generate subsidy races between Member States.

([15]) Case T-177/2010, pending.
([16]) Decision of 9 July 2010 in Case T-177/2010 R.
([17]) Case C-446/10, pending.

Organigram of the Competition Directorate-General (1 June 2011)



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From 1 May 2010 to 31 August 2010

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Joaquín Almunia, Vice-President European Commission responsible for Competition policy

SPEECH/10/736 - **07 July 2010**

Competition in Digital Media and the Internet

University College London.

SPEECH/10/346 - **28 June 2010**

Jornada conmemorativa del 30 aniversario del Consejo de Seguridad Nuclear

Consejo de Seguridad Nuclear , Madrid

SPEECH/10/312 - **14 June 2010**

Competition and Regulation: Micro-economic support for macro-economic recovery

London School of Economics, London

SPEECH/10/305 - **10 June 2010**

New Transatlantic Trends in Competition Policy

Friends of Europe Brussels, Brussels

SPEECH/10/301 - **10 June 2010**

State aid rules can help Europe exit crisis

European State Aid Law Institute, Brussels

SPEECH/10/270 - **27 May 2010**

New competition rules for the car sector

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SPEECH/10/247 - **19 May 2010**

First cartel decision under settlement procedure – Introductory remarks

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Competition and consumers: the future of EU competition policy

European Competition Day, Madrid.

SPEECH/10/214 - **05 May 2010**

Introductory remarks to European Parliament on review of Motor Vehicle Block Exemption Regulation

European Parliament, Brussels.

By the Competition Directorate-General staff

09 June 2010

Alexander Italianer: Competition Policy in support of the EU 2020 policy objectives

Vienna Competition Conference 2010, Vienna.

20 May 2010

Alexander Italianer: Priorities for Competition Policy en

St Gallen International Competition Law Forum, St. Gallen.

18 May 2010

Alexander Italianer: Speech at the European Policy Forum Roundtable

European Policy Forum Roundtable, London

Press releases and Memos

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British Airways, American Airlines and Iberia commitments to ensure competition on transatlantic passenger air transport markets made legally binding – frequently asked questions

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car prices fell only slightly in 2009 whereas prices for repairs and maintenance continued to rise despite the crisis

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Commission approves acquisition of Sociedad General de Aguas de Barcelona by Suez Environnement

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Commission clears civil and naval ship deal between Abu Dhabi Mar and ThyssenKrupp Marine Systems

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