EC COMPETITION POLICY NEWSLETTER

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La lutte contre les Cartels atteint sa vitesse de croisière en 2001

Alexander SCHAUB, Directeur Général de la Direction Générale Concurrence

L'année 2001 restera comme une année remarquable pour l'activité de la Commission européenne en matière de lutte anti-cartels. Remarquable, par le nombre de décisions adoptées; remarquable, par l'importance des pratiques sanctionnées; remarquable par le montant des amendes imposées. Remarquable enfin, et peut-être surtout, en ce qu'elle marque les premiers résultats positifs des efforts entrepris par la Direction Générale de la Concurrence depuis quelques années, pour intensifier sa lutte contre les cartels.

Bien entendu, la détection, la poursuite et la sanction des accords secrets de cartels constituent autant d'éléments centraux de la politique de concurrence menée par la Commission européenne depuis son origine. La Commission a d'ailleurs adopté, ces dernières années, plusieurs décisions importantes en matière de cartel, notamment dans les cas «*Poutrelles*» ([1]), «*Carton*» ([2]) et «*Ciment*» ([3]) et plus récemment encore dans les affaires «*Pre-insulated pipes*» en 1998 ([4]), «*Steel tubes*» et *Lysine* en 1999 ([5]).

Pour autant, l'opinion était largement répandue dans le monde économique, comme au sein même de la Commission, que l'intensité de la lutte anti-cartels menée par la Commission européenne, n'était pas à la hauteur du défi que pose à l'économie européenne la persistance de pratiques secrètes de cartels. En effet, ces pratiques figurent parmi les restrictions de concurrence les plus graves, se traduisent par des augmentations de prix et une réduction du choix offert aux consommateurs comme à l'ensemble des clients industriels européens et dégradent ainsi la compétitivité globale de l'industrie européenne.

Pour l'ensemble de ces raisons, mais aussi dans la perspective de l'entrée en vigueur du futur règlement du Conseil visant à remplacer le règlement 17, la Direction Générale de la Concurrence donne depuis 1998, une priorité accrue à la lutte contre les cartels. Cette priorité a pris notamment la forme de la création en 1998, d'une unité spécialisée dans les cartels, puis du renforcement, chaque année, des moyens humains et matériels de cette unité. Elle a également pris la forme d'une sensibilisation accrue des autres unités opérationnelles antitrust de la Direction Générale de la Concurrence, à la lutte anti-cartels.

Les dix décisions sanctionnant des accords de cartel secrets qui ont été adoptées en 2001 ([6]), imposant des amendes à 56 entreprises pour un montant total de € 1 836 millions constituent les premiers résultats de cet effort. Il convient d'y ajouter les 5 cas de cartels dans le secteur bancaire liés à l'introduction de l'Euro ([7]) qui ont été clôturés par voie de «settlements».

Quelques enseignements généraux me paraissent pouvoir en être tirés: Tout d'abord, les secteurs concernés démontrent par leur variété (transports aériens, services bancaires, produits alimentaires, chimie, biens industriels), combien les accords de cartels restent répandus dans de nombreux secteurs de l'économie européenne, mais aussi de l'économie mondiale. Ensuite la taille des entreprises impliquées met en évidence que ces pratiques sont aussi bien le fait de géants mondiaux que d'entreprises de taille modeste essentiellement actives sur des marchés nationaux. Enfin, la nature et les modalités de mise en œuvre des pratiques sanctionnées montrent que les entreprises font preuve d'une sophistication sans cesse croissante pour éviter d'être détectées et sanctionnées.

Tout indique donc qu'au-delà du réel succès que constitue le bilan d'activité 2001 en matière de cartels, il faut maintenant aller plus loin en stabilisant ces bons résultats sur la durée et en intensifiant encore la lutte contre les cartels que mène la Commission.

([1]) (1994) OJ L 116, p. 1
([2]) (1994) OJ L 243, p. 1.
([3]) (1994) OJ L 343, p. 1.
([4]) (1999) OJ L 24, p.1
([5]) Non publié
([6]) Deux d'entre elles ont été adoptées avant l'été et ont fait l'objet d'articles dans le numéro précédent de la Newsletter. Les huit autres sont détaillées dans cette édition de la Newsletter.
([7]) Voir communiqués de presse IP/01/554 du 11.4.2001, IP/01/634 du 3.5.2001, IP/01/635 du 3.5.2001, IP/01/650 du 7.5.2001, IP/01/690 du 14.5.2001 et IP/01/1159 du 31.7.2001.

Car trop souvent par le passé, l'activité anti-cartels de la Commission a revêtu un caractère cyclique, des périodes fastes, marquées par de remarquables succès, alternant avec des périodes plus creuses. Nous voulons rompre avec cette alternance cyclique qu'aucun facteur économique ne justifie. La Commission devra démontrer en 2002 et dans les années qui suivront qu'elle est à même de maintenir, sur longue durée, un niveau d'activité comparable à celui de 2001.

De la même manière, le traitement des cas de cartels, par les services de la Commission, a traditionnellement été caractérisé par des délais d'instruction très longs et sans doute trop longs. Les décisions adoptées cette année concernent des affaires qui étaient à l'instruction depuis 5 ans pour les plus anciennes et 3 ans pour les plus récentes. Là encore, l'amélioration des délais de traitement devra être confirmée en 2002 et dans les années qui suivront, avec pour objectif à terme, qu'ils restent, en règle générale, inférieurs à trois ans.

La Communication de la Commission sur la réduction ou la non-imposition d'amendes, dite communication «Leniency», s'est avérée être un outil d'enquête efficace, les entreprises mises en cause en ayant invoqué les dispositions dans une vaste majorité des cas décidés en 2001. La réforme du programme «Leniency» de la Commission, initiée en juillet 2001 et qui devrait se conclure par l'adoption d'une nouvelle communication au début de cette année, devrait encore renforcer cette efficacité. Toutefois, pour que cet outil rénové conserve toute son efficacité sur le long terme, la Commission européenne devra accroître sa capacité de détection par ses propres moyens, des pratiques de cartels. Par une meilleure connaissance des marchés, par un traitement plus efficace des plaintes, mais aussi par une coopération entre autorités de concurrence accrue, tant avec nos collègues de Etats membres, qu'avec les autres autorités de concurrence.

Meilleure détection des cartels, plus grande régularité de l'activité anti-cartels, réduction accrue des délais de traitement, intensification de la coopération internationale: tels sont les défis que la Commission devra relever dans les années à venir, pour confirmer et amplifier les bons résultats de 2001. Chacun de ces éléments est essentiel pour bâtir une politique anti-cartels efficace et crédible. Démontrer que la lutte anti-cartels est active et constante, que les chances d'être découvert sont grandes, et que les sanctions sont élevées; rapprocher la date de la sanction de celle de la découverte des infractions; apporter une réponse coordonnée à des pratiques qui se globalisent: c'est à ce prix que nous serons à même d'exercer un véritable effet de dissuasion et de voir enfin diminuer la fréquence de ces pratiques dans la vie économique.

Beaucoup a été fait depuis 1998. Les moyens mis à la disposition de la lutte anti-cartels se sont accrus considérablement, la productivité a augmenté, le nombre de cas activement traité est plus grand et les délais de traitement sont plus courts, tout en conservant le haut niveau de qualité que requièrent des décisions négatives avec amendes. Les résultats enregistrés en 2001 constituent les premiers fruits tangibles de ces efforts. Mais beaucoup reste à faire pour consolider ces bons résultats, les inscrire dans la durée et en faire une base de départ pour aller plus loin. C'est pourquoi la Direction Générale de la Concurrence accroîtra encore cette année, les moyens humains et matériels dédiés à la lutte contre les cartels et intensifiera les efforts de formation de ses personnels, d'ores et déjà entrepris dans ce domaine.

J'attache à ce dernier point, qui me paraît essentiel à la pérennisation du succès de notre lutte anti-cartels, une attention toute particulière. Les efforts de formation spécifique à la détection des cartels et aux techniques d'enquête devront être accrus, notamment en ce qui concerne l'utilisation des Nouvelles technologies de l'Information et de la Communication (NTIC). La Direction Générale de la Concurrence a d'ores et déjà formulé des propositions pour que ces formations soient communes à l'ensemble des autorités de concurrence européennes, afin de promouvoir une culture commune en matière de lutte anti-cartels et de bénéficier de l'échanges des meilleures pratiques développées par chacun d'entre nous. Dans le même esprit, des contacts ont également été pris avec diverses autorités de concurrence non-européennes, notamment dans le domaine de l'utilisation des NTIC.

J'ai confiance que l'ensemble des mesures prises, en matière de renforcement des moyens, d'amélioration de la gestion des dossiers, de formation et de collaboration internationale, permettra à la Commission de relever, avec succès, le nouveau défi que constitue la pérennisation des bons résultats enregistrés en 2001 et cela dès cette année.

EU enlargment and competition policy: where are we now?

Youri DEVUYST, Janne KÄNKÄNEN, Patrick LINDBERG, Irina ORSSICH and Georg ROEBLING, Directorate-General Competition, unit A-4

The year 2001 was a landmark for the accession negotiations on competition. Following the important progress that has been achieved by the Candidate Countries in the adoption and enforcement of the Community's competition *acquis*, it has been possible to conclude the competition negotiations with Estonia, Latvia, Lithuania and Slovenia, and to clearly identify the remaining steps to be taken in the other Candidate Countries. The continued progress in the competition field is, therefore, actively bringing forward the accession process, while also helping to achieve a level playing field throughout Europe.

The enlargement process

The European Union is currently engaged in enlargement negotiations with twelve Candidate Countries. Following the Luxembourg European Council of December 1997, accession negotiations were opened with Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia ('Luxembourg group'). Following the Helsinki European Council of December 1999, accession negotiations were also opened with Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia ("Helsinki group"). While the Helsinki European Council recognised Turkey as a Candidate Country, the conditions for starting accession negotiations have not yet been achieved.

The negotiations are guided by the principle of differentiation, which means that each Candidate Country is assessed on its own merits. This enables Candidate Countries that began negotiations at a later stage to catch up. As regards the timing of the accession process, the recent Laeken European Council reconfirmed the line taken by the European Council of Göteborg in June 2001 in declaring that the *'European Union is determined to bring the accession negotiations with the candidate countries that are ready to a successful conclusion in 2002, so that those countries can take part in the European Parliament elections in 2004 as members'*.

The competition dimension of the enlargement process

In practice, the accession negotiations have been sub-divided into 31 topical chapters. Chapter 6 concerns competition policy. The specific negotiations on the competition chapter started in 1998 for the Candidate Countries in the 'Luxembourg group' and in 2000 for the Candidate Countries in the 'Helsinki group', with the exception of Bulgaria for which the competition chapter was opened in March 2001.

In preparation for each important step in the negotiations, the Commission proposes so-called 'Draft Common Positions' for approval by the Member States in Council. Once agreed by the Member States, a Draft Common Position becomes an 'EU Common Position' that can be transmitted to the Candidate Country in question. Such Common Positions deal with one Candidate Country and one negotiating chapter at the time.

In its Enlargement Strategy Paper of November 2000, the Commission had committed itself to present revised Draft Common Positions on the competition chapter to the Council during the second half of 2001. This resulted, in late October 2001, in a presentation to the Council of twelve Draft Common Positions, containing an assessment of the competition situation in each Candidate Country. The Commission's assessment aimed at determining whether the conditions were present that could allow for the completion of the competition negotiations.

The Council agreed with the Commission's proposal in favour of the provisional ([1]) closure of the competition negotiations with Estonia, Latvia, Lithuania and Slovenia. With Bulgaria, Cyprus, the Czech Republic, Hungary, Malta, Slovakia, Poland and Romania, the competition negotiations are continuing. This was confirmed by the ongoing Accession Conferences that convened at ministerial level on 11-12 December 2001. The Accession Conference is composed of all Member States and the Candidate Country concerned.

([1]) The negotiations are based on a principle that nothing is formally finalised before an overall conclusion on the negotiations has been reached. Moreover, provisionally closed chapters are subject to continued monitoring and can under certain circumstances be reopened on request of either side during the negotiation process.

The requirements for closure of the competition chapter

The requirements for the provisional closure of the competition chapter are derived from the conclusions of the Copenhagen European Council in June 1993. At Copenhagen, the European Council defined the criteria which applicants have to meet before they can join the EU. In the economic sphere, these criteria require the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union.

The competition negotiations take place in the context of this 'economic criterion'. In this framework, the EU has consistently taken the view that the Candidate Countries can be regarded to be ready for accession only if their companies and public authorities have become accustomed to a competition discipline similar to that of the Community well before the date of accession. This is necessary to ensure that the economic actors in the Candidate Countries are able to withstand the competitive pressures of the internal market resulting from the full and direct application of the competition *acquis* upon accession.

Consequently, the requirement of adapting to a competition discipline well before accession stems both from the need to preserve the internal market discipline after enlargement, and from the difficulties that would arise in Candidate Countries if they were to adapt to the application of the *acquis* from one day to the next. In order to avoid such foreseeable consequences of an abrupt application of the competition rules, a solid pre-accession preparation is essential. Companies (including public undertakings) need to adjust to operating in accordance with antitrust rules and without distortive forms of State aid, the authorities and the judiciary need to grow accustomed to enforcing these rules, and public bodies involved in the granting of aid have to get used to State aid discipline, including *ex ante* notification procedures.

In translating these principles into concrete requirements, the EU has put forward three elements that must be in place in a Candidate Country before the competition negotiations can be closed:

(1) the necessary legislative framework with respect to antitrust and State aid;

(2) an adequate administrative capacity (in particular, a well-functioning competition authority); and

(3) a credible enforcement record of the acquis in all areas of competition policy.

To evaluate whether these conditions are met, DG Competition has carried out an in-depth assessment, including the examination of cases that the competition offices of the Candidate Countries have handled, both in the state aid and antitrust area. This has enabled the Commission and the Council to assess the degree to which the competition discipline is already being enforced in the Candidate Countries.

The results of the assessment

The decision to provisionally close the competition negotiations with Estonia, Latvia, Lithuania and Slovenia reflects the important progress that was made in the course of 2001 in these four applicant countries. In other countries, good progress has been achieved, but important shortcomings still remain.

In summary form, the situation in the anti-trust field looks reasonably satisfactory in most Candidate Countries. The adoption and alignment of national antitrust legislation is reaching its completion, containing all the main principles of the Community *acquis*. Furthermore, competition authorities are generally fully functioning and actively enforcing the antitrust disciplines. The bilateral pre-accession Association ('Europe') Agreements, which the EU has concluded with most of the Candidate Countries, contain explicit clauses obliging the countries concerned to apply the same substantive antitrust and State aid rules as in the Community. In accordance with the Europe Agreements, and their implementing rules, the Candidate Countries' competition authorities have been specifically charged with ensuring the application of antitrust rules within their respective countries, and actively cooperate with the Commission in doing so. Companies with activities in Candidate Countries will also find that procedures for notifying mergers, agreements and other practices, as well as the filing of complaints, largely follows the Community model.

Naturally, work needs to continue in the antitrust field, not least in view of preparing for the Commission's proposed procedural reform, which would more directly involve the (present and future) Member States in the application of Community rules. All Candidate Countries, therefore, need to continue their efforts to concentrate their resources on preventing the most serious distortions of competition, and to follow a more deterrent sanctioning policy. In some countries, most notably Cyprus and Malta, also other important work remains to be done: in Cyprus, the antitrust enforcement record has not yet fully developed and a much more pro-active approach to

maintaining the anti-trust discipline is needed, whereas in Malta, the application of competition law still has to be extended to all companies, including public undertakings.

In the area of State aid, progress has previously been much slower than in the antitrust field, and it is only more recently that a real State aid discipline has begun to emerge. As in the antitrust field, the Candidate Countries have now adopted national legislation, based on the Community acquis, and have set up State aid monitoring authorities charged with enforcing the rules. However, the degree to which a full and proper State aid discipline is enforced still varies considerably from country to country.

As to the accession negotiation requirements in the State aid field, a broad distinction can be made between three groups of Candidate Countries. First, there are the four Candidate Countries for which the EU has decided to provisionally close the negotiations. In these countries, State aid rules are being enforced and incompatible aid measures have been duly amended. The Czech Republic and Hungary form a second category. Their State aid enforcement record is, in general, satisfactory. However, a number of specific shortcomings have so far prevented the Commission from proposing the closure of the negotiations. Hungary needs to bring all fiscal aid under State aid control and fully align it with Community rules. In the Czech case, the need for a more effective State aid control in the steel and banking sectors has so far prevented the closure of the negotiations. Finally, in the other six Candidate Countries, more general problems of State aid discipline remain.

Main remaining State aid issues

As to the main issues that remain to be resolved in the State aid field, there are two particular problems that deserve to be highlighted.

Firstly, it is of particular concern, that some Candidate Countries continue to operate incompatible fiscal aid regimes, such as tax holidays, tax breaks, and tax credits intended to attract foreign investments. This is considered a major obstacle preventing the EU from concluding the competition negotiations with these countries. A credible enforcement record requires that also these kind of investment incentives are classified as incompatible State aid and are aligned with the *acquis* well before accession. Incompatible aid measures cannot continue after accession and are in fact already violating the pre-accession 'Europe Agreements'. In this context, the Commission is actively helping the Candidate Countries in converting incompatible State aid into permissible aid arrangements. It is also important to note that Candidate Countries that align their investment incentives can offer legal certainty to investors, which is of crucial importance for attracting long-term investments.

Secondly, there is also a problem of aid regimes used to prop up ailing industries. Such aid, consisting of e.g. tax arrears or loan guarantees, risks jeopardising the successful restructuring of several key sectors of the Candidate Countries' economies. As such, these aid measures also delay the preparation of the Candidate Countries for their full integration in the internal market. In this respect, effective State aid control is a necessity to get the badly needed viable restructuring of certain sectors properly up and running. This problem is particularly acute in the steel sector.

It must, however, be noted that respecting Community State aid rules does not mean that the Candidate Countries cannot grant any State aid to attract investors or to help restructure their economies. On the contrary, there remains considerable scope for State aid in the Candidate Countries, as long as it is explicitly recognised as such, and provided proper attention is paid to its compatibility with the rules of the Community *acquis*. The Community State aid 'tool box' is sufficiently flexible to cater for the specific needs of the Candidate Countries. For example, most of the Candidate Countries qualify as areas where regional aid is permitted, and high maximum aid ceilings apply, since the 'standard of living is abnormally low or there is serious underemployment' — in the meaning of the provisions on regional aid of the EC Treaty. To allow for the correct application of the regional aid rules in the Candidate Countries, the Commission, together with the countries, prepares regional aid maps that are in line with the Community's Guidelines on national regional aid. Hence, equal treatment is ensured both between the Candidate Countries and the Member States, as well as between the Candidate Countries themselves.

Conclusion

In looking at the enlargement process from a historical perspective, impressive progress has been achieved in legislative approximation and in the setting up of a competition discipline in all Candidate Countries. While there are remaining problem areas, most notably in the field of State aid, one can also notice a real desire and determination to find solutions to these lingering problems. Many in the Candidate Countries fully understand that competition policy, including State aid control is a key part in creating a well-functioning economy, as well as a level playing field.

The restructuring of the Italian banking sector: State aid cannot assist mergers

Sandro SANTAMATO, Directorate-General Competition, unit H-3

Introduction

On 11 December 2001, the European Commission decided that the tax measures for banks introduced by Italian Law n° 461/98 of 23 December 1998 and the related Legislative Decree n° 153/99 of 17 May 1999, are incompatible with the State Aid rules of the EC Treaty. The measures in question provide a discriminatory competitive advantage to the banks that participate in the operations that are being favoured. Italy must now recover the amounts that the banks, benefiting from tax exemptions, avoided having to pay. ([1])

Law 461/98 and Decree 153/99 introduced tax advantages for the consolidation of the banking sector. The main aspect consisted in the reduction to 12.5% of the rate of income tax (IRPEG) for banks that merge or engage in similar restructuring. ([2]) In addition, the law established that a fixed fee would replace the indirect taxes normally due in connection with mergers and that the operations would be exempted from the local tax on the increase in the value of property, due at the time of change in ownership. ([3])

The tax benefits concerned merger and restructuring operations carried out in the years 1998 to 2004 inclusive. On the basis of the sole operations that had taken place until 2000, the maximum theoretical benefits that all the banks concerned taken together could have derived over the entire period for which the measures were intended, is estimated at around € 2.8 billion. However, after the Commission had begun investigating these measures, the Italian authorities informed the Commission in April 2000 that they had suspended their implementation. It is therefore likely that the actual tax savings made by the banks are substantially lower than the above figure.

Position of the Italian authorities

In its answer to the initiation of the procedure the Italian government presented several observations, some of which raised interesting issues of a general nature.

It was argued that the Italian banking system had been subject since 1936 to a strict public control and direct government intervention in the management of a large majority of banks. Banks had been divided into different institutional categories, with different operational limits ('specialisation principle'). This had negatively affected the efficiency and competitiveness of the system. For this reason the authorities took several steps, since the beginning of the '80s, to abandon the specialisation principle, privatise State-owned banks and encourage an increase in the average dimension of Italian banks. Law 461/98 and Decree 153/99 should be seen as part of this long-term process aimed at modernising the banking sector rather than a derogation from the normal tax rules.

It was also observed that rules on State aid could not hinder an improvement in the general fairness and consistency of the system where it could be demonstrated that the initial situation was penalising certain undertakings or sectors. Data shows that banks contribute 20% of overall company tax revenues while contributing only 5% to the country's value added. Other figures support the claim that the banking sector is subject to higher imposition. While a reduction of the tax burden could have been achieved by granting banks the same taxation rules as other sectors, the government decided to rather offer incentives for the consolidation of the sector.

The Italian authorities also argued that the measures were to be considered of a general nature. All banks, including branches of foreign banks, could benefit from the tax breaks. As for the difference in treatment with respect to other

([1]) This decision closed one part of the investigation opened on 25 October 2000 on the legislative measures addressed to the Italian banking system. The Commission's investigation into State Aid to banking foundations (as distinct from banks themselves) continues, since the status of these measures still needs to be defined.

([2]) The reduction applies for five years after the operation, provided that the proceeds are placed in a special reserve, which may not be distributed for a period of three years. The proceeds that may be placed in the special reserve cannot exceed 1.2 % of the difference between the sum of credits and debits of the post-merger bank and the sum of credits and debits of the largest pre-merger bank.

([3]) Further measures, concerning the transfer of assets between banks and banking foundations, which represent a more specific aspect of the case, are not discussed in the present article.

sectors, this was justified by the nature or general scheme of the system. The banking sector is subject to a very specific regulation, which make banks a peculiar category of taxpayers. Banks are subject to many additional obligations with respect to other undertakings. As a result, a difference in tax treatment is objectively justified and is typical of this sector. It was therefore legitimate for the Italian legislator to seek to adapt the tax system to the peculiarity of the banking sector.

Another observation was that the measures did not involve use of State resources. The tax advantage was not automatic, but subordinated to the implementation of specific operations. Where those operations would have involved a tax burden, it is unlikely that they would have taken place in the absence of the tax benefit. In any event, the temporary reduction in company tax would have been compensated in the long term by the likely increase in profitability – and taxation thereof – of the interested banks.

It was further claimed that if the Commission did not accept the general arguments in favour of compatibility of the measures with the Treaty, it then had to verify case by case, i.e. by looking at each individual operation benefiting from the measures, whether the conditions for exemption were in place.

Finally, in case of a finding of incompatible aid, the recovery of the aid should be excluded as it would be against the proportionality principle. Merger operations had been carried out on the basis of the tax incentive; recovery could produce financial instability of the beneficiaries and would alter the conditions on which they had based their merging decisions.

General issues raised by the case

As it can be the seen from this partial account of the observations of the Italian authorities, a number of general issues were raised in the context of the case:

(1) To what extent a tax measure grants an advantage to certain undertakings or productions by derogating from the nature or general scheme of the system, as opposed to representing a legitimate adaptation to the peculiarity of a specific activity?

(2) Does a measure accessible to all operators in a sector distort competition?

(3) To what extent a policy measure designed to improve the economic performance of a sector may be hindered by the application of State aid rules?

(4) Can the favourable fiscal treatment of specific operations compensate a generally higher taxation burden imposed on the sector?

(5) Is there an effect on trade when operators of other Member States have access to the same benefits?

(6) Is there use of State resources when a lowering in tax rates may have the effect of enlarging the tax base and eventually earn more revenues?

(7) To what extent single operations that have benefited from a scheme have to be assessed individually?

(8) Does the recovery of an aid infringe the proportionality principle when the aid has determined economic choices that are hardly reversible?

The Commission's assessment of the aid

The decision addressed the above questions in a way that is obviously related to the specific circumstances of the case. It can, nevertheless, provide some useful insight into the elements relevant to their assessment.

1) Nature or general scheme of the system

In the decision it is acknowledged that the peculiar nature of an activity could, in principle, justify the introduction of specific tax rules for the sector. However, the measures under analysis did not represent an adaptation of the general system to the distinctive features of banking activity, but rather an ad hoc aid having the effect of improving the competitiveness of certain undertakings – i.e. the merging banks – and only in relation to certain operations. The fact that the banking sector might have been in need of restructuring in a particular historical period was an extrinsic element, bearing no relation with the normal operation of the fiscal system in the banking sector. It is not in the logic of the taxation system that banking activity should benefit from more favourable rules on mergers. For these reasons, it could not be accepted that the measures in question were justified by the nature or general scheme of the system.

2) Selectivity

The circumstance that a measure be accessible to all operators of a sector is, in principle, not sufficient to rule out its selective nature, also within the sector itself: the mechanism through which the aid operates needs to be assessed. In this case the measure

was selective vis à vis banks within the sector, since it was limited to only those companies involved in merger or consolidation operations. These are not operations that are currently performed by market participants, so that the aid is bound to favour only a few of them. Moreover, the aid measure described was not neutral with respect to the relative size of the companies involved and may have placed smaller operators at a disadvantage. ([1])

3) Improvement of sector performance

The decision follows the established view that the improvement of the economic performance of a sector is not a sufficient justification for the granting of sectoral aid. Sectoral aid alters the allocation of resources and discriminates between firms that compete for those. Because of overlapping in upstream and downstream markets, competition in other sectors is rarely undistorted. More importantly, aid to a sector would typically favour national firms over firms of other Member States. The circumstances of the case confirmed these worries.

The measures allowed banks a cheaper acquisition of shares in other companies, when these were owned by other banks involved in the assisted operations. Mergers and acquisitions could also concern different companies – e .g. financial or insurance companies – although the tax breaks were only attributed to the banks involved and in proportion of the banking business. More generally, merging operations having the same expected profitability might not have been carried out in other sectors not benefiting from the aid.

In addition, to the extent that smaller buyers were placed at a disadvantage and since the tax benefit applied to Community banks only as regards the branches established in Italy – which tend to be rather limited in size – there may have been an element of distortion also between foreign and Italian banks. The circumstance that the aid was available also to branches of other Member States' banks did not seem sufficient to eliminate this kind of bias in favour of mergers between Italian operators.

4) Compensation with other measures

The circumstance that the banking sector is generally subject to a heavier tax burden does not warrant the introduction of sectoral aid. If the bias in the tax system is justified by the nature of the business, it does not call for compensation, otherwise it is the bias itself that should be corrected. A selective measure might be justified by the specificity of the activity to which it is addressed, but not by the presence of other selective measures.

5) Effect on trade

An aid that benefits undertakings in a sector exposed to cross-border trade, would be considered as affecting that trade. The Court of Justice has observed: '*when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-community trade the latter must be regarded as affected by that aid*'. ([2]) In this respect, there is no doubt that for many years financial services, providers and consumers of financial services, and capital, have actually and potentially, directly and indirectly, crossed frontiers between Member States. Aid granted to credit undertakings, which offer financial services in competition with other European credit establishments, is certainly likely to distort intra-Community trade. It should also be borne in mind that banks often encounter obstacles to expansion abroad. Such obstacles are frequently due to the fact that local banks are well-established, which makes it more costly for foreign competitors to enter the market. As liberalisation will increasingly offer banks the opportunity to provide their services in other Member States, all aid granted to a bank, whether international or domestic, is likely to hamper those possibilities. Aid aimed at enabling even local banks to survive which would otherwise have been forced out of the market owing to their low profitability and competitive capacity is thus liable to distort competition in the Community as it makes it more difficult for foreign banks to enter the Italian market.

6) State resources

The argument that the taxed operations would not have taken place in the absence of the measures, so that the aid actually increased State revenues, could not be accepted. First of all it could not be ruled out that operations of the type covered by the scheme would have taken place anyway.

([1]) If, for simplicity, we consider an acquisition involving two banks, the fiscal benefits were directly proportional to the size (sum of credits and debts) of the smaller one. Accordingly, if the purchaser had a smaller size than the purchased, its fiscal advantage would have been lower than the one accruing to a hypothetical larger buyer of the same bank. This might have placed smaller buyers at a disadvantage with respect to larger ones.

([2]) Judgment of the Court of Justice of 17 September 1980 in Case 730/79 *Philip Morris Holland v Commission* [1980] ECR 2671, paragraph 11.

Secondly, such an assertion would have implied that the normal tax rules, applying to mergers in other sectors, are designed to discourage merger operations rather than raise revenues. The fact that, on a global scale, an aid scheme increases the number or the amount of taxable operations and therefore creates additional revenue for the State is not relevant to the notion of State resources in the sense of Article 87 EC.

7) Individual assessment

The object of the Commission's analysis was an aid scheme, that is an instrument by which the Member State offers fiscal advantages to any financial institution that fulfils the conditions laid down in the scheme. The Member State did not grant advantages on an individual basis and did not notify each individual case to the Commission. Consequently, the Commission was bound by the very nature of the measure to make a general and abstract examination of the scheme, both on the question of aid and on the question of compatibility.

The fact that the Italian authorities had requested the Commission to analyse each individual aid was not considered sufficient to oblige the Commission to do so. Any such request would at least have to be accompanied by all the information necessary for the Commission to conduct an assessment of each individual case. That is, all the information that should normally be provided to the Commission in the context of a complete notification of an individual aid pursuant to Article 88(3) EC. If a Member State considers that some particular cases within an aid scheme, because of their specific features, should be assessed on an individual basis, they are under a duty to inform the Commission of these features and to provide all the information needed for an individual assessment.

8) Legitimate expectations

The decision argues that the beneficiaries of the aid could not entertain a legitimate expectation that the measures were compatible with the common market. Accordingly, in deciding to carry out the aided merger operation, a diligent operator should have taken into account the possibility for that aid to be declared incompatible. If the tax advantage represented *a condicio sine qua non* for the profitability of the merger, a prudent operator would not have carried out the operation. For those reasons it cannot be claimed that the recovery of the aid would be against the proportionality principle, simply because the aid has determined economic choices that are difficult to reverse.

Conclusions

The Commission's decision on the Italian banks is to be seen in the context of an increasing enforcement of State aid rules in the banking sector. Since the beginning of the '90s, the Commission has examined various State Aid measures to banks in different Member States. The Commission first focused on rescue and restructuring cases of credit institutions. ([1]) More recently the Commission's action has enlarged to either individual or horizontal support schemes. Last July the Commission secured a commitment from the German Government to eliminate the guarantees to the public banks in Germany. Early 2002, the Commission concluded its investigation into the aid scheme in favour of the French bank Crédit Mutuel for the distribution of the saving book 'Livret Bleu'.

The present decision, which follows an approach well established in the Commission's practice and in the case law, confirms that the banking sector represents no exception to the general rule. On the contrary, the liberalisation of financial services and the integration of the financial market have had the effect of greatly increasing the sensitivity of intra-Community trade to distortions of competition. This tendency is heightened by the introduction of the single currency and the complete opening-up of markets, which increases competitive tension between Community countries. By this decision, the Commission takes the view that the introduction of national support schemes, which favour the consolidation of the sector, distort competition at the Community level and are obstacles to the development of a true single market in financial services, which would be to the advantage of consumers, savers and companies alike.

([1]) Inter alia, Crédit Lyonnais, Crédit Foncier de France, Société Marseillaise de Crédit, Westdeutsche Landesbank, Banco di Napoli, Banco di Sicilia…

Competition in the maritime transport sector: a new era

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Maritime transport is of vital importance to the European economy. Thus, in 1997, 69% of the total volume of all exported goods, ([1]) or 266 million tonnes, was carried by sea. Imports by sea in the same year amounted to 879 million tonnes, or 70% of the total. ([2])

The implementation of European competition policy in the liner shipping sector has been characterised by a long saga of Commission decisions prohibiting various aspects of the way in which liner shipping conferences (authorised by Council Regulation 4056/86) have sought to organise the trades on which they operate. This article reflects our belief that this long saga is drawing to a close and that a new liner shipping era, based on competition and innovation, is about to begin.

Council Regulation 4056/86, the main maritime competition regulation, is something of an anomaly amongst EC competition regulations. Not only does it have a dual legal basis, Articles 80(2) (transport) and 83 (competition) EC, ([3]) but it provides for a group exemption that is exceptionally generous when compared to those granted in other sectors. Article 3 of Regulation 4056/86 thus permits a liner conference not only to fix a common freight rate but also, *inter alia*, to regulate the capacity offered by each member of the conference. This exemption of collective price-fixing and supply regulation is said to be necessary in order to 'assure shippers of reliable [scheduled] services'. ([4])

Not surprisingly, given its broad wording and the tradition of self-regulation in the liner shipping sector, the interpretation of Article 3 has given rise to conflict.

1. A brief history of a long saga

1.1. Commission decisions (1994-1998)

The interpretation of the exemption for rate-fixing has been in issue in several cases. In its 1994 *TAA* ([5]) and *FEFC* ([6]) decisions, and again in the 1998 *TACA* decision, ([7]) the Commission objected, *inter alia*, to the collective fixing of tariffs for the inland leg of multimodal transport operations. Relying on the wording of Article 1(2) of Regulation 4056/86, which provides that the Regulation 'shall apply only to international maritime transport services from or to one or more Community ports' the Commission argued that the scope of the exemption contained in Article 3 could not be wider than the scope of the Regulation itself. ([8]) The matter is now before the Court of First Instance.

Secondly, in the *TACA* case the Commission objected to attempts by the conference to restrict the availability to shippers of individual and confidential service contracts. In this respect, the Commission made clear that it considered that the exemption for conference rate-fixing covered tariff arrangements only – it could not be interpreted as encompassing the entirely different concept of contract carriage.

Finally, the Commission objected to capacity freezes in the *TAA* and *EATA* cases, decided with the obvious purpose of increasing freight rates by limiting supply. In its *TAA* and *EATA* ([9]) decisions the Commission found that these capacity freezes were not consonant with the aim of Article 3(d), which was the improvement of the scheduled transport service(s) provided by the members of the conference.

([1]) I.e. exports to non-EU countries.
([2]) Source: EUROSTAT
([3]) Formerly 84(2) and 87.
([4]) Preamble to Regulation 4056/86, 8th recital.
([5]) Commission decision of 19 October 1994 in Case No IV/34.446 – *Trans-Atlantic Agreement* (OJ L 376, 31.12.1994)
([6]) Commission decision of 21 December 1994 in Case No IV/33.218 – *Far Eastern Freight Conference* (OJ L 378, 31.12.1994)
([7]) Commission decision of 16 September 1998 in Case No IV/35.134 – *Trans-Atlantic Conference Agreement* (OJ L 95, 9.4.1999)
([8]) The Commission's objection to inland price-fixing by conferences has on occasion been portrayed as a blanket prohibition against any form of inland co-operation between carriers. This is incorrect: co-operation that meets the requirements of Article 5 of Commission Regulation 1017/68 (inland transport) is permitted. If it could be demonstrated that an agreement on prices was *essential* in order to achieve the benefits mentioned in Article 5, and did not lead to the elimination of competition on a substantial part of the transport market concerned, it would presumably qualify for exemption.
([9]) Commission decision of 30 April 1999 in Case No IV/34.250 – *Europe-Asia Trades Agreement* (OJ L 193, 26.7.1999)

1.2. Consortia

Consortium agreements in the liner shipping sector – in effect joint ventures between vessel operating carriers – are intended to improve the liner shipping service by cutting costs and rationalising operations. These agreements, which have developed rapidly in response to the demands placed on carriers by the growth of containerisation, can be distinguished from conference agreements by the fact that they do not provide for price-fixing. Commission Regulation 870/95, containing a block exemption for liner shipping consortium agreements, expired in April 2000. As the Commission's experience of applying the Regulation had been unequivocally positive (no consortium agreement had ever been blocked), it was decided to renew the exemption for a further five years. The new Regulation, 823/2000, introduces some minor changes, the most important of which is the replacement of the 'trade share' thresholds in Article 6 with a reference to 'market share'.

1.3. Court ruling in CEWAL (2000)

No description, however brief, of the background to current EU liner shipping competition policy would be complete without some mention of the *CEWAL* case. This case, the first concerning the application of Regulation 4056/86 to have been decided by the Community judicature, raised two fundamental points. In its ruling, ([1]) the ECJ confirmed, first, that the same practice may simultaneously give rise to an infringement both of Article 81(1) EC and Article 82 EC. Secondly, the Court found that a liner conference within the meaning of Regulation 4056/86, by its very nature and in the light of its objectives, could be described as a collective entity presenting itself as such on the market. A liner conference was therefore capable of holding a dominant position within the meaning of Article 82 EC.

2. The end of the saga and beginning of a new era?

2.1. Discussions with carriers and shippers…

In conjunction with the TACA decision, Commission officials entered into discussions with carriers and shippers with a view to breaking the sterile cycle of litigation and establishing a consensus on the way forward. Out of these discussions came an indicative set of guiding principles for future conference agreements. From the Commission's perspective, the most important of these principles was that conference members should be free to enter into confidential individual contracts with shippers. Other key principles included an undertaking on the part of carriers not to engage in inland price-fixing and the placing of strict limits on the type of information that could be exchanged by conference members.

2.2. …and new liner shipping legislation in the United States…

On 1 May 1999 the Ocean Shipping Reform Act (OSRA) entered into force, substantially amending the United States' 1984 Shipping Act and bringing the US liner shipping competition regime into closer alignment with its EC counterpart. Two changes in particular had a profound impact on competition: (1) carriers were no longer required to make public all essential terms of service contracts and (2) conferences could no longer prohibit their members from entering into individual service contracts.

2.3. …produced competitive developments on the Transatlantic routes

In the Federal Maritime Commission's (FMC) final report on the impact of OSRA, ([2]) the FMC found that most containerised cargoes on trades to and from the United States were now carried under individual service contracts and that this had led to a dramatic decline in the number and importance of conferences. No more than ten percent of TACA cargoes are now carried under the conference tariff. The number of conference service contracts has decreased from 596 in 1998 to only 3 in the year 2000. Further, the combined market share of the TACA parties has fallen from a high of 80% in 1992 to approximately 50% in 2001. These developments have led to a decline in the direct impact of the general rate increases decided by the TACA. The indirect impact of the general rate increases would also appear to be quite limited: the FMC has found that service contract rates over the period 2000-2001 have increased only moderately in the westbound direction and have remained virtually unchanged eastbound.

Although the US and EU liner shipping competition regimes are arguably more closely aligned

([1]) Judgment of 16.3.2000 in Joined Cases C-395/96 P and 396/96 P, *Compagnie Maritime Belge Transport and Others v Commission* [2000] ECR I-1365.
([2]) 'The Impact of the Ocean Shipping Reform Act of 1998', Federal Maritime Commission, September 2001.

now than ever before, points of divergence nevertheless remain:

— While US legislation permits discussion agreements, the Commission has traditionally taken the view that these agreements do not fall within the scope of the EU liner conference block exemption and do not qualify for individual exemption;

— The US authorities permit conferences to establish voluntary guidelines for all aspects of their members' individual service contracts; the Commission has limited the scope of such guidelines to purely technical matters;

— The US authorities permit inland price-fixing by conferences; the Commission does not.

It is however common ground between the US and EU authorities that the decline of the conference agreement has been accompanied by a commensurate increase in the number and scope of consortium agreements, mainly because the latter agreements provide clear benefits to carriers and shippers alike in the form of cost-savings and improved services.

2.4. Revised TACA: the end of a long saga?

The revised Trans-Atlantic Conference Agreement ('the revised TACA') (Case COMP/37.396) is the first comprehensive attempt to put the guiding principles mentioned at 2.1 above into practice. Notified to the Commission in May 1999, the agreement comprises both inland and maritime aspects. The inland aspects were cleared by the Commission in August 1999. The Commission did however raise serious doubts about the maritime aspects of the agreement and in particular the arrangements concerning exchange of information.

On 29 November 2001 the Commission published a notice stating its intention to exempt the maritime aspects of the revised TACA agreement and giving third parties 30 days within which to comment.

In the period since the decision in August 1999 to raise serious doubts, the Commission's investigation has focused mainly on verifying that the provisions for exchange of information between members of the conference are not such as to jeopardise the confidentiality of individual service contracts concluded between individual carriers and shippers. The free and widespread availability of such contracts is, in the Commission's view, a crucial element in ensuring that the members of the revised TACA remain subject to effective competition. In considering whether this is indeed the case, the Commission has taken due account of the above finding of the FMC that no more than approximately ten percent of all cargo carried by the members of the revised TACA is currently carried under the conference tariff. The remaining 90 percent is carried under service contract.

In response to the Commission's concerns, the TACA parties have made significant amendments to the conference arrangements concerning information exchange and have given certain undertakings. The Commission has taken the preliminary view, pending comments from third parties, that these amendments and undertakings, in combination with the clear evidence of substantial internal and external competition, are sufficient to address the serious doubts raised in August 1999.

The Commission's decision in the revised TACA case ([1]) will hopefully mark the end of the long saga of conflict concerning the application of Regulation 4056/86. Although a number of issues still remain to be settled by the Community judicature, the business climate and competitive conditions for liner shipping have evolved to such an extent under the dual impetus of Commission action and the introduction of OSRA that there can be no turning back. However the revised TACA case should be seen for what it is; i.e. the concrete outcome of discussions between the Commission and carriers on the *application* of *existing* legislation. A part of shippers' criticism is in effect a thinly veiled challenge to the provisions of Regulation 4056/86, in particular to the block exemption contained in Article 3, rather than to one or other specificity of the revised TACA conference arrangements.

The same error is committed by those carrier and government representatives who argue in the context of the OECD regulatory reform debate that there is no need for a review of the EU liner shipping competition legislation because that review has already been carried out within the framework of the revised TACA case. In dealing with that case the Commission has not examined whether Regulation 4056/86 is adapted to current market conditions or whether it is consistent with competition policy in other sectors and in other jurisdictions. In other words, the Commission has not carried out a review – it has merely applied the existing legislation.

2.5. Commission's views on capacity management

The revised TACA case has also served to highlight the issue of capacity management. The

([1]) Expected for the first semester of 2002.

conference agreement contains a general provision modelled on Article 3(d) of Council Regulation 4056/86, which allows a conference to regulate the capacity offered by each of its members. The revised TACA availed itself of this option over the Christmas and New Year low season of 2000/ 2001. The capacity programme, which covered a period of five weeks and was notified to the Commission, gave the latter the opportunity to clarify its view of the scope of Article 3(d). The Commission thus considered *inter alia* that a conference capacity management programme could not be used as an instrument to create an artificial peak season and that capacity withdrawal could not be combined with an increase in the conference tariff. The revised TACA parties undertook to comply with these guidelines.

The scope of Article 3(d) was also at issue in a case involving the Far Eastern Freight Conference (the FEFC). In October 2001, the FEFC parties decided to implement a six-month co-ordinated vessel withdrawal scheme. The scheme was intended to deal with the combined effects of a drastic fall in demand on the Europe – Far East trades and the introduction of significant amounts of new capacity. In a warning letter to the parties, the Commission indicated that it considered that the FEFC programme was not covered by Article 3(d), as interpreted by the Commission in its *TAA* and *EATA* decisions. In particular, the programme did not, in the Commission's view, have the permissible objective of addressing a short-term fluctuation in demand. Nor would the programme qualify for individual exemption, as any possible benefit to transport users would be more than outweighed by the negative impact of the programme on shippers' transport costs. In response to the warning letter, the members of the FEFC immediately terminated their co-ordinated withdrawal scheme.

3. The OECD Liner Shipping Competition Policy Report: a basis for future work

3.1. The contents of the Report

As part of the OECD's general Regulatory Reform Programme, ([1]) the OECD Secretariat presented a 'Discussion document on regulatory reform in international maritime transport' ([2]) in May 1999. The document recommended *inter alia* that agreements to set common rates should no longer receive automatic antitrust immunity or exemption. It was then discussed at a joint workshop of the OECD's Maritime Transport Committee and Competition Law and Policy Committee in May 2000, at the end of which the OECD Secretariat decided to produce a draft report for discussion at a second workshop in 2001.

In November 2001 the OECD Secretariat circulated a draft Liner Shipping Competition Policy Report, ([3]) which makes, *inter alia*, the following findings of particular interest for EC maritime competition policy:

— The liner shipping industry is not 'unique' in the sense that its cost structure does not differ substantially from that of other transport industries and shipping lines do not suffer from exceptionally low returns on investment when compared to other scheduled transport providers. There is therefore no evidence that the industry needs to be protected from competition by anti-trust immunity for price-fixing and rate discussions;

— There is no evidence that the conference system (with anti-trust immunity or exemption for price-fixing) leads to more stable freight rates or more reliable shipping services than would be the case in a fully competitive market. On the contrary, the OECD finds support for the view that the most competitive markets provide the greatest stability.

In the light of its findings, the draft Report came to the conclusion that countries should:

— re-examine anti-trust exemptions for common pricing and rate discussions, with the goal of removing them, except where specifically and exceptionally justified;

— have the discretion to retain exemptions for other operational arrangements so long as these did not result in excessive market power.

The draft Report also put forward a 'second-best' solution which is essentially equivalent to the current EU and US liner shipping regimes.

3.2. Commission reaction to the OECD Report

The Commission representatives welcomed the Report and noted its conclusion questioning the

([1]) The Programme is a result of the request by Ministers in 1995 that the OECD should embark on a study of the reform of regulatory regimes in OECD countries. The review of liner shipping has a parallel in a similar OECD review of air cargo transport.
([2]) DSTI/DOT/MTC(99)8, 19.5.1999.
([3]) Available on the OECD website at http://www.oecd.org/pdf/M00020000/M00020755.pdf

existence of a causal relationship between exemption and reliability of services, which is the very basis of the EC block exemption for liner conferences. In agreement with the representatives of the EU Member States, they also announced that they would study the general question of exemption for liner conferences further, using the draft OECD Report as a starting point, but focusing more narrowly on those factual and legal issues that are of particular relevance for EC liner shipping competition policy.

Furthermore, nearly fifteen years have elapsed since Council Regulation 4056/86 entered into force and with it the block exemption for liner conferences. However, Regulation 4056/86 does not provide for an automatic, periodic, review of the functioning of and justification for the block exemption, which is granted for an unlimited period. ([1]) The fact that no review has been undertaken in the last fifteen years might be thought to be in itself sufficient to justify a review.

The great merit of the OECD's initiative on liner shipping competition policy is to have opened up the debate on a topic that has long been taboo. Whatever the shortcomings, real or perceived, of its various reports, the OECD Secretariat has undoubtedly asked the right questions. The work of the OECD Secretariat will therefore be of great assistance to the Commission when the latter undertakes its own examination into the justification for liner shipping exemptions in the current context.

Given the global nature of liner shipping, it will be important to maintain close contact throughout any review process with the EU's main trading partners and in particular with the United States. It will also be important to ensure that carriers and transport users have sufficient opportunity to make known their views and to provide relevant evidence.

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In the final years of the twentieth century the competitive environment of the maritime transport sector has been greatly improved, for a large part as a result of determined and continuous Commission action. The OECD Report has just questioned the justifications for the exemptions from normal rules of competition that this sector traditionally enjoys. The work in front of us now is to re-assess these justifications.

([1]) Cf. the consortium block exemption (reviewed every five years).

Minority shareholdings, interlocking directorships and the EC Competition Rules – Recent Commission practice

Enzo MOAVERO MILANESI, Directorate-General Competition, Director, and Alexander WINTERSTEIN, Directorate-General Competition, unit D-1

Minority shareholdings and interlocking directorships between competitors are, and have always been, a widespread practice in certain industries such as banking and insurance. Given that such links may influence the companies' competitive behaviour and thus the market outcome, they are bound to attract the attention of competition authorities ([1]). Indeed, the Commission's recent decisions in the Allianz/Dresdner ([2]) and Nordbanken/Postgirot ([3]) merger cases demonstrate the importance of this element in its analysis, and the US authorities appear to share the Commission's concerns ([4]).

The main competition concerns

The concept of workable competition presupposes and requires economic operators to act independently from each other. Both minority shareholdings and interlocking directorships may jeopardise this essential requirement. In this respect, the main antitrust concerns can be grouped in the following three categories:

(1) if X holds a significant share in competitor Y, their profit maximisation calculus may change as they take each other's business interests into account. As a result, the economic incentives to compete are modified in that X and Y may compete less vigorously and adopt behaviour more conducive to joint profit maximisation ('non-aggression understanding'). This effect will be even stronger in case of cross-shareholdings;

(2) if X holds significant shares in both Y and competing Z, X will try to further his interests in both Y and Z, which is apt to lessen competition between the latter two;

(3) interlocking directorships may act as a conduit for anti-competitive transfer of price and strategic information.

Framework of analysis and possible remedies

The acquisition of a minority shareholding as such does not amount to a restriction of competition. However, the ECJ held, in its first and so far only judgement on this issue, that Article 81 applies to the acquisition of minority shareholdings in a competitor if it is apt to 'serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition' ([5]). The Court added that, in this respect, oligopolistic markets warrant particular antitrust scrutiny.

From this it follows that there is a 'safe haven' for minority shareholdings in competitive markets and without accompanying voting/representation rights, interlocking directorships, special rights (such as share options) or post-transaction co-operation arrangements. However, Article 81 (1)

([1]) For a fuller analysis of ECJ and Commission case-law and reasoning see *Moavero Milanesi/Winterstein*, Minderheitsbeteiligungen und personelle Verflechtungen zwischen Wettbewerbern - Zur Anwendung von Artikel 81 und 82 EG-Vertrag, in *Rolfes/Fischer* [ed.], Handbuch der Europäischen Finanzdienstleistungsindustrie, Fritz Knapp Verlag, Frankfurt a.M. [2001] 251; (available also under http://europa.eu.int/comm/competition/speeches/text/sp2001_026_de.pdf).

([2]) M.2431, Decision of 19 July 2001 (press release IP/01/1040)

([3]) M.2567, Decision of 8 November 2001 (press release IP/01/1552)

([4]) see, e.g., *Nannes* (former Deputy Assistant Attorney General, DoJ Antitrust Division), The View from the Antitrust Trenches, 27 January 2000, available at http://www.usdoj.gov/atr/public/speeches/4086.pdf. For a discussion of DoJ and FTC practice as well as the underlying economic and legal arguments see *O'Brien/Salop*, Competitive Effects of Partial Ownership: Financial Interest and Corporate Control, 67 Antitrust L.J. 559 [2000] and *Dubrow*, Challenging the Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests, 69 Antitrust L.J. 113 [2001]. See also *FTC/DoJ*, Antitrust Guidelines for Collaborations Among Competitors [2000], at 3.34 (c).

([5]) Joint Cases 142, 156/84, *British American Tobacco Company Limited and R.J.Reynolds Industries Inc/Commission,* ECR [1987] 4487 (hereinafter *'Philip Morris'*). The Court mentioned a number of scenarios in which the test would be satisfied, i.e., if the agreement either results in control or gives the acquirer the possibility to take effective control at a later stage, creates a structure likely to be used for commercial co-operation or necessarily leads the undertakings concerned to taking each others' interest into account when making commercial decisions. In addition, the Court ruled that Article 82 can be infringed if the shareholding 'results in effective control of the other company or at least in some influence on its commercial policy'.

may be applicable if and to the extent that the acquisition directly or indirectly influences the conduct of the undertakings concerned and thereby leads them to no longer act independently from each other.

The right and ability to exert influence will normally arise from company law or from contractual arrangements ([1]). However, even in the absence of such rights particular market conditions – in particular the degree of concentration and the existence of entry barriers – can be such as to lead to minority shareholdings (and even more cross-shareholdings) giving rise to the relevant degree of influence ([2]). Particularly in oligopolistic markets with high entry barriers such an operation may modify the economic incentives of the companies to compete or to deal with other companies ([3]). In such cases, therefore, the competition analysis should arguably not be limited to examining the 'classic' ways of exercising influence but should be extended to analysing the parties' incentives to compete under the prevailing market conditions.

In the past, the Commission has addressed these competition concerns by imposing either structural remedies (i.e., divestiture of shareholdings and/or severance of interlocking directorships) or behavioural ones (e.g., setting-up of 'Chinese walls'). The following section gives some examples.

Commission practice in antitrust cases…

In *Enichem/ICI* ([4]) – the first relevant decision after *Philip Morris* – the Commission exempted a production JV between Enichem and ICI only on condition that neither the parents nor the JV should hold any participation in competitors which could be used to influence the economic behaviour of such companies. In the same vein, there should be no interlocking directorships ([5]). Similarly, the Commission cleared the acquisition by BT of 20% in MCI, including interlocking directorships, because BT undertook not to attempt to influence MCI's business conduct and not to acquire more than 20% within ten years following the transaction ([6]). In *Olivetti/Digital* ([7]), the Commission approved the acquisition by Digital of 8% in Olivetti, again including interlocking directorships, due to the fact that Olivetti's board – where Digital was represented – had delegated all executive powers to its chairman. Consequently, neither co-ordination of business behaviour nor anti-competitive information flows were considered likely.

…and in merger proceedings

In *Volvo/Renault*, the Commission cleared the merger *inter alia* after Volvo undertook to sell its minority stake in Scania ([8]). The same approach was followed in *AXA/GRE* ([9]) where the Commission took issue with GRE's minority shareholding in, and interlocking directorships with, its competitor Le Foyer. GRE undertook to sell its participation in Le Foyer, whereupon the Commission cleared the merger.

In the same vein, the Commission initially objected to the proposed merger between *Thyssen* and *Krupp* because Krupp held a 10% stake in its competitor Kone. Connected to this minority shareholding was a number of particular contractual rights granted to Krupp, including an inter-

([1]) Such arrangements include rights relating to voting, to representation, to acquisition of additional stock, to the establishment of interlocking directorships or to post-transaction co-operation. Whether such rights lead to an appreciable restriction of competition will depend – like in any other case – on an analysis of the legal and economic context.

([2]) In this context, it should be noted that under Article 82, minority shareholdings and/or interlocking directorships may be a factor leading to a situation of joint dominance. Moreover, in cases where undertakings already are in a dominant position (either individually or jointly), the acquisition of minority shareholdings and/or the establishment of interlocking directorships by such undertaking(s) may itself infringe Article 82. This may be because of the operation's detrimental effect on market structure, of the erection of an additional entry barrier or – in a vertical context – of the foreclosure of competitors on an up/downstream market; see Commission Decision of 10 November 1992, *Warner-Lambert/Gillette, BIC/Gillette*, OJ [1993] No L 116/21.

([3]) Indeed, the Court in *Philip Morris* assessed whether – in view of the oligopolistic structure of the cigarettes market – the participation of Morris in its competitor Rothmans would lead to a linking of profits, giving those two companies an incentive to compete less vigorously. The Court concluded that Morris's own commercial interests would outweigh its interest to protect its investment in its competitor Rothmans. In this context, note that it is generally under oligopolistic market conditions that an exchange of competitive information will become problematic: see, e.g., Case C-7/95 P, *John Deere Limited/Commission*, ECR [1998] I-3111, at paragraph 67

([4]) IV/31.846, Decision of 22 December 1987, OJ [1988] L 50/18

([5]) Given that ICI did indeed hold a minority shareholding in a competitor at the time of notification, the Commission in fact imposed a structural remedy.

([6]) IV/34.857, *BT/MCI*, Decision of 27 July 1994, OJ [1994] L 223/36

([7]) IV/34.410, Decision of 11 November 1994, OJ [1994] L 309/24

([8]) IV/M.1980, Decision of 1 September 2000

([9]) IV/M.1453, Decision of 8 April 1999

locking directorship. In view, *inter alia*, of the oligopolistic structure of the product market concerned, the Commission feared that such horizontal links could dampen the post-merger competition between the competitors Thyssen and Kone and cleared the operation only after Krupp undertook irrevocably to waive the exercise of its rights as well as to sever the interlocking directorship with Kone ([1]).

Likewise, in *Allianz/AGF* ([2]) the Commission did not accept the parties' initial argument that Coface, at the time being AGF's delcredere insurance subsidiary in France, would turn into an independent competitor to AGF after AGF would have reduced its shareholding in Coface to 24.9%. In reaching this conclusion, the Commission highlighted both business links and interlocking directorships between the two companies. It was only after AGF undertook to sever those interlocks (and to sell its stake in Coface) that the Commission cleared the transaction – without prejudice, naturally, to the possible application of Article 81 to the co-operation between AGF and Coface.

In Generali/INA ([3]), the Commission was initially concerned, *inter alia*, about the fact that Generali held large stakes in its direct competitors and that interlocking directorships could, at least potentially, allow it to exert significant influence. To ease those concerns, the parties undertook, *inter alia*, not to establish interlocking directorships with competitors in Italy. The Commission considered that this commitment was likely to remove the risk of anti-competitive information flows. In addition, certain existing interlocks were severed, or announced to be severed, prior to clearance by the Commission. ([4])

Finally, minority shareholdings and interlocking directorships played an important part in the Commission's analysis of two recent merger operations. In *Allianz/Dresdner*, the Commission noted the existence of significant cross-shareholdings between the merged entity and its most important competitor in Germany, Munich Re/ Ergo group. In particular, Allianz' and Dresdner's combined post-merger shareholding in Munich Re of 30-35% would, in view of the latter's dispersed shareholder structure, in all likelihood have afforded the merged entity with a majority in Munich Re's general shareholders' meetings. Moreover, the Commission found that the market value of Munich Re's shareholding in Allianz equalled more than one third of Munich Re's own total market value. Consequently, any change in the market value of competing Allianz would have an immediate impact on Munich Re's own economic situation.

In view of those circumstances, the Commission was initially concerned that, as a consequence of the transaction as notified, competition between the two groups would be significantly reduced. In order to remove the Commission's concerns, Allianz and Dresdner undertook to reduce to 20.5% their joint holdings in Munich Re until the end of 2003, and to refrain from exercising their voting rights in excess of 20.5% already as of the date of the Commission's decision.

Finally, in *Nordbanken/Postgirot* the Commission had to assess the proposed acquisition by Nordbanken, a large Swedish bank, of Postgirot, a Swedish company which owns and operates one of Sweden's two giro payment systems – the second system being Bankgirot, an entity owned by a number of Swedish banks. Nordbanken held a significant shareholding in Bankgirot and was represented in the Bankgirot's Board of Directors. Thus, following its acquisition of Postgirot, Nordbanken would have had access to confidential business information of the only competing giro system and could have exerted significant influence on strategic decisions by both systems. The Commission took the initial view that such a scenario could seriously reduce competition between the only two providers of giro payment services in Sweden.

In order to remove the Commission's concerns, Nordbanken undertook to reduce its shareholding in Bankgirot to no more than 10 % and to refrain from exercising any shareholder rights going beyond minority protection rights safeguarding the financial value of its participation. In addition, Nordbanken would withdraw all its representatives in Bankgirot's Board of Directors, working groups or other bodies, and no commercial information available to the Board, the working groups and other bodies would be made available to Nordbanken ([5]). In view of those commitments, the Commission cleared the transaction.

Outlook

This article has identified potential competition problems where there are shareholdings falling

([1]) IV/M.1080, Decision of 2 June 1998
([2]) IV/M.1082, Decision of 8 May 1998
([3]) COMP/M.1712, Decision of 12 January 2000
([4]) See press release IP/00/29

short of sole or joint control. The question is whether shareholdings, where they confer sufficient influence, alter the behavior of the companies concerned in a way that restricts competition under Article 81(1).

As this is a question of economic appraisal, there are no automatic thresholds above which concerns will always be triggered or below which concerns can always be excluded. It will be necessary to analyse each transaction in its specific legal and economic context. Similarly, whether the appropriate remedy is structural or behavioral will also vary depending on this context and the severity of the competition concern.

([5]) For other examples of similar arrangements required by the Commission see its decision in *AT&T/BT* (JV.15) of 30 March 1999 and its comfort letter plus press release concerning *Volbroker.com* (IP/00/896). In both cases, the parties offered commitments with a view to avoid the exchange of sensitive business information.

The SNELPD Decision in the light of the previous Article 86(3) Decisions of the Commission

Christian HOCEPIED, Directorate-General Competition, unit C-1

Article 86(3) of the EEC Treaty entrusts the Commission with a specific surveillance duty 'in the case of public undertakings and undertakings to which Member States grant special or exclusive rights'. The Commission must 'where necessary, address appropriate directives or decisions to Member States' which enact or 'maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89'.

The Commission adopted its first Article 86(3) Decision in 1985. Since then the Commission adopted 16 decisions covering most of the areas where Member States granted special and exclusive rights: posts (4), mobile telecommunications (2), airports (4), ports and maritime transport (4), insurance (1) and broadcasting (1). In addition complaints were examined in other sectors, such as horse betting ([1]), but without arriving at formal decisions. As a matter of fact, Article 86(3) investigations do not – contrary to Merger cases – all result in a formal decision. Cases may appear unfounded or remedies may be found to solve the concerns of the Commission in the course of the procedure. In addition, the Commission adopted a number of Directives under Article 86(3) to render transparent the financial relations between the Member States and their public companies and to liberalise the telecommunications markets.

The only two important sectors where the Commission has until now refrained from intervening on the basis of Article 86(3) are energy and railways, where the liberalisation process has just started.

In 2001 the Commission applied Article 86(3) applied once, when on 23 October 2001 it addressed on 23 October 2001 a Decision to France subsequent to a complaint of the SNELPD – the trade association representing the majority of the French mail preparation firms.

1. The SNELPD Decision

Mail preparation encompasses a wide array of services ranging from the editing and printing of postal items on behalf of large mail originators to the handing-over to the offices of the Post of presorted mailbags. In 1998, La Poste reviewed the conditions applied to the mail preparation firms and SNELPD lodged a formal complaint against the French postal legislation.

In its Decision, the Commission takes the view that by granting a legal monopoly to La Poste for the transport and delivery of certain mail items, the French Government creates a situation where La Poste is induced to abuse its dominant position. It can indeed determine the scales of charges and technical conditions for access to its network by mail preparation firms in a discretionary way. Abuses are all the more likely given that La Poste, along with a number of its subsidiaries, like Datapost and Mikros, are themselves active on the mail preparation market.

The Commission Decision acknowledges that the French Government has some but limited surveillance powers over La Poste. In practice, it does however not control most of the contractual relationships between the latter and the mail preparation firms.

In addition, the Commission Decision notes that this scrutiny is exercised by the Ministry of Finance, whose remit also encompasses the supervision of the financial interests of the State in the public postal operator. The Commission decision states that this might affect the impartiality of the Ministry while performing its control over La Poste and that the Ministry itself could be placed in a situation of conflict of interest. In fact, the case presented a double conflict of interest, namely within La Poste as being both a competitor and an unavoidable partner of mail preparation firms, and within the Ministry as being both the watchdog of La Poste's competitive behaviour and its sole shareholder.

The Decision therefore concludes that the French legislation is contrary to Article 86(1), read in conjunction with Article 82 of the EC Treaty, to the extent that it allows only limited scrutiny of the non-discriminatory nature of the technical and financial conditions applied by La Poste to mail

([1]) In November 1989, a company requested the Commission to take a decision relating to the French horsebetting legislation. The complainant brought the Commission to the Court considering that it failed to do so. The Court upheld the position of the Commission. See Judgement of the Court of First Instance (Second Chamber) of 27 October 1994, Ladbroke Racing Ltd v Commission of the European Communities, Case T-32/93.E.C.R. 1994 p. II-1015

preparation firms, and to the extent that this partial scrutiny is furthermore carried out by a public authority that is insufficiently independent and neutral in relation to La Poste.

2. Article 86(3) Decisions in the postal sector

It is not fortuitous that the last two Article 86(3) Decisions adopted by the Commission both concern the postal Sector ([1]). Between 1990 ([2]) and 2000, the Commission did not adopt any decision concerning the postal sector. This 'abstention' corresponds to the (slow) adoption and subsequent implementation of Parliament and Council Directive 97/67/EC that has harmonised the scope of the services which may be reserved to the universal postal service providers in the Community. Pending the discussion of the Directive in Council most of the Member States did not amend their Postal legislation and therefore did not enact new 'State measures' in the sense of Article 86(1). Decision 2001/176/EC of 21 December 2000 concerning the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy relates to a measure taken to implement the Directive.

The SNELPD decision reflects in this regard a shift in the application of Article 86(3). It is not used, as the Italian Decision, to monitor the borderline between reserved and non-reserved area in the Postal area, but to assess how effective the competitive safeguards are established by the Member State concerned.

The SNELPD decision furthermore applies Article 86(3) in conjunction with Article 82 before there is evidence that an abuse in the sense of that provision has actually occurred and although the State measure leaves La Poste a margin of freedom. In the SNELPD decision, the Commission only states that in the relevant circumstances La Poste would be induced to abuse its dominant position. The Commission did not wait until abuses occurred to challenge the failure of the State to take measures. In dynamic markets such as the liberalised postal services, this would mean that the Commission would only intervene when the competition has already been distorted and market share has already been lost to the incumbent, which would make no sense.

Monitoring the level playing field in the Postal sector where a market player enjoying a reserved service competes with private operators will remain indispensable given the outcome of the review of directive 97/67/EC. The Commission proposal raised expectations for a strong limitation of the reserved area. However, Council and Parliament weakened substantially the proposal made by the Commission on 30 May 2000. As a result, a substantial reserved service will be maintained at least until 2009.

3. A decision which did not question a monopoly, but the monitoring of this monopoly by the Member State

Most of the Article 86 Decisions relate to State measures granting exclusive rights incompatible with the Treaty. Initially the Commission only used this instrument to declare exclusive or special rights contrary to the Treaty and to request their abolition. However, if the power of the Commission were limited to requesting the abolition of State measures, the scope of Article 86(3) would be quite limited.

3.1. Differences in comparison with previous Article 86(3) decisions and in particular the Italian port decision

The SNELPD Decision is based on the same legal argumentation as Commission Decision 97/744/EC of 21 October 1997 regarding the provisions of the Italian port legislation relating to employment ([3]). In recital 30 of the latter Decision, the Commission stated that 'if the Port Authority licenses only one undertaking to supply labour to other undertakings, the licensed undertaking is placed in a situation of conflict of interest as it becomes the sole supplier of its competitors. … The conflict of interest is inherently an abuse. It is not necessary to wait until undertakings actually commit such abuses before action can be taken against them. It is sufficient for them to be legally placed in a position in which they are induced to commit abuses if they have an interest in so doing'. The Italian Ports Decision was based on an established jurisprudence and in particular the Court of Justice judgement of 13 December 1991 in Case

([1]) The previous one was Decision 2001/176/EC of 21 December 2000 concerning the provision of certain new postal services with a guaranteed day- or time-certain delivery in Italy *Official Journal L 63 , 3/3/2001 p. 59 -66*

([2]) Decision 90/16/EEC of 20 December 1989 concerning the provision in the Netherlands of express delivery services O. J. L 10 , 12/01/1990 p. 47 and Decision 90/456/EEC of 1 August 1990 concerning the provision in Spain of international express courier services, O J L 233 , 28/08/1990 p. 19-23

([3]) OJ L 301 , 05/11/1997, p. 7 - 26

C-18/88 GB-Inno BM ([1]), to which the SNELPD decision also refers.

The main difference between the SNELPD Decision and the Italian Ports Decision is that in the latter the Commission requested the abolition of the 'the monopoly for the supply of temporary labour to other port undertakings'. The Italian Government had argued that the monopoly was not infringing these provisions, 'on the ground that compliance with the competition rules would in any event be closely monitored both by the Port Authority and, if necessary, the Commission'. The Commission nevertheless rejected this defence stating that while it 'does not doubt the ability of the Port Authority to enforce compliance with the law. It is the law itself that is incompatible with the Treaty'. It held that a conflict of interest is inherently abusive.

In the SNELPD case, the Postal monopoly is obviously not put in question. This monopoly is legal under Directive 97/67/EC. The Commission accepts that an 'a priori' independent supervision of the access conditions (in particular of the so-called 'technical' contracts) determined by La Poste would be sufficient to allow for the continuation of the conflict of interest situation in which La Poste is placed.

3.2. Similarities with previous Article 86(3) decisions and in particular the Italian GSM decision

Certain State measures by their nature cannot be abolished once implemented or, at least, their abolition would create further distortions. The Commission was for the first time confronted with such a situation in 1994 when assessing the procedure applied by Italy for the granting of the second GSM licence. The tender introduced competition in the area of digital mobile telephony. However, certain conditions were found to be anti-competitive. If the Commission had asked the Italian Government to abolish the relevant tender condition, the whole tender procedure would have been threatened. The consortium whose bid had not been retained could indeed have challenged the granting of the second mobile licence under national law since the abolition would have modified the original tender obligations after the completion of the selection procedure. For this reason, Article 1 of Decision 95/489/EC requested the Italian Government 'to take the steps necessary to abolish the distortion of competition resulting from the initial payment imposed on Omnitel Pronto Italia and to secure equal conditions for operators of GSM radiotelephony on the Italian market at the latest by (…). The measures definitively adopted may not impair the competition created by the licensing of the second GSM operator on 2 December 1994'.

The Member State concerned was not obliged to abstain from introducing certain measures ('non facere'), but imposed an obligation to adopt certain substantive measures ('facere'). The Commission even specified that the measures should only be implemented 'after receiving the agreement of the Commission'.

The SNELPD decision confirms the view of the Commission that Article 86(1) not only requires the abolition of explicit measures but also requires Member States to end failures to regulate industries entrusted with a service of general economic interest by active behaviour ('facere'). The Decision requires the French government to supervise private law contractual relations in areas outside the monopoly area, but where the universal postal operator can leverage its monopoly position in the reserved area.

3.3. A new role for Article 86(3)?

Notwithstanding the partial liberalisation of monopolised sectors and the confirmation of monopolies in Parliament and Council Directives, Article 86 retains thus an important role to ensure that relevant measures are in place to safeguard a level playing field despite the presence of the privileged market player entrusted with tasks of general economic interest. The preliminary ruling of 17 May 2001 in the Traco case – where the Court left the issue open whether the stamp duties in favour of Poste were legal or not in the absence of data on the financing of the service of general economic interest ([2]) – illustrates the need to tackle abstentions from Member States to adopt clear rules regarding the operation and financing of the relevant tasks. Such abstention constitutes a State measure (in the sense of 'administrative silence')

([1]) Judgment of 13 December 1991, Case C-18/88 [1991] ECR I-5941

([2]) 'It is apparent from the case-law of the Court that it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (see, in particular, Case C-67/96 Albany [1999] ECR I-5751, paragraph 107)'. (paragraph 54)

in the sense of Article 86(1). In a market economy this abstention creates uncertainties dissuading market entry and investment and thus entrenching the dominant position of the incumbent undertaking. Competition law remedies are often not sufficient to deal with such situations. They prohibit excessive prices and/or discrimination but are for example not suited to set out a scheme to share in a fair way the burden of public interest services. There are certain methodological choices that only a Member State can take in this regard. In addition, market certainty requires that such decisions are made a priori, and cannot wait for competition law decisions and the outcome of possible appeals.

4. Conclusion

The SNELPD Decision reflects the new context resulting from Article 16 EC, introduced by the Amsterdam Treaty. According to the latter 'given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions'.

This Article requires both the Community and the Member States to explicit spell out the principles and conditions under which the bodies entrusted with services of general economic interest have to fulfil their mission and 'to take care' that they 'operate on the basis of these principles'. This implies necessarily independent supervision regarding over the undertakings they entrust with such tasks.

European Competition Day Madrid

The fifth European Competition Day takes place on 26 February in Madrid.

The main topics are

- Telecommunications: access to the local loop and the internet
- Sport broadcasting rights
- Competition and consumers

The conference will be hosted and organised by the Spanish competition authority in collaboration with DG Competition. There will be opening statements by the Spanish Minister of Economic Affairs, Mr Rato, Commissioner Monti and the chairman of the Economic and Monetary Affairs Committee of the European Parliament, Mrs Randzio-Plath.

Further information may be obtained on the website of the Spanish presidency (www.ue2002.es) – see the calendar.

European Competition Day, Antwerpen, 11.10.2001 – Competition and the Consumer – The case of Pharmaceutical Products

Ansgar HELD, Directorate-General Competition, unit A-1

1. The fourth European Competition Day took place on 11 October 2001 in Antwerpen. It focused on the theme: Competition and the Consumer – The case of Pharmaceutical Products. The approximately 200 participants of the conference organised by the Belgian Ministry of Economic Affairs were composed of lawyers, industry and consumer representatives, some University teachers, officials of different Belgian institutions and of the competition authorities of several Member States. The conference, which was chaired by Koen Lenaerts, Judge at the Court of First Instance, was opened with statements of Minister Charles Picqué, Commissioner Mario Monti and MEP Christa Randzio-Plath.

2. Minister Picqué underlined the important role of competition. The specific feature of the conference theme is the tension between the two objectives to ensure a high level of public health and to maintain at the same time an appropriate level of competition.

Commissioner Monti demonstrated the beneficial effects of competition policy on the consumers with the example of the car cases, the investigation into Euro currency conversion bank charges and into the Belgian beer cartel. Concerning pharmaceuticals, the Commission's focus would be on obstacles to parallel trade and to abusive extension of the duration of patent rights.

Mrs Randzio-Plath also very much supported competition in general but regretted that in the pharmaceutical sector consumers are not price sensitive. Parallel trade could be enhanced by internet trade. This would require that some Member States lift their ban on this form of trade in pharmaceuticals. In her view health policy would not be sustainable without generic products. Wrong developments in the area of patent protection should be countered.

3. The subsequent discussion panel was composed of François Bouvy, of the European Federation of Pharmaceutical Industries, Jean-Philippe Ducart of Test-Achats, Luc Valade of the French competition authority and Luc Gyselen of DG Competition. Mr Bouvy underlined the importance of R&D and the burden of regulation and price control in Europe and criticised the 'parallel import' approach of the Commission. Mr Ducart and Mr Valade stressed the tendency of industry and doctors (advised by industry) to prescribe too many and too costly products and proposed to increase the use of generics. Mr Gyselen defended the Commission's position regarding parallel import and referred to decisions of the Commission to defend competition.

The subsequent discussion within the panel and with the floor addressed issues like the need to safeguard necessary incentive for industry to invest in R&D, parallel import from third countries and the need for price harmonisation.

4. In his concluding remark, Jean-François Pons, Deputy Director General of DG Competition, underlined the remarkable coherence of the Statements of the three EU institutions at the beginning of the conference. All were in favour of a strong competition policy benefiting the consumer, and of the project of modernisation. He also underlined that, despite disagreement between the participants of the second roundtable, there were also some convergence: the specificity of the sector (health, R&D), the interest in the increase of generics and in more responsibility for the consumer (preferably through their associations), and more generally a common wish of more European harmonisation.

5. In conclusion, the competition day left participants largely satisfied. Even if the public was mostly composed of representatives of industry and lawyers, the meeting contributed also to raise the awareness of the consumers' representatives about the interest of an increase of competition in this sector.

The creation of an International Competition Network

Yves DEVELLENNES, Directorate-General Competition, Head of unit A-4;
Georgios KIRIAZIS, Directorate-General Competition, unit A-4

Introduction

The increasing internationalization of our economies creates very important challenges for antitrust authorities around the world; the response to these challenges has been the development of bilateral cooperation with the competition authorities of the EU's major trading partners through different types of agreements, including regional ones (e.g. Mercosur).

There are over 90 countries today that have enacted some form of competition law regime, many of which have only been introduced during the past decade – and more countries are in the process of adopting competition rules. Given the ever-increasing integration of the world economy, and the consequent growing inter-dependence of national and regional economies, there is a clear need to go beyond bilateralism and to reinforce multilateral efforts to ensure convergence and coordination between the growing number of competition enforcement systems.

Given the need for enhanced governance mechanisms, many officials from competition authorities have voiced their support for the creation of a new and informal vehicle that will enable antitrust agencies in all parts of the world to work together in order to improve international antitrust cooperation and sound antitrust enforcement, in an attempt to forge as broad a world-wide consensus as possible.

As a result of the above discussions and practical efforts, the creation of an **International Competition Network (ICN)** was announced publicly on Thursday 25 October in New York, USA. ([1]) National Competition Authorities (NCAs) of EU Member States have been involved in this project since the beginning at a high level.

It is important to stress that it is the first time that so many competition authorities take an autonomous initiative designed to enable them to share experiences and exchange views on competition issues deriving from an ever-increasing globalisation of the world economy.

Mission and Activities of ICN

ICN will be a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure. It will encourage the dissemination of antitrust experience and best practices, promote the advocacy role of antitrust agencies and seek to facilitate international cooperation.

Membership and organization

Any national or regional competition agency responsible for the enforcement of antitrust laws may become a member of the ICN. The network will also actively seek advice and contributions from the private sector and various non-governmental organizations, and will cooperate closely with the following types of entities: international organizations, such as OECD, WTO, and UNCTAD, industry and consumer associations, practitioners of antitrust law and/or economics and members of the academic community. In particular, ICN will seek input from these non-governmental advisers, who are not members of the Network but who will provide support in terms of identifying projects. ICN may also request that certain non-governmental advisers participate in working groups for designated projects and contribute papers or participate in hearings related to ICN projects.

As regards its organization, ICN is intended as a virtual structure without any permanent secretariat, flexibly organized around its projects, guided by a steering group which will identify projects and devise work plans for approval of the ICN as a whole. The authority hosting the annual conference will cover for a year logistic and secretarial costs related to its organization.

Conferences and Meetings

There will be one ICN conference per year. The Conference will bring together heads of antitrust

([1]) All available information on ICN activities can be consulted on-line at the new ICN website at http://www.internationalcompetitionnetwork.org

agencies to commission new projects and review the progress and recommendations of current projects. The conferences will provide a structured dialogue by focusing on a limited number of projects selected sufficiently in advance by ICN to permit meaningful participation by all members.

The ICN will concentrate its efforts on international antitrust issues that are difficult yet capable of resolution. Initially, the ICN will work on two important issues in antitrust: the merger control process in the multi-jurisdictional context and the competition advocacy role of antitrust agencies. This agenda will be later opened up to include issues of particular relevance to transition and developing economies.

The first official ICN conference will be hosted by the Italian Antitrust Authority in Naples 28-29 September 2002. Thereafter, annual conferences will be held in the following countries, in this order: Mexico (2003); Korea (2004); Germany (2005); and South Africa (2006).

Link with WTO and OECD Global Forum

The community's objectives in the WTO in the area of Trade and Competition are currently aimed at putting in place a set of basic systemic guarantees coupled with certain minimum substantive requirements, principally the prohibition of hard-core cartels. The Doha WTO Ministerial recently confirmed that negotiations on these issues will take place after the next session of the Ministerial Conference. ICN is much more a venue designed to spread competition culture amongst competition agencies in all parts of the world. ICN is therefore not an alternative to the WTO efforts and the two avenues should be regarded as complementary and should be pursued in parallel in order to be mutually reinforcing in achieving competition policy objectives.

Similarly, there is a need and a role for both the ICN as well as the newly launched Global Competition Forum, OECD's project for reaching-out and engaging in dialogue economies that are not members of the Paris based organisation. The two groups will work closely with one another and will be partners. ICN, however, will be open to all national and regional competition agencies and will focus on a select number of narrowly defined issues that it will seek to resolve in a relatively short period of time. In contrast, the OECD's Global Competition Forum will bring a limited number of developed and developing countries together to share experiences on a broad range of antitrust subjects.

Conclusion

The ICN complements the EU's efforts both within the framework of the existing bilateral agreements as well as in the multilateral level and in different fora (WTO, OECD, UNCTAD), to enhance cooperation in the area of competition and to provide technical assistance to emerging jurisdictions that seek now to build their knowledge base, experience and institutional capacity needed to enforce domestic competition rules and negotiate multilateral ones.

The ICN will be a much valued and useful cooperation project, particularly since experience shows that it takes a long time for competition authorities to be fully operational. Undoubtedly the adoption of a competition law is a good starting point, but this law needs to be complemented by reliable public enforcement. This informal initiative of antitrust agencies around the world will better harness globalization and will put in place much needed governance mechanisms for the global markets.

Competition policy makes it into the Doha Agenda

Yves DEVELLENNES, Directorate-General Competition, Head of unit A-4;
Georgios KIRIAZIS, Directorate-General Competition, unit A-4

The Commission has, since the Singapore Ministerial in 1996 and during the deliberations in the WTO Working Group on Trade and Competition in Geneva, been at the forefront of efforts to persuade member countries of the merits of a WTO multilateral agreement on competition. The Declaration adopted on 14th November 2001 by the 4th WTO Ministerial Conference in Doha addresses the 'Interaction between Trade and Competition policy'. ([1])

The Declaration recognizes the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need to step up efforts to provide technical assistance and build the capacity of developing and least developed countries in this area. WTO Members agreed in Doha that there is a valid case for the WTO to negotiate and conclude a Multilateral Agreement on Trade and Competition and that negotiations on trade and competition and other Singapore issues will take place after the Fifth WTO Ministerial on the basis of a decision to be taken, by explicit consensus, at that meeting on modalities of negotiations.

The Declaration also recognizes the needs of developing and least-developed countries for more policy analysis so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, it was decided in Doha to work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

Finally, the Declaration mentions that in the period until the Fifth Ministerial, further work in the Geneva-based Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. It was also agreed to take fully into account the needs of developing and least-developed country participants and provide appropriate flexibility to address these needs.

This result is quite satisfactory for the following reasons:

- first, all parties signing to the Doha declaration (including some of the countries that were rather skeptical till now: certain developing countries, Hong Kong and India) recognize for the first time that negotiation and conclusion of a Multilateral Agreement on Trade and Competition is desirable. Up to now even the principle of having such an agreement at the WTO was controversial. The recognition of the importance of developing such a framework and its relevance for international trade and development, will contribute towards the introduction and more effective application of domestic competition regimes and will be of considerable benefit to consumers world-wide, including those of the developing countries.

- second, even if we must wait for the 5th Ministerial, in less than 2 years time, in order to enter the formal phase of negotiations on the multilateral agreement, there is now a clear commitment to launch such negotiations at a certain date and the issue will fall within the single undertaking. We will now enter a «preparatory phase» within which we can do a lot of useful work to clarify with our partners from developing and developed countries the elements needed in such an agreement.

- third, our proposals on the basic elements for such an agreement have been widely accepted. The EC has been driving this issue for some time now and can be quite satisfied that the Declaration focuses on the elements that it has highlighted as items that need to be taken up first for clarification in the period until the Fifth Ministerial.

- finally, as the Working Group now shifts its attention to the discussion on these elements, the

([1]) Information on the Conference and the full texts of the declarations and other decisions are available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (paragraphs 23 to 25 for competition)

Declaration opens up the scope for more focused technical assistance and capacity building activity that will help emerging and developing economies to better understand and appreciate the significance of these issues. In this process UNCTAD and other international institutions as well as regional and bilateral arrangements will certainly contribute and have an important role to play in order for everybody to be perfectly ready to open negotiations in the next Ministerial.

At Doha we have taken a first step in an ambitious and far reaching process of establishing a multilateral framework for competition rules at the WTO. The next step – that is to open formal negotiations at the 5th Ministerial – will not be easy and it will be quite difficult to agree on a text with our partners in the WTO. To improve our chances we will continue to work in order that in particular India and the developing countries agree to launch these negotiations and that the US maintains a supportive stance. We will also now enter a new phase of discussions in Geneva. Members of the Working Group will be able to go beyond the examination of abstract principles and focus on the drafting of a detailed negotiation agenda that will lead in the future to the adoption of rules of a binding nature. The envisaged multilateral rules will certainly influence both the legislative activity and the enforcement practice of many members of the WTO. We will finally work with DG Trade and DG Development to make sure that technical assistance and capacity building in the area of competition are given adequate priority.

Commission adopts eight new decisions imposing fines on hard-core cartels

Following-up on two Decisions adopted earlier in the year 2001 (Decisions *SAS-Maersk* and *Graphite electrodes*, both adopted on 18 July 2001: see Competition Newsletter 2001, Issue n°3), the Commission adopted during the second semester of 2001 eight new Decisions under Article 81(1) of the Treaty and (in most cases) Article 53(1) of the EEA Agreement, imposing heavy fines on a string of hard core cartels. The products concerned by the illegal market-sharing and price-fixing agreements ranged from vitamins and food additives (citric acid) to financial services (currency exchange charges) and from beverage products (beer) to paper and chemicals (sodium gluconate, zinc phosphate).

In all, fines were imposed on 56 companies in 2001 (3 of which were fined twice), totalling a record amount of € 1 836 million. In the *Vitamins* case the highest cumulative fine ever, totalling € 462 million, was imposed on the Swiss company F. Hoffmann-La Roche AG with regard to its simultaneous involvement in several cartels. In the *Carbonless paper* case, British company Arjo Wiggins Appleton Limited (AWA) received a fine of €184.27 million, the highest fine ever imposed on a company for a single infringement.

For the first time in 2001, the Commission applied section B of its Notice on the non-imposition or reduction of fines in cartel cases (hereafter: 'the Leniency Notice'). Section B was applied in five cases (*Sodium Gluconate, Vitamins, Citric Acid, Luxembourg Brewers, Carbonless paper*). The reductions granted under this section ranged from 80% to 100% (total exemption from fine) according to the specific circumstances of each case.

1. The sodium gluconate cartel

François ARBAULT ([1]), Sari SUURNÄKKI ([1]), Directorate-General Competition, unit E-1

On 2 October 2001, the Commission fined Archer Daniels Midland Company Inc., Akzo Nobel N.V, Avebe B.A., Fujisawa Pharmaceutical Company Ltd., Jungbunzlauer AG and Roquette Frères S.A. a total of € 57.53 million for fixing the price and sharing the market for sodium gluconate. For the first time, the Commission granted a reduction of fine pursuant to Section B of its Leniency Notice: Fujisawa got a reduction of 80% of its fine.

Sodium gluconate is a chemical used to clean metal and glass, with applications such as bottle washing, utensil cleaning, and paint removal. The product is also used as a retarder and water reducer in concrete admixtures, as a paper and textile bleaching admixture, as well as as an additive in food and in various chemical applications.

Following an investigation which started in 1997, the Commission established that Archer Daniels Midland Company Inc. ('ADM'); Avebe B.A. ('Avebe', as a parent of Glucona B.V.); Akzo Nobel N.V. ('Akzo', as a former parent of Glucona B.V.); Fujisawa Pharmaceutical Company Ltd. ('Fujisawa'); Jungbunzlauer AG ('Jungbunzlauer'); and Roquette Frères S.A. ('Roquette') participated in a worldwide cartel between 1987 and 1995, through which they fixed the price and shared out the market for sodium gluconate. The cartel agreements were implemented through detailed sales monitoring, the holding of regular multi- and bi-lateral meetings, and the enforcement of a pluri-annual compensation scheme.

At the material time, the quasi-totality of the sodium gluconate produced world-wide was in the hands of Fujisawa, Glucona B.V. (a 50/50 joint-venture between Akzo and Avebe), Jungbunzlauer and Roquette. After it entered the market in 1990, ADM also became a significant player, until its withdrawal in the course of 1995. The EEA market for sodium gluconate was worth about € 20 million in 1995.

From 1987 until June 1995, the companies mentioned above held regular meetings, where they agreed on individual sales quotas, fixed 'minimum' and 'target' prices and shared out specific customers. The Commission gathered evidence of over 25 cartel meetings, held in places such as

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Amsterdam, London, Paris, but also Hakone (Japan), Chicago, Vancouver or Zürich. Compliance with agreed sales quotas was carefully monitored, and the rule was that if a company had oversold at the end of a given year, its sales quota for the next year would be reduced accordingly.

The Commission characterised the companies' behaviour as a 'very serious' infringement of the Community and EEA competition rules, and adopted a Decision under Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement, imposing heavy fines. The leader of the cartel, Jungbunzlauer, was fined € 20.4 million. As to the other cartel participants ADM, Akzo, Avebe, Fujisawa and Roquette, they were fined € 10.13 million, € 9 million, € 3.6 million, € 3.6 million and € 10.8 million respectively.

Calculation of fines and application of the Leniency Notice

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The Leniency Notice was applied.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into two groups according to their relative importance in the market concerned. Further upward adjustments were made in the case of two companies, with regard to their very large size and thus of their overall resources.

With the exception of ADM which committed an infringement of medium duration, all other cartel participants committed an infringement of long duration (exceeding five years). The leadership of the infringement was retained as an aggravating circumstance against Jungbunzlauer, justifying an increased of its fine by 50%.

Application of the Leniency Notice

The Commission granted for the first time a reduction of fine pursuant to Section B of the Leniency notice. Fujisawa benefited from a reduction of 80% of the fine it would otherwise have received, on the ground that it was the first to adduce decisive evidence of the cartel's existence, before the Commission had undertaken any investigation ordered by Decision. The Commission did not grant Fujisawa a 100% reduction of its fine, as it could have done under section B of the notice, since Fujisawa approached the Commission only after it had received a request for information. This reluctance to come forward spontaneously prior to any investigatory measure was taken into account.

All other parties were granted reductions of the fine that would otherwise have been imposed pursuant to Section D of the Leniency notice.

Before the Commission adopted its Statement of Objections, ADM, Glucona, Jungbunzlauer and Roquette provided the Commission with information and documents which materially contributed to establishing the existence of the infringement. None of them substantially contested the facts on which the Commission based its Statement of Objections.

Roquette provided documents that record the events and conclusions of the cartel meetings. These documents were, however, given in Roquette's response to a formal request for information from the Commission. Moreover, Roquette and ADM described in their statements the cartel mechanics and the roles of the participants and gave details of some meetings. Together with Fujisawa's statements, the documents and statements provided by Roquette together with ADM's statements constituted the main sources of evidence used by the Commission in the Decision. Consequently, Roquette and ADM were both granted a 40 % reduction of their fine. As for Glucona (i.e. Akzo and Avebe) and Jungbunzlauer, they did not provide in their statements any information above and beyond what was already in the Commission's possession, but they corroborated part of that information. Therefore, the Commission considered that only a reduction of 20 % was appropriate with regard to their cooperation.

2. The vitamin cartels

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On 21 November 2001, the Commission fined F. Hoffmann-La Roche AG, BASF AG, Aventis SA, Solvay Pharmaceuticals BV, Merck KgaA, Daiichi Pharmaceutical Co Ltd, Eisai Co Ltd and Takeda

Chemical Industries Ltd a total of € 855.23 million for participating in eight distinct secret market-sharing and price-fixing cartels affecting vitamin products (vitamins A, E, B2, B5, C, D3, Beta Carotene and carotinoids). Each cartel had a specific number of participants and duration, although all operated between September 1989 and February 1999. Five other companies, Lonza AG, Kongo Chemical Co Ltd, Sumitomo Chemical Co Ltd, Sumika Fine Chemicals Ltd and Tanabe Saiyaku Co Ltd were not fined because the cartels in which they were involved – Vitamin H or Folic Acid – ended five years or more before the Commission opened its investigation. Under EU law, prescription applies under these circumstances. Prescription also applied to cartels in vitamins B1 and B6.

Following the opening of an investigation in May 1999, the European Commission found that thirteen European and non-European companies participated in cartels aimed at eliminating competition in the vitamin A, E, B1, B2, B5, B6, C, D3, Biotin (H), Folic Acid, Beta Carotene and carotinoids markets. A striking feature of this complex of infringements was the central role played by Hoffmann-La Roche and BASF, the two main vitamin producers, in virtually each and every cartel, whilst other players were involved in only a limited number of vitamin products.

Vitamins are vital elements for human and animal nutrition and are essential for normal growth, development and maintenance of life. They are added to both compound animal feeds and human food products. Vitamins for pharmaceutical purposes are marketed to the public as diet supplements in tablet or capsule form. In the cosmetics industry, vitamins are added to skin- and health-care products. The Commission estimates that the European Economic Area (EEA) market for the products covered in the decision was worth around € 800 million 1998. This includes vitamin E, which in 1998 was worth approximately € 250 million in the EEA and vitamin A, which represented some € 150 million.

The participants in each of the cartels fixed prices for the different vitamin products, allocated sales quotas, agreed on and implemented price increases and issued price announcements in accordance with their agreements. They also set up a machinery to monitor and enforce their agreements and participated in regular meetings to implement their plans.

The *modus operandi* of the different cartels was essentially the same if not identical ('target' and 'minimum' prices; maintenance of the status quo in market shares and compensation arrangements), in particular it included:

- the establishment of formal structure and hierarchy of different levels of management, often with overlapping membership at the most senior levels to ensure the functioning of the cartels;
- the exchange of sales values, volumes of sales and pricing information on a quarterly or monthly basis at regular meetings;
- in the case of the largest cartels, the preparation, agreement and implementation and monitoring of an annual 'budget' followed by the adjustment of actual sales achieved so as to comply with the quotas allocated;

The cartel arrangements generally followed this scheme, pioneered in vitamins A and E, with certain variants in other products. Hoffmann-La Roche acted as the agent and representative of the European producers in the meetings and negotiations held in Japan and the Far East.

The simultaneous existence of the collusive arrangements in the various vitamins was not a spontaneous or haphazard development, but was conceived and directed by the same persons at the most senior levels of the undertakings concerned.

The prime mover and main beneficiary of these schemes was Hoffmann-La Roche, the largest vitamin producer in the world, with some 50% of the overall market. The cartel arrangements covered its full range of vitamin products. The involvement of some of its most senior executives tends to confirm that the arrangements were part of a strategic plan conceived at the highest levels to control the world market in vitamins by illegal means.

BASF, the next largest vitamin producer worldwide, assumed a paramount role in following Hoffmann-La Roche's lead. Both major European producers effectively formed a common front in conceiving and implementing the arrangements with the Japanese producers concerned. Together, for example, they recruited Eisai to their «Club» in vitamin E.

Takeda, as one of the main world producers of bulk vitamins, was fully involved in the cartel arrangements for vitamins B1, B2, B6, C and Folic Acid. Takeda's involvement in the arrangements in each of these vitamin products was instrumental to Hoffmann-La Roche's designs to secure the illegal coordination of the vitamin markets it was active in, including those in the range of vitamin products it shared with Takeda. The other vitamin producers were all active members of the cartel arrangements in the respective vitamin product markets in which they operated.

Calculation of the fines and application of the Leniency Notice

Given the continuity and similarity of method, the Commission considered it appropriate to treat in one and the same procedure the complex of agreements covering the different vitamins. The Commission therefore covered several infringements in a single decision.

When setting fines, the Commission takes into account the gravity of the infringement, its duration, any aggravating or mitigating circumstances as well as the cooperation of a company. It also takes account of a company's market share in the product market concerned and its overall size. The upper limit of any fine is established at 10% of a company's total annual turnover.

The Commission considered that each cartel in this case represents a very serious infringement of EU competition law. Furthermore, most of the cartel participants committed infringements of long duration, i.e. more than five years (see table above).

Hoffmann-La Roche and BASF were the two leaders of each of the cartels for which fines were imposed in this Decision. This was therefore retained as an aggravating factor to be taken into account in the determination of the amount of the fines imposed on these companies, justifying an increase of **50 %** and **35 %** in their respective basic amounts for each of the cartels they were involved in.

The only attenuating circumstance identified in all of the cartels for which fines were imposed was Rhône-Poulenc's passive role in the vitamin D3 infringement. It did not attend any of the cartel meetings and was not allocated an individual market share. This attenuating circumstance was taken into account in the determination of the amount of the fines imposed on Aventis for its infringement affecting the vitamin D3 market.

Application of the Leniency Notice

The addressees of the Decision co-operated with the Commission within the terms set by the Leniency Notice at different stages of the investigation and in relation to different vitamin products covered by the investigation. The Decision applies the Leniency Notice as follows:

Aventis was the first undertaking to adduce decisive evidence of the existence of an international cartel affecting the EEA in the vitamin A and vitamin E markets before the Commission had any knowledge of its existence. This decisive evidence was provided in the Statements made by Aventis on 19 and 25 May 1999. It also met all other conditions as set out in Section B of the Leniency Notice

Participants, product, duration

Vitamin	Participants	Duration (*)	
		From	To
Vitamin A	Roche, BASF, Rhône-Poulenc (Aventis)	September 1989	February 1999
Vitamin E	Roche, BASF, Rhône-Poulenc (Aventis), Eisai	September 1989	February 1999
Vitamin B1 (Thiamine)	Roche, Takeda, BASF	January 1991	June 1994
Vitamin B2 (Riboflavin)	Roche, BASF, Takeda	January 1991	Sept. 1995
Vitamin B5 (Calpan)	Roche, BASF, Daiichi	January 1991	February 1999
Vitamin B6	Roche, Takeda, Daiichi	January 1991	June 1994
Folic Acid (B)	Roche, Takeda, Kongo, Sumika	January 1991	June 1994
Vitamin C	Roche, BASF, Takeda, Merck	January 1991	August 1995
Vitamin D3	Roche, BASF, Solvay Pharm, Rhône-Poulenc (Aventis)	January 1994	June 1998
Vitamin H (Biotin)	Roche, Merck, Lonza, Sumitomo, Tanabe, BASF	October 1991	April 1994
Beta Carotene	Roche, BASF	September 1992	December 1998
Carotinioids	Roche, BASF	May 1993	December 1998

(*) The duration is not necessarily the same for all participants

in relation to its involvement in the cartels in vitamins A and E. On these grounds, *Aventis* was granted a **100 %** reduction of the fine that would have been imposed with regard to its activities in the vitamin A and vitamin E markets.

Roche and *BASF*, through the principal material submitted to the Commission between 2 June 1999 and 30 July 1999, were the first to provide the Commission with decisive evidence of the existence of cartel arrangements affecting the vitamin B2, B5, C, D3, Beta Carotene and carotinoids markets. The evidence submitted by both *Roche* and *BASF* in relation to the cartels in vitamins A and E was very substantial and was provided at an early stage in the Commission's procedure. That is to say, both companies contributed crucial information to establish and/or confirm essential aspects of the infringements committed in each of the vitamin product markets they were involved in.

Nevertheless, *Roche* and *BASF* acted as instigators or played a determining role in the illegal activities affecting the vitamin A, E, B2, B5, C, D3, Beta Carotene and carotinoids product markets. Therefore neither of them met condition (e) of Section B of the Leniency Notice and could not benefit from any reduction under Sections B or C of this Notice even if they were to meet the other conditions set out therein. Both *Hoffmann La Roche* and *BASF* were granted a **50 %** reduction of the fine that would have been imposed if they had not cooperated for each of the cartels in which they were involved in.

Prior to the Commission's Statement of Objections (SO) *Daiichi*, *Solvay*, *Takeda* and *Eisai* provided the Commission with information and documents, in particular detailed corporate statements, which helped establish important aspects of the infringement committed in the vitamin B5 (*Daiichi*), D3 (*Solvay*), B2 and C (*Takeda*) and C (*Eisai*) markets.

The documents provided by the companies gave details of the organisation and structure of the cartels. However, in the case of *Eisai* these were only forthcoming after three other participants in the vitamin C cartel (*Roche*, *BASF* and *Takeda*) had submitted detailed evidence on the cartel. *Daiichi*, *Solvay* and *Takeda* were granted a **35 %** reduction of the fine that would otherwise have been imposed and a **30 %** reduction of the fine to *Eisai*.

As to *Merck* and *Aventis*, with regard to the vitamin C and vitamin D3 cartels respectively, they only cooperated actively with the Commission once they had received the SO. *Merck* provided information concerning its participation

Fines imposed on participants by product (in millions of euro)

	Vit A	Vit E	Vit B1	Vit B2	Vit B5	Vit B6	Folic Acid	Vit C	Vit D3	Vit H	Beta Carotene	Caroti-noids	Total
Roche	85.5	99.75	NA	42	54	NA	NA	65.25	21	NA	48	46.5	462
BASF	46.17	89.78	NA	18.9	34.02			14.68	7.56	NA	43.2	41.85	296.16
Aventis	0	0							5.04				5.04
Lonza										NA			
Solvay Pharm									9.1				9.1
Merck								9.24		NA			9.24
Daiichi					23.4	NA							23.4
Eisai		13.23											13.23
Kongo							NA						
Sumika							NA						
Sumitomo										NA			
Takeda			NA	8.78		NA	NA	28.28					37.06
Tanabe										NA			
TOTAL	131.67	202.76		69.68	111.42			117.45	42.7		91.2	88.35	855.23

N.A.: Non applicable

in the vitamin C cartel in its written reply to the SO. Aventis, on the other hand, simply confirmed that it did not substantially contest the facts on which the Commission had based the SO, including the section dealing with the vitamin D3 cartel. *Merck* was granted a reduction of **15 %** of the fine that would otherwise have been imposed and a reduction of **10 %** of the fine in the case of *Aventis*.

'This is the most damaging series of cartels the Commission has ever investigated due to the sheer range of vitamins covered which are found in a multitude of products from cereals, biscuits and drinks to animal feed, pharmaceuticals and cosmetics' said Competition Commissioner Mario Monti. *'''The companies'' collusive behaviour enabled them to charge higher prices than if the full forces of competition had been at play, damaging consumers and allowing the companies to pocket illicit profits. It is particularly unacceptable that this illegal behaviour concerned substances which are vital elements for nutrition and essential for normal growth and maintenance of life'*.

3. The citric acid cartel

François ARBAULT, Francisco PEIRÓ, Directorate-General Competition, unit E-1

On 5 December 2001, the Commission fined Archer Daniels Midland Co.; Cerestar Bioproducts B.V.; Haarmann & Reimer Corp.; F. Hoffmann-La Roche AG and Jungbunzlauer AG a total of € 135.22 million for fixing the price and sharing the market for citric acid, the world's most widespread acidulent and preservative. The Commission has gathered evidence that from March 1991 to May 1995, the cartel participants fixed market shares for citric acid, agreed on price targets for the product, agreed on price lists for the product, agreed to eliminate discounts on all but the five largest customers and set up a machinery to monitor and enforce their agreements.

Citric acid is used primarily in the food/beverage industry and is the most widely adopted acidulent/preservative world-wide. Citric acid is also used in detergents as well as in pharmaceutical and cosmetic products. The annual market value was approximately € 320 million (EEA) in 1995 (the last year of the infringement).

After a careful investigation which started in 1997, the European Commission found that US companies Archer Daniels Midland (ADM) and Haarmann & Reimer (H&R), the latter ultimately owned by Bayer AG, Dutch company Cerestar Bioproducts B.V., Hoffmann-La Roche and Jungbunzlauer (JBL), both Swiss, participated in a worldwide cartel between 1991 and 1995, through which they fixed the price and shared out the market for citric acid.

The cartel started on 6 March 1991 at the Hotel Plaza in Basle (Switzerland), as stated by the companies in documents submitted to the Commission. There, and following on previous informal contacts, the founding members ADM, H&R, Roche and JBL agreed on the main features of their plan to eliminate competition between them. Cerestar joined the group in May 1992, shortly after it entered the citric acid market. The cartel continued until May 1995 and pursued four main objectives, namely allocating specific sales quotas for each member; fixing 'target' and 'floor prices' for citric acid; exchanging specific customer information, and eliminating price discounts.

A limited exception was made to the last objective in relation to the five major consumers of citric acid world-wide, since it was considered unrealistic by the cartel members to expect them to pay the price published on the public price lists. It was, however, agreed that a discount of no more than 3% would be offered to these larger consumers.

The companies held regular and frequent meetings, which were the hallmark of the cartel's organisation. After 1993 and in order to resolve certain grievances and market "difficulties" additional, more technically oriented, meetings were organised that become known as '*Sherpa*' meetings in contrast to the more high-level and strategic '*Masters*' meetings.

A sophisticated monitoring system was established, whereby each company would report its monthly sales figures to a previously agreed member, who would then ensure the distribution of the confidential information to all the others. In order to ensure that each player would stick to the quotas assigned, a compensation scheme was created, obliging any member that over-sold its allocated quota to provide compensation to the others.

A further striking feature of the cartel was the concerted action taken by the companies against Chinese manufacturers, who had increased their exports to the European market as a result of the significant rise in prices for citric acid during the time the cartel operated. The cartel participants tried to regain some of the customers lost to the Chinese suppliers through a concerted and carefully targeted price war. The list of the clients lost and targeted by the cartel for 'recovery' came to be known as the '*Serbia List*' and was regularly monitored during the '*Sherpa*' meetings.

The Commission characterised the companies' behaviour as a 'very serious' infringement of the Community and EEA competition rules, and adopted a Decision under Article 81(1) of the Treaty and Article 53(1) of the EEA-Agreement, imposing heavy fines. The two leaders of the cartel, F. Hoffmann-La Roche AG and ADM were fined € 63.5 million and € 39.69 million respectively. As to the other cartel participants, Jungbunzlauer, Haarmann & Reimer and Cerestar Bioproducts, they were fined € 17.64 million, € 14.22 million and €170,000 respectively.

Calculation of the fines and application of the Leniency Notice

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The Notice on the non-imposition or reduction of fines in cartel cases ('the Leniency Notice') was applied.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into three groups according to their relative importance in the market concerned. Further upward adjustments were made in the case of three companies, with regard to their very large size (or the very large size of the group to which they belong according to a 100% ownership), and thus of their overall resources.

The cartel started in March 1991 and ended in May 1995. Under the Guidelines on Fines, ADM, Haarmann & Reimer, Hoffmann-La Roche and Jungbunzlauer committed a medium-term infringement (4 years). Cerestar Bioproducts also committed a medium-term infringement (3 years). The respective basic amounts of the fines were increased accordingly.

Because they acted as co-leaders of the cartel – an aggravating factor, the basic fines on ADM and Roche were increased by 35 percent. This figure is below the level applied for a leadership role in previous cartel cases, which is usually 50%, but takes account of the fact that whilst these two companies clearly had an outstanding role in the infringement, other members of the cartel also carried out activities usually associated with a leadership role (like chairing meetings or centralising data distribution).

Application of the Leniency notice

Part of the evidence on the cartel was provided to the Commission by the companies involved, under EU rules providing for full or partial immunity from fines for companies that co-operate with the Commission in cartel cases.

Cerestar Bioproducts was the first undertaking to provide the Commission with decisive information. But because its application for Leniency was not entirely spontaneous, and since it approached the Commission only after it was fully aware that the citric acid cartel was the object of an on-going investigation by the Commission, it was granted a 90 % reduction of the fine rather than full immunity.

All the other participants co-operated in one way or another with the Commission and were granted appropriate reductions. ADM provided detailed information, which together with that obtained from Cerestar Bioproducts was used to draft requests for information that largely contributed to trigger the admission by H&R, Roche and JBL of their participation in the citric acid cartel. ADM was able to provide the Commission with documents contemporaneous to the infringement, including *inter alia* hand-written notes taken during cartel meetings and price instructions related to the decisions taken by the cartel. On these grounds, ADM was granted a 50 % reduction.

Jungbunzlauer and Haarmann & Reimer confirmed the vast majority of the meetings, the identity of the participants, as well as the facts in question. Jungbunzlauer also submitted to the Commission a number of tables created contemporaneously to the time of the infringement, indicating the quotas that were allocated to each of the cartel participants. Nevertheless, a large part of the information submitted by both companies was provided in reply to detailed requests for information and therefore fell within the ambit of an undertaking's duty to fully reply to these requests as set out in Article 11 of Regulation 17. The Commis-

sion granted these two companies a reduction of 40 % and 30 % of their respective fines.

Roche confirmed its participation in the cartel and the purpose of the meetings related to it prior to the receipt of the Commission's Statement of Objections, which was sent on March 28, 2000. The Commission therefore granted Hoffmann-La Roche a 20 % reduction of its fine.

4. Market-sharing and price-fixing cartels on the Belgian beer market ([1])

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On 5 December 2001, the Commission fined Interbrew, Danone, Alken-Maes, Haacht and Martens a total of over € 91 million for participating in cartels on the Belgian beer market between 1993 and 1998. The infringements included market sharing, price fixing and information exchange. They affected the horeca sector (i.e. hotels, restaurants and cafés) as well as the retail sector (i.e. supermarkets and other food shops), including the sale of private label beers.

In the course of 1999 the European Commission undertook surprise inspections at the premises of Interbrew, Alken-Maes and the Belgian brewers confederation (CBB). These inspections led to an investigation which enabled the Commission to find evidence of two distinct cartels in the Belgian market.

The first cartel involved Interbrew (by far the number one brewer in Belgium with a market share of around 55% and the number two brewer in the world) and Alken-Maes (the number two player in Belgium with a market share of around 15%) as well as its then parent company Danone. This cartel covered a wide range of anti-competitive arrangements in the horeca sector (i.e. sales for away-from-home consumption in hotels, restaurants and cafés) as well as the retail sector (e.g. sales in supermarkets or smaller food shops for consumption at home).

The second cartel concerned specifically the segment of so-called private label beers, i.e. beers which supermarkets order from brewers but sell under their own brand name. Interbrew, Alken-Maes, Haacht and Martens (a brewer whose production consists almost entirely of private label beer) participated in this second cartel.

Total fines were imposed on the companies involved as follows: € 46.487.000 ([2]) for Interbrew; € 44.628.000 ([3]) for Danone/Alken-Maes; € 270.000 for Haacht and € 270.000 for Martens.

The cartel between Interbrew and Danone/Alken-Maes

From early 1993 until the beginning of 1998, the two parties were involved in wide ranging cartel activities on the Belgian beer market. Interbrew used the code name 'Université de Lille' or 'project Green' for these activities. The cartel activities encompassed a general non-aggression pact and more specifically the limitation of investments and advertising in the horeca sector, the allocation of horeca customers, price-fixing in the retail sector, a new tariff structure to be applied in the horeca sector as well as in the retail sector and finally a detailed monthly information exchange system concerning sales volumes in both sectors.

A striking feature of this cartel is that the CEO's themselves and other top management of the companies regularly met to initiate and monitor the above mentioned arrangements. Another feature worth mentioning is that Danone, which was Alken Maes' parent company during the relevant period, was itself very actively involved in these arrangements.

The cartel took off with a price fixing agreement for the retail sector and an agreed limitation of commercial investments in the horeca sector. An internal Interbrew note from the spring of 1993 showed that Interbrew's and Danone's top management were already considering entering into a closer cooperation. However, the Interbrew people thought that Danone had more to gain from this. Moreover, they had antitrust concerns.

([1]) See also press release of 5 December 2001, IP/01/1739

([2]) € 45.675.000 for the cartel with Danone/Alken-Maes and € 812.000 for the private label cartel.

([3]) € 44.043.000 for Danone's and Alken-Maes' participation in the cartel with Interbrew and € 585.000 for Alken-Maes' participation in the private label cartel.

In May 1994, contacts between the two companies intensified. This was due to a threat from Danone: if Interbrew did not transfer 500.000 hl (roughly 5% share of the Belgian market) to Alken-Maes in the Belgian retail sector, it would make life difficult for Interbrew-France. Evidence of this threat stems from declarations made by former Interbrew representatives but also from an internal Heineken document. This document was found during an inspection at Heineken's premises, concerning another cartel investigation.

The threat eventually led to a 'gentlemen's agreement' between the parties at the end of 1994. They committed themselves generally to respect each other's market positions. They further agreed on a number of specific points, including price-fixing in the retail sector, market sharing in the horeca (initially the classic outlets, later on also the national accounts ([1])), commercial investments and a new tariff structure in both sectors. In addition, throughout this period the parties exchanged monthly information about their sales volumes in both sectors.

At the beginning of 1998, the parties noted that they had achieved a good deal of their objectives.

Calculation of the fines

The Commission considers that the price fixing and market sharing cartel between Interbrew and Danone/Alken-Maes represents a very serious breach of EU competition law. For such a breach, the likely amount of the fines is at least € 20 million. Although Interbrew and Danone are both big, international companies, Interbrew's starting amount for gravity is higher than Danone's, because its market share on the Belgian beer market is substantially larger than Danone's. Furthermore, it is a cartel of medium duration (five years). This led the Commission to increase the basic fines for both companies by almost 50%.

For Danone there are two aggravating factors which led to a further increase of the fine by 50%.

First, Danone or as it was called at the time Boussois-Souchon-Neuvesel (BSN) – has participated in similar antitrust infringements already twice before (in 1974 and 1984). ([2]) The circumstance that these infringements occurred in a different sector (flat glass) is irrelevant. It is the nature of the infringement and the identity of the company that matter. Moreover, the Commission notes that for the entire period during which BSN, later Danone, committed these infringements, the same person acted as CEO of the company and that some flat glass managers at the time were active in Danone's retail business during the period of the beer cartel.

The second aggravating circumstance concerns Danone's threat to make Interbrew's life difficult in France if Interbrew did not meet its request to have 500.000 hl of beer transferred to its subsidiary Alken-Maes. As pointed out above, this threat led to an increase of the cartel activity.

As a mitigating circumstance, the Commission recognises that Alken-Maes ended the information exchange with Interbrew. For this a reduction of 10% is granted.

Application of the Leniency Notice

Both parties co-operated to a certain extent during the investigation by supplying information to the Commission. However, Interbrew's cooperation was more material than that of Danone/Alken-Maes. On this basis, Interbrew was granted a reduction of 30% and Danone/Alken-Maes a reduction of 10%.

The private label cartel

In the course of the on-going investigation regarding the cartel between Interbrew and Danone/Alken-Maes, Interbrew informed the Commission about a series of meetings in the period from October 1997 until July 1998 between itself, Alken-Maes, Haacht and Martens concerning the private label beer market in Belgium.

The discussions during these meetings aimed at avoiding a price war and at consolidating the existing allocation of customers. This amounted to a concerted practice within the meaning of Art. 81 EC Treaty. In addition, the parties agreed to exchange information about their clients in the private label segment.

Interbrew and Alken-Maes took the initiative of organizing the four meetings. However, Haacht and Martens did not merely play a passive role in the concerted practice. Both participated in all meetings and actually exchanged information about sales volumes. Moreover, Martens at one point suggested inviting the Dutch private label beer producers to the meetings.

([1]) Typical examples of national accounts are caterers, airports, large cinema complexes.
([2]) See Commission decisions of 15 May 1974 (O.J. L 160/1) and 23 July 1984 (O.J. L 212/13).

Calculation of the fines

Since the cartel was limited to the small private label beer segment in Belgium (roughly 5% of beer consumption in Belgium), the Commission considers the parties' behaviour only as a serious infringement for which the likely amount of the fine is in principle between i1 million and i20 million. The cartel was of a short duration (nine months).

The fact that Interbrew and Alken-Maes took the initiative for these meetings is an aggravating factor. This results in an increase of the fine by 30% for both parties.

Application of the Leniency Notice

All parties co-operated with the Commission during the procedure. Interbrew even disclosed the cartel. Although it blew the whistle, it could not, however, benefit from full immunity under the Commission's so-called Leniency Notice ([1]) because it was one of the instigators of the cartel. For its co-operation, it was granted a reduction of 50%. The other brewers were granted a reduction of 10% for their co-operation.

5. Market sharing cartel on the Luxembourg beer market

Paul BRIDGELAND, Directorate-General Competition, unit F-3

On 5 December 2001, the Commission fined three Luxembourg brewers: Brasserie Nationale-Bofferding, Brasserie de Wiltz and Brasserie Battin a total of € 448 000 for their participation in a market sharing cartel affecting the Luxembourg 'horeca' or 'on-trade' sector (hotels, restaurants and cafés). The brewers agreed to guarantee each other's exclusive purchasing arrangements with horeca customers and to restrict penetration of the sector by foreign brewers. A fourth cartel member, Brasserie de Luxembourg Mousel-Diekirch (a subsidiary of Interbrew), escaped any fine because it disclosed the cartel to the Commission.

Following an investigation which began in February 2000, the Commission found that all four brewers active in Luxembourg had participated in a market sharing cartel in the Luxembourg horeca sector between 1985 and 2000.

The cartel consisted of a written agreement signed in 1985 by which the parties agreed not to supply beer to any horeca outlet (hotels, restaurants, cafés and beer wholesalers) which was tied to another party by an exclusive purchasing contract or 'beer tie'. The beer tie guarantee extended to beer ties which were invalid or unenforceable in law, as well as to supply arrangements where a brewer simply invested in a drinks outlet but did not impose an exclusive purchasing contract. To this extent, the beer tie guarantee was more restrictive than the beer ties themselves. It therefore served to protect each party's clientele. The beer tie guarantee was reinforced by a prior consultation mechanism, which obliged the parties to check with each other about the presence of a beer tie before they supplied new customers. Financial penalties were provided for non-compliance with the guarantee or the consultation mechanism.

The cartel agreement also contained provisions intended to keep foreign brewers out of the Luxembourg horeca sector. First, there was a joint defensive mechanism whereby the parties agreed to consult each other in the event that a foreign brewer attempted to negotiate a supply contract with one of their tied outlets. Priority would then be allocated to one of the parties to attempt to keep the outlet as a customer. If that party succeeded in negotiating a new contract with the outlet, it was obliged to compensate the party which had lost the outlet by transferring an equivalent outlet to it. Other provisions allowed for the exclusion from the cartel of any party which co-operated with a foreign brewer or distributed its beer.

The cartel agreement was signed for an unlimited duration and required the parties to give twelve months' notice to terminate. No party gave notice before Interbrew, the parent company of Brasserie de Luxembourg Mousel-Diekirch, disclosed the cartel to the Commission in February 2000. Furthermore, parts of the agreement had been implemented until 1998.

Calculation of the fines and application of the Leniency Notice

The Commission imposed a fine of EUR 400 000 on Brasserie Nationale-Bofferding and fines of

([1]) OJ C 207 of 18 July 1996

EUR 24 000 each on Brasserie de Wiltz and Brasserie Battin.

The Commission considered the gravity of the infringement to be 'serious'. Although market sharing and attempts to impede trade between Member States are by nature very serious infringements, the cartel was limited to the relatively small Luxembourg horeca sector and it was not implemented in full. Within this category, the undertakings were divided into three groups according to the volume of their sales in the sector concerned.

The infringement was of long duration: more than fourteen years. This led the Commission to double the amount imposed for gravity.

As an attenuating circumstance, the Commission recognised that there was legal uncertainty about the enforceability of beer ties in Luxembourg at the time the cartel agreement was signed and that this may have led the parties to doubt whether certain aspects of the beer tie guarantee constituted an infringement. This merited a 20% reduction in the fines.

Application of the Leniency Notice

Brasserie de Luxembourg Mousel-Diekirch was granted total exemption from the substantial fine that would otherwise have been imposed because it provided the Commission with decisive evidence of the cartel before the Commission had any knowledge of it and satisfied all the other conditions of Section B of the Leniency Notice.

6. Commission fines five German banks for fixing the charges for the exchange of euro-zone currencies

Gerald BERGER, Directorate-General Competition, unit E-1

On 11 December 2001, the Commission fined Commerzbank, Dresdner Bank, Bayerische Hypo- und Vereinsbank, Deutsche Verkehrsbank and Vereins- und Westbank a total of € 100.8 million for concluding an agreement on a commission of about 3% for the buying and selling of euro-zone banknotes during the three-year transitional period beginning 1 January 1999. The purpose was to recover about 90% of the 'exchange margin' income after the abolition of the 'spread' (i.e. buying and selling rates) on 1 January 1999.

Background of the case

Shortly after the introduction of the European single currency, the euro, on 1 January 1999, the Commission started an investigation into whether banks had collectively fixed charges for the exchange of euro-zone currencies. The Commission thereafter concluded that it had sufficient evidence that banks and national associations in seven Member States namely Germany, Ireland, Portugal, Finland, Belgium, The Netherlands and Austria had colluded in setting bank charges for the exchange of euro-zone banknotes.

However, between April and the summer of 2001, the vast majority of banks, including some German banks other than the addressees of the final Commission decision of 11 December 2001, unilaterally proposed to substantially reduce their charges for the exchange of euro-zone currencies. The banks thereby abandoned their collusive behaviour and recovered their freedom to set prices individually.

On the basis of these proposals the Commission took the view that it would be in the consumer interest for it to secure an immediate and substantial reduction in the charges before the summer holiday period and that the free-of-charge exchange of euro-zone currencies for account-holders towards the end of the year offered by the banks in question would indeed facilitate the changeover to the euro notes and coins.

The Commission thus ended cartel proceedings against all Belgian, Finnish, Dutch, Irish and Portuguese banks following their acceptable proposals of reducing charges for the exchange of euro-zone currencies. The Austrian case has been integrated into the Lombard case and will be dealt with therein.

The Commission's unusual attitude was justified by the exceptional circumstances of the present case. The introduction of euro notes and coins on 1 January 2002, replacing the national currencies of the participating euro-zone countries, puts an automatic end to the cartel behaviour.

The German cartel

In Germany several banks have come forward with acceptable proposals for reducing their charges for the exchange of euro-zone currencies. The Commission has ended proceedings against these banks. Commerzbank, Dresdner Bank, Bayerische Hypo- und Vereinsbank, Vereins- und Westbank and Deutsche Verkehrsbank, which did not approach the Commission with acceptable proposals with direct benefit for the consumers, were addressees of a decision with fines.

The Commission characterised the companies' behaviour as a serious infringement of the EC competition rules, and adopted a Decision under Article 81(1) of the EC Treaty imposing the following fines:

Commerzbank AG:	€ 28.0 million
Dresdner Bank AG:	€ 28.0 million
Bayerische Hypo- und Vereinsbank AG:	€ 28.0 million
Deutsche Verkehrsbank AG:	€ 14.0 million
Vereins- und Westbank AG:	€ 2.8 million

Calculation of the fines

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement.

The Commission considered that the cartel entered into by the German banks represented a very serious infringement of the EC competition rules and justified heavy fines. However, because the effect of the cartel was limited to Germany and the Dutch border regions, the Commission categorised the case as a 'serious infringement' for the purpose of establishing the starting amount of the fines.

Within this category of a serious infringement, the banks were divided into two groups according to their relative importance in the market concerned. Being very big banks it was necessary to make further upward adjustments for Commerzbank, Dresdner Bank and Hypo- und Vereinsbank in order to set their fine at a level which ensured that it had a sufficiently deterrent effect.

The duration of the infringement committed by Commerzbank, Dresdner Bank, Bayerische Hypo- und Vereinsbank, Deutsche Verkehrsbank and Vereins- und Westbank was four years and one month from the date of concluding the agreement until the present time. The starting amounts of the fines determined for gravity were therefore increased by 10% per year, i.e. by 40% in total.

In this case there were no aggravating and mitigating circumstances applicable and as the addressees of the decision have at no stage of the procedure co-operated with the Commission the Leniency Notice was also not applicable.

7. The zinc phosphate market-sharing and price-fixing cartel

François ARBAULT, Maarit LINDROOS, Directorate-General Competition, unit E-1

On 11 December 2001, the Commission fined Britannia Alloys & Chemicals Ltd.; Dr Hans Heubach GmbH & Co. KG; James M. Brown Ltd.; Société Nouvelle des Couleurs Zinciques S.A.; Trident Alloys Ltd. and Waardals Kjemiske Fabrikker A/S a total of € 11.95 million for fixing the price and sharing the market for zinc phosphate, an anti-corrosion mineral pigment widely used for the manufacture of industrial paints.

Following an investigation opened in May 1998, when on-the-spot investigations were carried out at the premises of several addressees of the decision, the European Commission found that British companies Britannia Alloys & Chemicals Ltd, James M. Brown Ltd and Trident Alloys Ltd, Germany's Dr Hans Heubach GmbH & Co. KG, France's Société Nouvelle des Couleurs Zinciques S.A (SNCZ) and Norwegian company Waardals Kjemiske Fabrikker A/S participated in a European-wide cartel between 1994 and 1998, through which they fixed the price and shared out the market for zinc phosphate.

In March 1997 the zinc phosphate activities of Britannia Alloys took the name of Trident Alloys Ltd following a management buy out. The new company continued its involvement in the illegal practice. Since Britannia Alloys still exists, as a 100-percent subsidiary of M.I.M. Holdings, both it and Trident Alloys are the addressees of this decision.

Zinc phosphate is widely used as an anti-corrosion mineral pigment in protective coating systems. Paint manufacturers use it for the production of anti-corrosive industrial paints for the automotive, aeronautic and marine sectors. During the infringement period, the annual market was worth around € 16 million in the European Economic Area – the

15 EU member states plus Norway, Iceland and Liechtenstein. Whilst the companies concerned are of a modest size, they accounted for over 90% of the EEA-wide market for zinc phosphate.

The cartel began on 24 March 1994 in London, at the Holiday Inn Heathrow Airport Hotel. There, and following on previous informal contacts, Britannia Alloys, James Brown, Heubach, SNCZ and Waardals decided to maintain the 'status quo' on quantities of zinc phosphate supplied in Europe. It was decided to attribute to each member of 'the Club' (as they called themselves) a reference market share to be complied with.

The market shares were defined by reference to the 1991-1993 sales figures in France, Germany, UK and Scandinavia. During subsequent cartel meetings, the cartel participants circulated lists of 'recommended' minimum prices and shared out specific customers. In order to ensure that market shares were adhered to, a monitoring system was also set up.

From March 1994 until May 1998, 'the Club' held regular cartel meetings, sixteen of which have been clearly identified by the Commission.

During the inspections carried out in May 1998, numerous hand-written notes and tables of the cartel meetings were collected. Whilst a meeting room had already been booked for the forthcoming cartel meeting at Amsterdam's Schiphol airport on 22 July 1998, the event had to be cancelled due to the Commission's intervention.

The companies' conduct was a very serious infringement of the competition rules, as set out in Article 81 of the European Union Treaty and Article 53 of the EEA-Agreement.

The following is a list of the individual fines (in million Euro):

Britannia Alloys & Chemicals Limited: 3.37
Dr Hans Heubach GmbH & Co. KG: 3.78
James M. Brown Limited: 0.94
Société Nouvelle des Couleurs Zinciques S.A.: 1.53
Trident Alloys Limited: 1.98
Waardals Kjemiske Fabrikker A/S: 0.35

Calculation of the fines and application of the Leniency Notice

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The Notice on the non-imposition or reduction of fines in cartel cases ('the Leniency Notice') was applied.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into two groups according to their relative importance in the market concerned. Without prejudice to the very serious nature of the infringement, the Commission had regard to the limited size of the zinc phosphate market when setting the appropriate starting amounts.

The cartel was of medium duration (between one and five years). The Commission did not identify any ringleader, since the creation of the cartel, which followed various preliminary informal contacts, was a joint initiative.

Application of the Leniency notice

Part of the evidence on the cartel was provided to the Commission by the companies involved, under EU rules providing for full or partial immunity from fines for companies that co-operate with the Commission in cartel cases.

Waardals approached the Commission shortly after the surprise investigations were carried out and fully co-operated with the Commission, giving an account of the cartel which included, *inter alia*, a list of the cartel meetings held between 1994 and 1998.

This allowed the Commission to establish a clearer picture of the history and mechanisms of the cartel, and to more accurately interpret the documents in its possession.

The explanations provided by Waardals enabled the Commission to address very detailed requests for information to the other cartel participants. On this basis, the Commission granted Waardals a 50% reduction of its fine.

Trident began to co-operate only after it received a request for information from the Commission. The company subsequently provided the Commission with a written statement giving a detailed account of the cartel, as well as a number of documents relevant to the case. On these grounds, Trident was granted a 40% reduction of its fine.

Britannia, Heubach and SNCZ did not substantially contest the facts as set out in the Statement of Objections they received in August 2000. For this reason, they were each granted a 10 % reduction of their fine.

James Brown was also granted a 10 % reduction of its fine.

8. The carbonless paper cartel

Erwan MARTEIL, Sari SUURNÄKKI, Directorate-General Competition, unit E-1

On 20 December 2001, the Commission fined Arjo Wiggins Appleton Limited and Carrs Paper Ltd (United Kingdom), Mitsubishi HiTech Paper Bielefeld GmbH, Papierfabrik August Koehler AG and Zanders Feinpapiere AG (Germany), Bolloré SA and Papeteries Mougeot SA (France), Distribuidora Vizcaina de Papeles S.L, Papelera Guipuzcoana de Zicuñaga SA and Torraspapel SA (Spain) a total of € 313.69 million for having implemented concerted price increases on the carbonless paper market. Sappi Limited (South Africa) was granted total immunity under the rules on leniency laid down by the Commission in 1996 as it was the first company to cooperate in the investigation and supplied decisive evidence of the cartel. This Decision, coming at the end of a year in which the Commission has taken a long line of decisions against cartels, is another example of the Commission's determination to uncover and punish the most damaging of all anti-competitive practices.

Carbonless paper, also known as self-copying paper, is intended for the multiple duplication of documents and is made from a base paper to which layers of chemical products are applied. The principle behind carbonless paper thus involves obtaining a copy by reaction between two complementary layers under pressure of handwriting or the impact of a computer printer or typewriter. Business forms (e.g. delivery slips, bank transfer forms) have always been the single largest application for carbonless papers, accounting for over 90% of total consumption. Other applications for carbonless papers include roll converting. Carbonless paper is sold in reels (80%) and sheets (20%).

The size of the EU carbonless paper market was some ECU 850 million in 1995 (last year of the infringement). In the same year the estimated West European (EEA) production capacity of carbonless paper was 1 010 000 tonnes, of which the members of the Association of European Manufacturers of Carbonless Paper (AEMCP) accounted for 890 000 tonnes (i.e. 88%). The AEMCP members account together for 85-90% of the sales in the EEA.

After a detailed investigation the Commission discovered that the following companies took part between 1992 and 1995 in a Europe-wide cartel designed essentially to implement concerted price increases: Arjo Wiggins Appleton Limited and Carrs Paper Ltd (United Kingdom), Mitsubishi HiTech Paper Bielefeld GmbH, Papierfabrik August Koehler AG and Zanders Feinpapiere AG (Germany), Bolloré SA and Papeteries Mougeot SA (France), Distribuidora Vizcaina de Papeles S.L (Divipa), Papelera Guipuzcoana de Zicuñaga SA and Torraspapel SA (Spain) and Sappi Limited (South Africa). All these companies were members of the AEMCP except Carrs, Divipa and Zicuñaga.

The main objective of the cartel was to agree on price increases and on the timetable for implementing them. The cartel members held meetings at two separate levels: general meetings at European level attended by chief executives, commercial directors or equivalent managers in the carbonless paper industry, and national or regional cartel meetings attended by national or regional sales managers, often together with the aforementioned senior managers. The Commission gathered evidence on five general meetings and 20 national meetings for France, the United Kingdom and Ireland, Spain and Portugal. Several parties to the cartel also admitted that they attended meetings for Germany, Italy, Denmark, Finland, Norway and Sweden.

The Commission uncovered evidence that, in order to ensure implementation of the agreed price increases, a sales quota was allocated to the various participants and a market share was fixed for each of them at certain national cartel meetings – for example, in autumn 1993 for the Spanish and French markets. To help reach agreement on price increases and sales quotas and to monitor compliance with the agreements, the carbonless paper producers exchanged individual, confidential data (detailed information on their prices and sales volumes).

Statements by Sappi show that there were contacts of a collusive nature between the European manufacturers right from the foundation of their professional body, AEMCP, in 1981 and in particular from the mid-1980s. More specifically, the information supplied by Sappi shows that cartel meetings were held from 1989 onwards. However, the Commission confined its examination of the case to the period beginning in January 1992, the date from which it is in possession of convergent statements from cartel members and firm evidence of

regular collusion between carbonless paper producers.

Towards the end of the period, there are reasons to suspect that at least some aspects of collusion persisted after September 1995. When it sent its statement of objections to the companies concerned, the Commission argued that the infringement had persisted until February or March 1997. However, all the parties, except AWA, Carrs and Sappi, deny that they continued to take part in collusion after 1995. Moreover, the statements made by AWA, Carrs and Sappi diverge considerably with regard to the nature and dates of collusive contacts and are not sufficiently documented or corroborated by conclusive evidence for the Commission to establish that the conduct examined in this investigation persisted after September 1995.

On a recommendation from the Hearing Officer (whose final report is attached to the decision), the Commission therefore confined its investigation to the period up to September 1995, the period for which it has firm evidence of the cartel's existence.

The conduct of the companies concerned constitutes a very serious infringement of the competition rules laid down in Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

The individual fines imposed are as follows (€ million): Arjo Wiggins Appleton Limited: 184.27, Papierfabrik August Koehler AG: 33.07, Zanders Feinpapiere AG: 29.76, Bolloré SA: 22.68, Mitsubishi HiTech Paper Bielefeld GmbH: 21.24, Torraspapel SA: 14.17, Papeteries Mougeot SA: 3.64 Distribuidora Vizcaina de Papeles S.L.: 1.75, Carrs Paper Ltd: 1.57, Papelera Guipuzcoana de Zicuñaga SA: 1.54.

Calculation of fines and application of the Leniency Notice

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases ('the Leniency Notice') was applied.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into five groups according to their relative importance in the market concerned. Further upward adjustments were made in the case of three companies (AWA, Bolloré and Sappi), with regard to their very large size and thus of their overall resources.

All cartel participants committed an infringement of medium duration (one to five years). The leadership of the infringement was retained as an aggravating circumstance against AWA. The basic amount of its fine was therefore increased by 50%, which is the Commission's normal practice. No mitigating circumstance was found applicable in the present case.

Application of the Leniency Notice

Sappi has been granted total immunity pursuant to Section B of the Leniency notice. This is the third time that the Commission has granted a 100% reduction in a fine (following Aventis S.A. in the vitamins A and E case, and Brasserie de Luxembourg Mousel-Diekirch in the Luxembourg brewers case).

Some of the other parties were granted reductions of the fine that would otherwise have been imposed on them pursuant to Section D of the Leniency notice.

The Commission reduced the fine imposed on Mougeot by 50%, on AWA by 35% and on Bolloré by 20% because these companies supplied information that helped to shed further light on the unlawful practice in question before the statement of objections was sent out.

The Commission also reduced the fines imposed on Carrs, MHTP and Zanders by 10% as these companies did not dispute the facts set out in the statement of objections.

Competition Commissioner Mario Monti said:

'This new case comes at the end of a year in which the Commission has taken a long line of decisions against cartels of all kinds. This unprecedented level of activity shows two things: first that these secret practices are – unfortunately – widespread, but also that the Commission has given itself the wherewithal to detect and pursue such offences and impose effective penalties. Today, I hope companies are fully aware of the risks they run when the collude. They should also know that the only way of alleviating the legal and financial consequences they face is to come and talk to us'.

New Notice on agreements of minor importance (de minimis Notice)

Luc PEEPERKORN, Directorate-General Competition, unit A-2

The Commission adopted on 20 December 2001 a new Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the EC Treaty ('de minimis Notice'). The new Notice replaces the previous Notice of 1997. ([1]) The revision of the 'de minimis' notice is part of the Commission's review of the EC competition rules. By defining when agreements between companies are not prohibited by the Treaty, the Notice will reduce the compliance burden for companies, especially smaller companies. At the same time the Commission will be better able to avoid examining cases which have no interest from a competition policy point of view and will thus be able to concentrate on more important cases.

During the discussions leading to the adoption of Council Regulations 1215/99 and 1216/99 ([2]) and Commission Block Exemption Regulation 2790/1999 ([3]) (the BER on vertical restraints) the Member States and the Commission discussed the need to review the old de minimis Notice once the new EC competition rules for vertical restraints were adopted. It was considered necessary to assure coherence between the new BER on vertical restraints and the de minimis Notice. The review became even more necessary after at the end of 2000 also the new EC competition rules towards horizontal agreements were adopted. ([4]) The Commission therefore adopted on the 16th of May 2001 a draft new de minimis Notice inviting comments from industry, consumer organisations and other interested third parties. ([5])

The new Notice reflects an economic approach and has the following key features distinguishing it from the previous Notice:

1) It only deals with the question what is not an appreciable restriction of competition.

Article 81 (1) of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-community trade or on competition is not appreciable. In the new Notice the Commission quantifies, with the help of market share thresholds, what is *not* an appreciable restriction of competition and is thus not prohibited by Article 81(1) for that reason.

The previous de minimis Notice was somewhat ambiguous. It referred both to what is not an appreciable restriction of competition and an appreciable effect on trade between Member States without separating the two. Like the new Notice, it used only market share thresholds to quantify appreciability. However, market share thresholds, certainly of the level adopted in the new de minimis Notice, are useful to define what is not an appreciable restriction of competition but are not a good indicator of what is an appreciable effect on trade between Member States. For the latter, which is directly linked to market integration, a turnover threshold, possibly combined with a much lower market share threshold, could be a good indicator. Therefore, the new de-minimis Notice with higher market share thresholds could no longer be linked to the issue of effect on trade in the way it was done under the previous Notice.

Furthermore, in the discussion on the reform of Regulation 17 an important aspect is the delineation of the jurisdiction between EC law and national law. In the proposed new Regulation 17 this delineation is foreseen along the lines of whether trade between Member States is affected or not. ([6]) In the light of the final outcome of this discussion, it may be necessary to define in a separate notice what appreciable effect on trade means. This discussion can not and should not be pre-empted at this stage.

([1]) OJ C 372, 9.12.1997, p. 13.

([2]) OJ L 148, 15.6.1999, p. 1 and p. 5.

([3]) OJ L 336, 29.12.1999, p. 21.

([4]) Commission Block Exemption Regulation 2658/2000 on specialisation agreements and Commission Block Exemption Regulation 2659/2000 on R&D agreements, OJ L 304, 5.12.2000, p. 3 respectively p. 7, and Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2.

([5]) See Competition Policy Newsletter Number 2, June 2001, pages 4-6.

([6]) Article 3 of the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ C 365 E, 19.12.2000, p. 284 - 296.

However, in the new Notice it is made clear that agreements between small and medium-sized enterprises (SMEs) are rarely capable of appreciably affecting trade between Member States. Agreements between SMEs therefore generally fall outside the scope of Article 81(1).

2) The 'de minimis' thresholds are raised to 10% market share for agreements between competitors and to 15% for agreements between non-competitors.

The previous Notice had fixed the 'de minimis' thresholds at respectively 5% and 10% market share. The new Notice has raised these thresholds to respectively 10% and 15%. ([1]) Competition concerns can in general not be expected when companies do not have a minimum degree of market power. The new thresholds take account of this while at the same time staying low enough to be applicable whatever the overall market structure looks like. The difference between the two thresholds takes into account, as before, that agreements between competitors in general lead more easily to anti-competitive effects than agreements between non-competitors.

3) The Notice specifies for the first time a market share threshold for networks of agreements producing a cumulative anti-competitive effect.

The previous de minimis Notice excluded from its benefit agreements operated on a market where 'competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers.' This meant in practice that firms operating in sectors like the beer and petrol sector could usually not benefit from the de-minimis Notice. The new Notice introduces a special 'de minimis' market share threshold of 5% for markets where there exist such parallel networks of similar agreements.

4) The Notice contains the same list of hardcore restrictions as in the horizontal and vertical Block Exemption Regulations.

The new Notice defines in a clearer and more consistent way the hardcore restrictions, i.e. those restrictions, such as price fixing and market sharing, which are normally always prohibited irrespective of the market shares of the companies concerned. Hardcore restrictions can not benefit from the de minimis Notice. For agreements between non-competitors the new Notice has taken over the hardcore restrictions set out in Block Exemption Regulation 2790/1999 for vertical agreements. ([2]) For agreements between competitors the new Notice has taken over the hardcore restrictions set out in Block Exemption Regulation 2658/2000 for specialisation agreements. ([3])

In cases covered by the new Notice, the Commission will not institute proceedings either upon application or on its own initiative. Where companies assume in good faith that an agreement is covered by the Notice, the Commission will not impose fines. Although not binding on them, the Notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81.

The new Notice on agreements of minor importance is published in the Official Journal of the Communities, C 368 of 22.12.2001, and is also available on the internet at the following address:

http://europa.eu.int/comm/competition/antitrust/deminimis/

([1]) This does not imply that agreements between companies that exceed the thresholds set out in the Notice do appreciably restrict competition. Such agreements may still have only a negligible effect on competition within the common market, but this can only be assessed on a case-by-case basis. Such assessment is relevant in particular for agreements that are not covered by any of the block exemption regulations of the Commission.

([2]) Commission Block Exemption Regulation 2790/1999, OJ L 336, 29.12.1999, p. 21.

([3]) Commission Block Exemption Regulation 2658/2000, OJ L 304, 5.12.2000, p. 3.

Review of the block exemption Regulation on technology transfer agreements

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While the Block Exemption Regulation n° 240 on transfer of technology (hereafter 'TTBE') is expected to apply until 31 March 2006, Article 12 requires the Commission to carry out regular assessments of the application of this Regulation. To this end, DG Comp has prepared an evaluation report (hereafter the 'Report'), which was adopted by the Commission on the 21 December 2001 ([1]).

The Report provides a critical analysis of the application and the policy approach underpinning the TTBE. It discusses the problems arising in the context of licences of intellectual property rights (hereafter 'IPRs') and acknowledges the complementary role of competition and innovation policies. It also contains a comparison between the competition policy approach to licensing of IPRs in the Community and in the US. It stresses the need to adapt the TTBE to ensure consistency with the new Commission block exemptions concerning distribution agreements ([2]) as well as R&D and specialisation agreements ([3]) that are based on a more economic approach. The Report raises also more specific issues such as the treatment of software licensing agreements and licensing pools which have become increasingly important for the development and dissemination of new technologies.

Licensing agreements represent an important and complex policy area of Community antitrust. In fact, the economic development of the Community and its ability to draw abreast of its competitors in the rest of the world largely depends on the capacity of industry to devise new technologies and to disseminate them at a large scale. Competition is one of the main driving forces of innovation and it is therefore important to find the right balance between protecting competition and protecting intellectual property rights. In its Report the Commission is asking for comments on its competition policy approach to licensing agreements. After discussion on the Report with industry, consumer associations and other interested parties the Commission may propose new competition rules for the application of Article 81 to licensing agreements in the second half of the year 2002.

Basic findings of the Report

Before adopting its Report, the Commission carried out a preliminary fact-finding that has shown that industry would be favourable to a review of the TTBE and insists on the need to proceed with a simplification and clarification of the current rules.

The Report finds that by using criteria relating more to the form of the agreement than the actual effects on the market, the TTBE entails four main shortcomings:

— Firstly, the TTBE is too prescriptive and seems to work as a straitjacket, which may discourage efficient transactions and hamper dissemination of new technologies.

— Secondly, the TTBE only covers certain patent and know-how licensing agreements. This narrow scope of application of the TTBE seems increasingly inadequate to deal with the complexity of modern licensing arrangements (e.g. pooling arrangements, software licenses involving copyright).

— Thirdly, a number of restraints are currently presumed illegal or excluded from the block exemption without a good economic justification. This concerns in particular certain restrictions extending beyond the scope of the licensed IPR (e.g. non-compete obligations, tying). In terms of economic analysis, such restraints may be efficiency enhancing or anti-competitive depending on the competitive relationship between the parties, the market structure and the parties' market power.

— Fourthly, by concentrating on the form of the agreement the TTBE extends the benefit of the block exemption to situations which cannot always be presumed to fulfil the conditions of Article 81(3), either because the contracting

([1]) The Report is published as a COM document with the reference COM(2001) 786 and is also available on the internet at the following address: http://europa.eu.int/comm/competition/antitrust/technology_transfer/

([2]) Commission Block Exemption Regulation 2790/1999, OJ L 336, 29.12.1999, p. 21.

([3]) Commission Block Exemption Regulations 2658/2000 and 2659/2000, OJ L 304, 5.12.2000, p. 3 respectively p.7.

parties are competitors or because they hold a strong position on the market. For instance, the grant of an exclusive license can have serious foreclosure effects when an exclusive license is granted to a dominant producer which prevents other companies gaining access to technology that might foster their market entry.

Some issues for discussion

The Report invites comments on a number of issues:

— Should the scope of the TTBE, which only applies to patents and know-how, be widened to cover also copyright, design rights and trademarks? This issue is of particular importance for a number of sectors including the software industry, which depends upon a chain of copyright licences for manufacture and distribution.

— Should a revised block exemption also cover licensing agreements between more than two companies such as licensing pools? Such arrangements have become increasingly important for industry, given the growing complexity of new technologies. In this respect, it can be observed that multiparty licences may be efficiency enhancing and pro-competitive, in particular where without all the patents contributed to the pool the exploitation of the new technology would not be possible. However, multiparty licenses may also have serious anti-competitive effects, especially when the agreement covers competitive technologies or where it requires the members to grant licences to each other for current and future technology at minimal cost or on an exclusive basis. In such circumstances, multiparty agreements may disguise a cartel, lead to foreclosure or reduce the parties' incentives to engage in R&D thereby delaying innovation.

— Should a revised block exemption adopt a more lenient approach to licensing agreements between non-competitors? Without excluding other possible options, the Report proposes a framework for a future regime where a clear distinction would be made in respect of licensing between competitors and between non-competitors. In fact, it is generally acknowledged that if the parties to an agreement are in a vertical relationship, i.e. are not competitors, exclusive licences are generally efficiency enhancing and pro-competitive. For instance, if the IPR holder does not have the assets for the production or distribution of the licensed products, it is more efficient to license to someone who does have these assets. The exclusivity may be necessary to protect the licensee against free riding on his investments or to create the necessary incentives for both parties to invest in further improvements.

In the light of this, it is proposed that, as far as licensing between non-competitors is concerned, the future block exemption could cover restraints that do relate to the exploitation of the licensed IPR, such as territorial, customer and field of use restraints, subject only to a dominance threshold. Furthermore, it could treat restraints that do not relate to the exploitation of the licensed IPR, such as non-compete and tying, in the same way as Regulation 2790/99. The block exemption would include a limited hardcore list, in particular concerning pricing restrictions and possibly certain territorial restraints. It may also contain conditions which would exclude certain restraints from the coverage of the block exemption (severability). It should be underlined that, for the restraints that do not relate to the exploitation of the licensed IPR (e.g. non-compete obligations, tying), such a treatment would create coherence with Block Exemption Regulation 2790/99.

Compared with the current TTBE, it would mean that certain restraints currently in the black or grey lists would be exempted up to a certain market share threshold. For restraints that relate to the exploitation of the licensed IPR (e.g. exclusive licenses and territorial restraints), the dominance threshold would only apply in case the restrictions fall within Article 81(1) in the first place, for instance in case of foreclosure. Also, a more limited hardcore list would apply so that certain restraints would no longer be per se illegal: this could allow coverage of quantity restrictions, certain customer restrictions and maximum and recommended prices. The hardcore list, while basing itself on Block Exemption Regulation 2790/99, should take account of the specific characteristics of licence agreements.

— Should a future block exemption adopt a more prudent approach to licensing agreements between competitors? Agreements between competitors may give rise to a number of competition concerns if the licence prevents competition that could have taken place between the licensor and the licensee absent the licence. On the one hand, exclusive licences will often lead to market sharing through the allocation of territories or customers, especially when the licence is reciprocal or the exclusivity extends also into non-

licensed competing products. Production quotas agreed in licensing agreements between competitors may easily lead to a straightforward output restriction. On the other hand, under certain conditions, in particular in the case of licensing to a joint venture and in case of non-reciprocal licensing, the exclusivity may not only lead to a loss of inter-brand competition but also to efficiencies. To assess whether the negative effects on competition may be outweighed by the efficiencies, the market power of the parties and the structure of the markets affected by the agreement need to be taken into account.

In the light of this, the Report proposes that, as far as licensing between competitors is concerned, the future block exemption could be limited by a market share threshold of up to 25%. In addition, it would contain a hardcore list for restrictions which directly or indirectly fix prices, limit output or sales, or allocate territories or customers and may have to contain a list of conditions which would exclude certain restraints from the coverage of the block exemption (severability). This would create coherence with Block Exemption Regulation 2659/2000. Compared with the TTBE this would mean a more nuanced approach for pooling arrangements, cross licensing agreements, licence agreements concerning joint ventures and for restraints that do not concern the exploitation of the IPR itself, such as non-compete and tying. These are restrictions which are presently either excluded from the TTBE or blacklisted. It would justifiably provide less protection to territorial restraints between competitors in exclusive licensing agreements.

Above the mentioned thresholds, guidelines would have to clarify competition policy, with appropriate references to the existing Guidelines on Horizontal Co-operation and Guidelines on Vertical Restraints.

Comments on the Report have to be sent to the Commission by 26 April 2002.

Commission confirms its policy line in respect of horizontal agreements on energy efficiency of domestic appliances

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On 14 November 2001, the Competition Directorate-General closed its examination of two agreements concluded under the aegis of and notified by the Conseil Européen de la Construction d'Appareils Domestiques (CECED) ([1]). These agreements aim at improving the energy efficiency of, respectively, household dishwashers and water heaters. In both cases, the agreements are entered into by competing manufacturers accounting for a predominant proportion of sales in the Community and/or the Member States. Following the publication of a notice in the OJ pursuant to Article 19(3) of Regulation 17 ([2]), the cases have been closed by administrative letters.

These cases illustrate the way in which the recent Commission *'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements'* ('the guidelines') are applied in the case of agreements aiming at furthering environmental objectives ([3]). In particular, they show how the benefits for consumers individually concerned may be assessed under Article 81(3) when the agreement triggers general environmental advantages.

The agreements

Water heaters

The agreement between EC manufacturers of domestic electric storage water heaters ('DESWH') ([4]) covers three sets of objectives concerning: (i) production and imports of DESWH; (ii) monitoring and reporting; and (iii) promotion of technological development as well as consumer awareness. The agreement will last until 31.12.2003. The parties have mainly agreed the following:

Production and imports: following an undertaking to provide public declarations stating the standing losses of their DESWH:

— after 31 December 2000 – each party stops producing for and importing into the community DESWH, the standing losses of which, expressed in kWh per 24 hours, exceed the maximum allowable values set forth in the agreement. Such values vary for small (volume of 25 to 45 litres), vertical (45 to 220 litres), horizontal (45 to 220 litres) DESWH ([5]);

— by January 1, 2002 – each party undertakes to reduce the weighted average standing losses of its production to certain thresholds for each of the above categories of DESWH, except vented DESWH in the UK, where these thresholds should be attained by the end of 2002 ([6]).

Monitoring and reporting: CECED will set up and maintain a database containing an analysis of all models of DESWH placed on the community market by all participants. It will be available to the European Commission and national authorities. The fulfilment of the objectives of the agreement will be monitored by a notary who will report annually to CECED and the Commission. Individual data will not be disclosed to other parties, including CECED members.

Consumer awareness and technological advancement: the participants have agreed to enhance consumer and installer awareness about energy savings and to develop insulation and other methods to further reduce standing losses.

([1]) See IP 01/1659 of 26.11.2001

([2]) OJ C 250 of 8.9.2001, p. 2 and 4.

([3]) OJ C 3 of 6.1.2001, p. 3, in particular, chapter 7, 'Environmental Agreements'.

([4]) CECED members and other participants who have signed the agreement on water heaters include Atlantic Group, Baxi Spa, Bosch Siemens Hausgeräte Gmbh, Electrolux Productline Home Comfort/AEG Hausgeräte GmbH/, Fagor Electrodomésticos S.Coop. Heatrae Sadia Heating Ltd., Lorenzi Vasco Spa, Merloni Termosanitary Spa, Siemens Heiztechnik, Société Thermique de Valence, Stiebel Eltron Gmbh & Co KG, Technoterm Gmbh and Joh. Vaillant Gmbh & Co. All of them manufacture and sell various domestic appliances in several Member States.

([5]) The maximum allowable values are as follows : a) small unvented: 0.1474 + 0.0719 x Volume $^{2/3}$, small vented: 0.1561 + 0.0802 x Volume $^{2/3}$, b) vertical unvented: 0.224 + 0.0663 x Volume $^{2/3}$, vertical vented: 0.236 + 0.074 x Volume $^{2/3}$ and c) horizontal unvented: 0.939 + 0.0104 x Volume, horizontal vented: 1.034 + 0.0116 x Volume.

([6]) The thresholds are as follows: a) small: 0.13 + 0.0553 x Volume $^{2/3}$, b) vertical 0.2 + 0.051 x Volume $^{2/3}$ and c) horizontal: 0.75 + 0.008 x Volume.

Dishwashers

The agreement between EC manufacturers of dishwashers ([1]) covers three sets of objectives concerning: (i) production and imports of domestic dishwashers; (ii) monitoring and reporting; and (iii) promotion of technological development as well as consumer awareness. It is open to new participants and remains valid until 31.12.2004. The parties have mainly agreed the following:

Production and imports: pursuant to Commission Directive 97/17/EC ([2]), household dishwashers sold in the EU are classified and labelled according to their energy efficiency. There are seven categories of energy efficiency ranging from A to G. Pursuant to the agreement's main objective of reducing the overall European production weighted average energy consumption of dishwashers by 20% by the year 2002, the participants have agreed to cease producing for and importing into the EC the following categories of dishwashers:

— by 31 December 2000 – (the first step), dishwashers belonging to the energy efficiency classes E, F and G (for dishwashers with more than 10 or just 10 place settings) and F and G for dishwashers with less than 10 place settings.

— by 31 December 2003 – (the second step), dishwashers belonging to the energy efficiency class D (for dishwashers with 10 or more place settings) or E (for dishwashers with less than 10 place settings).

Monitoring and reporting: CECED will set up and maintain a database containing an analysis of all models of dishwashers placed on the EC market by all participants. It will be available to the European Commission and national authorities. The results will be monitored by a notary who will report annually to CECED and to the Commission. Individual data will not be disclosed to other parties, including CECED members.

Consumer awareness and technological advancement: the participants have agreed to educate consumers on the environmentally conscious use of dishwashers, to give more information in operating manuals about ways to save energy and water, to promote technological advancement and to co-operate with national energy authorities on common programmes to promote the efficient use of dishwashers.

Assessment under Article 81 (1)

Both agreements involve producers which, on aggregate, have a major share of sales in the EC or in Member States, namely close to 100% for dishwashers and more than 65% for DESWH. As stressed in the Commission guidelines, market shares, however high, are not a sufficient condition for a horizontal environmental agreement to be automatically caught by Article 81(1) ([3]).

The key criteria for these and similar cases are the proportion of the total sales directly affected by the agreement for the parties as a whole and for each individual party, on the one hand and, on the other hand, the relevance of the product characteristic affected in influencing purchase decisions ([4]). That is, in essence, whether or not the environmental aspect agreed upon is marginal as a product attribute and whether or not the agreement will affect a non negligible amount of products in the relevant market(s) ([5]). For both dishwashers and DESWH, energy efficiency ranks high among the criteria influencing purchase decisions. In both cases as well, around a quarter of the appliances marketed before the agreements were concluded will be affected, i.e. the equivalent of the markets of the United Kingdom, Benelux and Spain combined.

Finally, the economic and commercial relevance of the agreement must be assessed in the light of the individual obligations placed upon each party. In past cases and in the guidelines, the Commission has taken the view that loose commitments to contribute to a sector-wide target may not be restrictive of competition ([6]). However, in the two cases at hand, each manufacturer undertakes individual obligations which appreciably restrict its

([1]) CECED members and other participants who have signed the agreement include Antonio Merloni Spa, Arçelik A.T., Bosch Siemens Hausgeräte GmbH, Brandt SA, Candy Elettrodomestici Srl, Electrolux Holdings Ltd, Fagor Electrodomésticos S.Coop, Gorenje d.d., Merloni Elettrodomestici Spa, Miele & Cie GmbH & Co, SMEG Spa and Whirlpool Europe Srl. All of them manufacture and sell a wide range of domestic appliances under various brands in various Member States.

([2]) Commission Directive 97/17/EC of 16 April 1997, implementing Council Directive 92/75 with regard to energy labelling of household dishwashers, OJ L 118, 7.5.1997, p.1.

([3]) Guidelines, point 184.

([4]) See Commission Decision of 24 January 2000 in case 36 718 CECED, OJ L 187 of 26.7.2000, at points 30 to 37.

([5]) Guidelines, points 186 and 190.

([6]) See cases COMP/37.231 ACEA (IP 98/865 of 16.10.1998), 37.634 JAMA, 37.612 KAMA (IP 99/922 1.12.1999) and 37.775 CEMEP (IP/00/508 of 23.5.2000); see also guidelines, point 185.

freedom to produce and market its products, as they stood prior to the agreement.

Conditions for an exemption under Article 81(3)

In these circumstances, the Commission today and, possibly, national authorities and jurisdictions in the future, must assess whether the conditions for an exemption under Article 81(3) are fulfilled. For both DESWH and dishwashers, the contribution to technical and economic progress is clear. More energy-efficient appliances provide the same levels of service with reduced consumption of energy inputs.

A more difficult question to assess objectively, that is, quantitatively, is whether consumers derive objective benefits from an agreement which reduces externalities which are not, by definition, integrated in the price system and which consumers are relevant for the assessment: either society at large or the individual purchasers of the appliances. In these two cases a major proportion of individual purchasers facing potentially higher purchase costs for more efficient appliances will be likely to recoup such costs in reasonable timeframes during the operation of the appliance.

However, as financial savings depend on electricity prices and frequency of use, it cannot be always guaranteed that every individual purchaser would recoup such costs. This is why it might be appropriate to take into account, for the sake of completeness and secondary to the benefits of individual consumers directly involved, the most defuse benefits which the society at large derives from improved environmental conditions. Although the economic monetarisation of environmental benefits is no exact science, abundant research allows to quantify such benefits, which need to be weighed against the costs of implementation, as stressed in the guidelines ([1]).

In presence of indisputable benefits which would not be obtained otherwise, e.g. if the parties adhered only to a general industry target, and absent elimination of competition as to other key characteristics on which the parties will still compete, such as price, quality advertising and marketing, the conditions for an exemption pursuant to Article 81(3) may thus appear to be fulfilled.

Conclusion

These two cases illustrate, if need be, that environmental protection and environmental agreements do not necessarily conflict with Article 81. A non negligible amount of experience in these and similar cases, complemented by the Commission guidelines in this respect, show that such agreements can be handled in a system of decentralised application of Article 81, provided that the arguments put forward by the parties are objective. In respect of (rebuttable) claims of efficiencies under Article 81(3), environmental agreements do not present greater difficulties than other categories of agreements.

([1]) Guidelines, point 194.

Commission clears the creation of three B2B e-marketplaces: 'Covisint', 'Eutilia' and 'Endorsia'

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Introduction

DG Competition has recently cleared the creation of three new B2B marketplace joint ventures: Covisint (car sector), Eutilia (electricity sector), and Endorsia (industrial goods and services).

B2B marketplaces are Internet-based electronic fora designed to allow business-to-business communications and transactions. Participants can include suppliers, distributors, providers of business services, infrastructure providers and their customers. Such projects are becoming very common ([1]), and have a major impact on the way in which companies do business. In general, they are expected to have major pro-competitive effects. They should create more transparency, thereby helping to link more operators and to integrate markets, and they may also create market efficiencies by reducing search and information costs and improving inventory management, leading ultimately to lower prices for the end consumer.

As with stock exchanges, the liquidity and efficiency of B2B electronic marketplaces will generally increase as the number of users rises, and the pro-competitive effects of such exchanges should also increase as more and more buyers and suppliers are linked to the system. The fact that these exchanges try to sign up as many users as possible therefore does not usually constitute a competition problem in itself.

However, in certain circumstances, negative effects on competition may outweigh market efficiencies. This may in particular be the case where ([2]):

- Users of the exchange are able to exchange or discover market-sensitive information relating to, for example, prices and quantities. Their ability to do so will usually be related to the design of the system, in particular as regards the users' ability to access each other's data.
- Discrimination against certain classes of users leads to foreclosure. Rules concerning the ownership of the marketplace and its operation could be used, for instance, to exclude certain participants from the most efficient marketplace, thereby putting them at a competitive disadvantage. Discrimination issues could arise if shareholders were to have exclusive access to information regarding transactions through the marketplace.
- Users can get together to 'bundle' buying or selling volumes, and can thereby co-ordinate their behaviour. This phenomenon is discussed extensively in the Guidelines on Horizontal Restraints.

The Notified Projects

None of the notified projects involved mergers, since the parent companies did not exercise joint or sole control over the JVs. The agreements therefore fell to be examined under Article 81 rather than under the Merger Regulation.

Covisint

In August 2001, the Commission granted regulatory approval to the creation of **Covisint** ([3]). Covisint was formed by the major motor manufacturers Ford, DaimlerChrysler, General Motors, Renault and Nissan. A sixth carmaker, PSA Peugeot Citroën, later joined the project.

Covisint was the first major B2B exchange to be examined under Article 81, and may therefore potentially serve as a guide for the treatment of other similar projects.

Covisint is a purchaser-managed 'buy-side' exchange, unlike other exchanges such as SupplyOn, which are set up by the sellers of components. The

([1]) A number have already been examined under the competition rules: M.2027 Deutsche Bank/SAP/JV; 38.866 Volbroker; M.1969 UTC/Honeywell/i2/MyAircraft.com; M.2075 Jupiter/M&G/Scudder/JV; M.2138 Siemens/SAP/JV, M.2096 Bayer/Deutsche Telekom/Infraserv Hoechst; M.2172 Babcock Borsig/mg technologies/SAP Markets/ec4ec; M.2270 Babcock Borsig/SAP Markets/ Deusche Bank/VA Tech/ec4ec; M.2398 Linde/Jungheinrich/JV; M.2374 Telenor/Ergogroup/DNB/Accenture/JV

([2]) See Joachim Lücking, "B2b e-marketplaces and EC competition law: where do we stand" in *Competition Policy Newsletter*, October 2001, Number 3.

([3]) See press release IP/01/1155 dated 31 July 2001

carmakers that intend to purchase through the exchange (including Covisint's shareholders) account for about 63% of worldwide car production. Most major suppliers of automotive components have also indicated their willingness to use the marketplace.

Covisint is intended to provide the automotive industry with procurement, collaborative product development and supply chain management tools. Procurement of a variety of goods and services takes place both through on-line auctions and catalogue purchasing. The exchange also has a supply-chain management function. Individual users can «see» the current and future status of materials upstream in their supply chain, and can thereby better manage stock levels and predict capacity constraints, leading to substantial cost savings. Covisint will also allow users located in different parts of the world to work together on-line to design car components, thereby speeding up development times and encouraging innovation.

After examining the notified agreements and the replies received to information requests, the Commission concluded that the agreements contain adequate provisions to eliminate potential competition concerns of the types discussed above. In particular, the agreements showed that Covisint is open to all firms in the industry on a non-discriminatory basis, is based on open standards, allows both shareholders and other users to participate in other B2B exchanges, does not allow joint purchasing between car manufacturers or for automotive-specific products, and provides for adequate data protection, through the use of firewalls and security rules.

Although, since no restriction of competition was found, it was not necessary to come to any conclusions as to the relevant product market definition, the investigation revealed that in the car sector, more traditional procurement methods such as letters, faxes, and telephones are no longer substitutable for modern computerised systems such as B2B exchanges. However, for the time being at least, carmakers can still use Electronic Data Interchange systems (EDI) in parallel with the new B2B technology.

The investigation also revealed that Covisint has the potential to alter the nature of the relationship between the various actors in the automotive supply chain fundamentally. In particular, various interested parties expressed concerns that sophisticated components could become commodities, leading to competition on price alone rather than on specification and quality levels.

For the near future at least, Covisint is likely to be the only B2B exchange satisfying the procurement needs of several different carmakers. It is therefore possible that at some point in the future the Commission will be called upon to analyse the exchange under Article 82 of the Treaty.

Eutilia

On 26 February 2001, the Commission received a notification relating to the setting up of a joint venture known as **Eutilia.** The new company will run a business to business marketplace providing services for the procurement of goods for electricity utilities.

The parent companies, eleven major European electricity companies ([1]), will each hold between 8.5% and 9.8% of Eutilia's shares.

Eutilia will offer auctions, catalogue purchasing, off-catalogue purchasing, buy/sell enquiries and supplier database services. It may subsequently expand the range of its activities by offering various transaction support services (e.g. financial services), supply chain integration services and hosting services. It will initially focus on the procurement of goods and services to utilities in the electricity sector but hopes to broaden its focus to goods and services for other utilities thereafter.

The notifying parties estimate that Eutilia will allow users (buyers and suppliers) to reduce transaction costs by 20/25-50% (based on efficiency gains being realised in other B2B ventures).

The Commission concluded that there will be no restriction of competition as regards services provided at the marketplace level for the following reasons: (i) the notifying parties are not active in the same market as the JV, (ii) the JV itself does not restrict or distort competition, but rather is pro-competitive in that it will create significant cost efficiency benefits for users; (iii) the JV will face significant competition from a variety of procurement methods such as traditional methods (telephone, fax, etc), own company buy sites and competing marketplaces ([2]); (iv) barriers to entry in e-commerce are very low; (v) there will be no exclusivity or minimum use requirements.

Similarly, the JV has been structured to ensure that there will be no restriction of competition on the

([1]) Electrabel SA, Electricité de France, Endesa Net Factory SL, Enel SPA, Iberdrola, National Grid Holdings Limited , NV Nuon , RWE Systems AG, Scottish Power UK PLC, United Utilities BV and Vattenfall AB

([2]) Achilles and Elettroclick are other platforms in the same sector.

downstream markets. There will be open access to the marketplace, and appropriate protection of confidential information. Moreover, the JV will not act as a buying club but as an intermediary.

Endorsia

The B2B marketplace **Endorsia**, a non-co-operative joint venture notified to the Commission on 5 March 2001, involves five manufacturers ([1]) of machines and industry components, which will each acquire a 20% interest in the JV company.

Endorsia will support the buying and selling requirements of various manufacturers, distributors and end-users for branded industrial goods and services. Suppliers will be able to connect to customers and customers to their suppliers by using one single electronic interface. Endorsia itself does not engage in any buying or selling activities. Each of the sellers will maintain their own separate "storefronts", deciding, for example, their own selling and customer access rules, terms and conditions of sale, shipping policy and pricing. Thus, Endorsia will serve as a conduit between individual sellers and their customers.

The Commission's examination revealed there to be no significant barriers to entry on the market for the provision of sales support services for industrial products. Each participant will be free to participate in other B2B e-commerce ventures or to establish its own. New manufacturers that meet objective criteria such as financial stability or depth and breadth of product lines will have open access to the marketplace.

Endorsia has also established appropriate firewalls and procedures to prevent the exchange of commercially sensitive information among the companies transacting business on the website. Endorsia will not itself be involved in buying or selling activities.

Outcome

In each of the three cases, the Commission concluded that the project as notified did not currently restrict competition in the sense of Article 81(1) of the EC Treaty, and sent the parties a comfort letter to this effect.

([1]) Aktiebolaget SKF, Reliance Electric Industrial Company, The Timken Corporation, Industriewerk Schaeffler INA-Ingenieurdienst GmbH and Sandvik Finance B.V.

The fourth prohibition decision in the area of car distribution in four years: This time it's Mercedes' turn

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Introduction

The Commission decided on 10 October 2001 to impose a fine of EUR 71.825 million on Daimler Chrysler AG for three types of infringements of Article 81 of the EC Treaty in the area of car distribution. ([1]) The decision concerns measures adopted by DaimlerChrysler in order to impede parallel trade in cars and limit competition in the leasing and sale of motor vehicles. This is the fourth Commission decision imposing a fine against a car manufacturer that does not respect EC competition rules. ([2])

The Commission started the investigation concerning the distribution of motor vehicles of the Mercedes-Benz make after receiving complaints from consumers about restrictions on the export of new cars in various Member States. Inspections were carried out in undertakings in Germany, Belgium, the Netherlands and Spain. Daimler Chrysler AG is the parent company of the group that manufactures and distributes Mercedes cars. The Mercedes-Benz make holds a particularly strong position in the market segments for executive cars and for luxury cars.

Obstacles to parallel trade

The first infringement of the EC competition rules consisted of measures by DaimlerChrysler that constitute obstacles to parallel trade in the form of export restrictions from Germany. In this Member State, the undertaking sells cars via wholly-owned branches and via agents. The destination of the parallel exports was mainly Belgium.

The export restrictions were twofold. Firstly, the undertaking instructed the members of its German distribution network for Mercedes passenger cars, in particular via circular letters, not to sell cars outside their respective territory. In order to reinforce this measure, DaimlerChrysler warned them that it would reduce deliveries of new E-class cars where it found that the demand in any distributor's market area did not fully absorb the new cars allocated to the distributor. In a further circular letter, DaimlerChrysler informed its German distributors that it would now reduce the supplies of new E-class cars to its network. It also announced to repeat this measure for other models if the parallel exports from Germany to Belgium did not decrease.

Secondly, due to an instruction of Daimler Chrysler to its distributors foreign consumers were obliged to pay a deposit of 15% to Daimler Chrysler when ordering a car in Germany. This was not the case for German consumers, even though they might have been in a similar situation, for instance, being unknown to the seller, ordering a car with particular specifications, or living far away from the seller.

Although 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 ([3]) foresees in Article 3 point 10 a) that a car manufacturer can prohibit sales to independent ('grey') resellers ([4]), the measures adopted by Daimler Chrysler in Germany did not focus only on these grey exports, but were directed against all, including permissible, parallel exports to final consumers in other Member States.

The application of Article 81 on restrictions of competition agreed with agents

In principle, Article 81 is not applicable to restrictions agreed between an undertaking and its

([1]) See Commission Press Release IP/01/1394 of 10.10.2001.

([2]) Commission Decision of 28.1.1998 (Case IV/35.733 – VW, OJ L 124, 25.4.1998, p. 60); Commission Decision of 20.9.2000 (Case COMP/36.653 – Opel, OJ L 59, 28.2.2001, p. 1); Commission Decision of 29.6.2001 (Case COMP/36.693 – Volkswagen, OJ L 262, 2.10.2001, p. 14).

([3]) OJ L 145, 29.6.1995, p. 25. This regulation will expire on 30.9.2002. The Commission adopted an evaluation report on the application of this regulation on 15.11.2000. This report is available on the website of DG Competition of the Commission: http://europa.eu.int/comm/competition/car_sector/distribution/eval_reg_1475_95/report/

([4]) In a system of selective distribution, dealers are only authorised to sell to dealers of the same network or to final consumers (or their intermediaries), but not to independent resellers.

commercial agents. As commercial agents exercise an economic activity, they have to be considered as undertakings within the meaning of the EC competition rules. But due to the fact that they act on behalf of another undertaking, they operate as auxiliary organs forming an integral part of the principal's undertaking. The restrictions contained in agreements between the principal and its commercial agents are, therefore, in general not considered as restrictions of competition within the meaning of Article 81.

But in the present case, the application of Article 81 to the restrictions agreed between Daimler Chrysler and its German agents results from the fact that these agents have to bear considerable financial and commercial risks linked to their activity. From the point of view of EC competition law, they had, therefore, to be treated not as commercial agents but as dealers.

This result is based on the case-law of the Court of Justice. ([1]) It is also in line with the Commission Guidelines on vertical restraints ([2]) that explain the criteria for a commercial agent to be submitted or not to Article 81: According to these guidelines, the determining factor in assessing whether Article 81(1) applies to the activity of a commercial agent is whether or not the agent has to bear a financial or commercial risk linked to the sale of goods or services he is involved in.

Sales of cars to leasing companies

In a second infringement of the competition rules, DaimlerChrysler limited the sales of cars by Mercedes agents in Germany and Mercedes dealers in Spain to independent leasing companies as long as these companies had not yet found customers ('lessees') for the cars concerned. A clause to this effect was included in the contracts with these dealers and agents. Consequently, the undertaking restricted the competition between its own leasing companies and independent leasing companies because the latter were not able to put cars on stock or benefit from rebates which are granted to fleet owners. Consequently, the independent leasing companies were not able to pass on such favourable conditions, in particular concerning the price and availability of cars, to their clients. The behaviour of DaimlerChrysler aimed at avoiding that independent leasing companies would offer leasing rates that undercut those which the leasing companies belonging to DaimlerChrysler were prepared to offer.

It is important to note that sales of Mercedes cars to leasing companies represent a substantial part of all sales of these cars. According to Article 10 point 12 of Regulation No 1475/95, leasing companies have to be treated in the same way as final customers as long as the leasing contract does not provide for a transfer of ownership of the motor vehicle or an option to purchase prior to the expiry of the contract. Distributors are, therefore, completely free to sell new cars to independent leasing companies.

Price fixing

As a third infringement, DaimlerChrysler participated in a price fixing agreement in Belgium with the aim of limiting the rebates granted to consumers by its subsidiary Mercedes Belgium – which is the importer of Mercedes cars in this Member State and sells them not only to dealers but also directly to final consumers – and the other Belgian Mercedes dealers. A 'ghost shopper' investigated the sales policies of the dealers, and DaimlerChrysler agreed to enforce the agreement by reducing the supply with cars to dealers that granted higher rebates than the 3% that had been agreed. This amounts to resale price maintenance, a practice that was already prohibited by the Commission in June 2001 in the Volkswagen Decision. Also under the general regime for vertical restraints, as it stands in 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 ([3]) and is applicable in other economic sectors than motor vehicles, price fixing is considered as a hardcore restriction of competition.

Article 81 and the block exemption regulation for motor vehicle distribution

The described measures adopted by Daimler Chrysler infringe the provisions of Article 81(1), which prohibits all agreements between undertakings which may affect trade between Member States, and which have as their object or effect the

([1]) See Case C-266/93 *Bundeskartellamt* v *Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, paragraph 19.

([2]) OJ C 291, 13.10.2000, p. 1. It is noted that these Guidelines are not applicable in this case as the infringement predates them. Paragraphs 12 to 20 of the Guidelines replace the Notice on exclusive dealing contracts with commercial agents of 1962 (OJ 139, 24.12.1962, p. 2921/62).

([3]) OJ L 336, 29.12.1999, p. 21.

prevention, restriction or distortion of competition within the Single Market.

Moreover, Regulation No 1475/95 prohibits car manufacturers and their importers from restricting, either directly or indirectly, the freedom of final consumers to buy new motor vehicles in the Member State of their choice. It therefore assures that European consumers have the option of buying a car wherever it is most advantageous to them, provided that they find a dealer willing to sell to them. The regulation furthermore states that the freedom of dealers to determine prices and discounts in reselling to final consumers must not be restricted. This means that the sales prices and conditions must not be fixed by the manufacturer. They have to be determined independently by each individual dealer.

These restrictions of competition are restrictions by object as they have the direct purpose of restricting competition between dealers in the sale or leasing of new cars. In the case of the first and third infringement, they concern directly the intra-brand competition among dealers of Mercedes cars. The second infringement, limiting supplies to leasing companies, restricts the competition on prices and delivery conditions for leasing companies and concerns also the competition between these companies in selling their services.

The fine

In accordance with the Commission Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ([1]), the total amount of the fine had to take into account the gravity of each of the three infringements and the duration of each one. In addition, the fine had to have also a sufficiently deterrent effect on DaimlerChrysler and other companies.

The first infringement, the obstruction of parallel trade, is very serious because it is directly jeopardising the proper functioning of the Single Market by partitioning national markets. This qualification is in line with the case-law of the Court of First Instance that identified restrictions to parallel trade as an infringement designed to partition the markets that is 'by its very nature particularly serious. It frustrates the most fundamental aims of the Community, particularly the attainment of a single market'. ([2]) It constituted an infringement of long duration. The restrictions imposed on the sale of cars to leasing companies were qualified as a serious infringement of medium duration. Finally, the resale price maintenance, which is by its nature a very serious infringement, was also qualified as serious because of specific circumstances in this case. ([3]) This infringement was of medium duration.

Conclusion

This case shows once more that car manufacturers do not always respect the current regulatory regime, to the detriment of the European consumers. On the one hand, it includes infringements of EC competition rules that were already the subject of earlier prohibition decisions in the area of car distribution (obstacles to parallel trade constituted infringements in the VW Decision of 1998 and in the Opel Decision of 2000, price fixing was identified as a violation of Article 81 in the Volkswagen Decision of 2001). The Commission services are still investigating possible cases against other car manufacturers that might lead to similar findings.

([1]) OJ C 9, 14.1.1998, p. 3.

([2]) Case T-62/98 *Volkswagen AG* v *Commission* [2000] ECR II-2707, paragraph 336.

([3]) This qualification is in line with the Commission Decision of 29.6.2001 against Volkswagen.

Commission publishes a study on the future of motor vehicle distribution

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Car Distribution at EC level is currently regulated by Block Exemption Regulation 1475/95, which expires on 30 September 2002. On 15 November 2000, the Commission adopted an evaluation report ([1]) on the Block Exemption, as required by the regulation. That report concluded that the 1995 Block Exemption has only achieved some of the aims that the Commission had in mind when it renewed its permission to use selective and exclusive distribution networks for the distribution of motor vehicles. It would also seem that some of the assumptions upon which the regulation was based are now questionable. All interested parties provided written comments on the report.

Following the adoption of the evaluation report, a hearing was held on 13 and 14 February 2001 to give all interested parties the opportunity to present their views orally on the current car distribution regime ([2]).

In the context of the reflections on a future regime for motor vehicle distribution, it was considered essential to determine the consequences on the market of any possible legislative change.

After a public tender, the Commission asked an independent consultant, Andersen, to analyse the economic impact of the implementation of five different legislative scenarios for motor vehicle distribution, using the current system as a benchmark ([3]). The study should also examine several specific issues, which are considered to be variables that may influence each scenario. Andersen has carried out its analysis with regard to the findings of the evaluation report on Regulation 1475/95 and the comments received on those findings.

The five legislative scenarios analysed are:

1. A system in which independent car distributors have the right to purchase new vehicles from manufacturers or their official distribution networks (the so-called 'free for all' scenario).
2. An exclusive distribution system in which the manufacturer agrees to sell new vehicles only to a single distributor within a well-defined territory.
3. A selective distribution system based only on qualitative criteria.
4. A selective distribution system based on qualitative and quantitative criteria, with no territorial exclusivity.
5. A selective distribution system based on qualitative and quantitative criteria with limited territorial exclusivity in which active and passive sales in other territories are unrestrained.

The specific issues that may influence each scenario are: the link between sales of new motor vehicles and after-sales services, multi-branding for sales and after-sales services, access to technical information for independent repairers, distribution of original spare parts, dealer remuneration, allocation of vehicles (and particularly the 'first come first served' principle), direct sales by manufacturers, the role of intermediaries, and the availability clause ([4]).

The in-depth report that resulted from this study, for which an executive summary is available, will allow the Commission to obtain the information that it needs to assess the economic effects that several alternative legislative regimes may have on the competitive structure of the market and particularly on all current market players, on new entrants (or would-be entrants) and on consumers. The study analyses the impact on four areas of competition: competition between different makes, competition between players representing the same make, competition in after-sales servicing and European market integration. ([5])

This study is the third one carried out for the Commission in the field of car distribution. The two previous studies are the study on car price differentials, by consultants K.U. Leuven and

([1]) See also press release IP/00/1306, 15.11.2000. The evaluation report can be consulted on the «car sector» page of the Directorate General Competition website: http://europa.eu.int/comm/competition/car_sector/distribution/eval_reg_1475_95/report/#studies

([2]) See also press release IP/01/204, 14.2.2001. The presentations of all participants to the hearing can be consulted on the same above-mentioned website.

([3]) The terms of reference of the study can be consulted on the same above mentioned website.

([4]) The availability clause in the current block exemption forces car manufacturers to supply their dealers with corresponding models of the dealer's current product range (for exemple, right hand drive cars on the Continent for British consumers.)

([5]) The study can be consulted on the Directorate-general for Competition website at: http://europa.eu.int/comm/competition/car_sector/distribution

C.E.P.R., and the paper on the link between sales and after-sales by the consultancy firm Autopolis ([1]).

The study does not contain any element that would amount to a proposal for any future regime. This condition was a pre-requisite for the study and was set out in the terms of reference. The study reflects the views of its authors. It has not been approved by the Commission and should not therefore be perceived as a Commission statement.

This study should not be confused with another economic impact study, commissioned from Accenture by ACEA (the European motor vehicle association), that was made public by ACEA at the end of September 2001.

Although Accenture and Andersen both arose out of the break-up of the former Arthur Andersen Consulting, there are no links between the two companies, which are fully independent from each other.

([1]) http://europa.eu.int/comm/competition/car_sector/distribution/eval_reg_1475_95/report/

Commission exceptionally orders the licensing of a copyright to safeguard competition in the German pharmaceutical sales reports market

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1. Introduction

On 3 July 2001 the Commission adopted an interim measures Decision finding that IMS Health ([1]), a US company selling pharmaceutical sales reports, had infringed Article 82. IMS had refused to grant licences to a 'brick structure', a copyrighted map dividing Germany into 1 860 segments used to present the data which form the reports. The Commission found that in the exceptional circumstances of the case, it was not possible to compete to sell such sales reports without using this structure.

Given the likelihood that IMS would gain a lasting monopoly on the German market without urgent action, the Commission considered that the only possible remedy was to order IMS to licence this copyright to its competitors, NDC Health ([2]) and AzyX ([3]).

On 26 October 2001 the President of the Court of First Instance (CFI) suspended the Decision. He considered that there was a 'serious dispute' regarding the reasoning underlying the Decision, although a full examination of this reasoning could only be made by the CFI in the appeal case. The President felt that the Decision might cause IMS serious damage which would go beyond the harm intrinsic to interim measures, and doubted if NDC and AzyX would be expelled from the market if the Decision were suspended.

2. Pharmaceutical sales reports

Pharmaceutical companies need to assess the sales of their products on a local basis, principally to measure the effectiveness of their sales representatives. To meet these needs, companies such as IMS collect raw data on sales by pharmaceutical wholesalers to pharmacists (as a proxy for pharmacists' own sales) and process them to create reports analysing drug sales, and describing trends.

To create the reports, raw sales data is grouped to show sales to pharmacies in small geographic areas – 'bricks'–- which are made up of one or more postcode areas. Each brick contains at least 4 pharmacies, for data protection law reasons. The map showing which postcode is in which brick is called a brick structure. Once formatted in this structure, analyses are carried out on the data, according to the customer's needs. Other features which differentiate the reports are e.g. the speed, frequency and means of delivery of the data, its quality, the means of classifying drugs and whether they drugs returned to the wholesaler and cost rebates are shown.

3. The complaint

On 19 December 2000, NDC, also a US company, complained to the Commission that IMS abused its dominant position when several weeks earlier it had refused to grant NDC a licence to its copyright in the 1860 structure. This copyright had been recognised in the Frankfurt Courts (though this is under appeal), and all use of the structure and derivatives without IMS' permission was prohibited. NDC then asked the Commission for interim measures, namely to order IMS to grant it a licence to the 1860 brick structure and derivatives on commercially reasonable terms. NDC said that IMS' refusal to licence meant no other firm could compete with IMS in Germany.

4. Effect of IMS' refusal to licence

The Commission defined the relevant market as that for German regional sales data services. Market share information showed IMS to be in a quasi-monopoly position and so clearly dominant. The Commission first considered whether there was a *prima facie* breach of Article 82, the standard required for interim measures.

([1]) Intercontinental Marketing Services Health Inc.
([2]) National Data Corporation Health Information Services
([3]) AzyX Deutschland GmbH Geopharma Information Services

Obstacles to marketing alternative structures

The Commission first considered whether other firms could in practice use - instead of the 1860 structure or a compatible structure - another structure which would not infringe IMS' copyright. This depends in part whether there is a real possibility for customers of regional sales data to buy data formatted in another structure. To ascertain this, the Commission asked 110 customers (the pharmaceutical companies) for information. These firms accounted for 56% of drug sales in Germany.

The result was that the vast majority of respondents consider the 1860 brick structure (or compatible ones) to be an industry standard, and would not consider receiving sales data in another structure. The pharmaceutical companies had become 'locked in' to this structure to such an extent that to buy sales data in a structure incompatible with it, whilst theoretically possible, would be unviable economically. A major consideration was that the pharmaceutical companies themselves, through a working group which represented the industry as a whole, had played a key role over the last 30 years in designing the 1860 structure so that now it meets their needs exactly. It is worth noting that since IMS' 30-year monopoly in Germany ended, prices of sales reports have fallen significantly.

Other key reasons why receiving data in another structure was unviable were as follows: First, the costs of modifying the many computer applications based on the 1860 structure would be significant. Second, other information with which sales data is usually integrated, and sales data for earlier time periods (used to spot trends), are generally only available in the 1860 structure. Third, since sales territories are based on bricks in a structure, a change in structure would imply breaking some doctor-sales rep relationships, which are very valuable to pharmaceutical companies. The Commission's interim conclusion was that the costs of switching from the 1860 structure to buy reports presented in an alternative structure would be unacceptably high, and so a very significant obstacle to their doing so.

Obstacles to creating alternative structures

The Commission also found that there were technical and legal constraints which made it, at the least, unreasonably difficult to create another structure in which regional data services could be presented and marketed in Germany. The information needed to create brick structures, such as doctors' addresses, is publicly available, so in theory many structures are possible. However, the need to, for example, create bricks from postcode areas, to respect data protection law, made it impossible to create a structure in which regional sales data services could be marketed.

In addition, any structures even broadly similar to the 1860 structure would be seen by pharmaceutical companies as being legally uncertain, because of possible copyright challenges by IMS, and so could not be used. This uncertainty affects NDC and AzyX's sales of data services very badly. This is widely perceived in the industry as being a problem – in April 2001 17 German drug companies wrote to IMS asking it to licence the 1860 structure, to allow competition in the market.

The Commission also noted that previous attempts by NDC and AzyX to create alternative structures failed. Both companies found that only in a small number of cases could the bricks in these 'alternative' structures not be aggregated to form the 1860 structure, which would make them subject to legal uncertainty.

No objective justification for the refusal

The reasons given for IMS' refusal to licence NDC were that NDC had infringed IMS' copyright and was still contesting the copyright's validity, that the sum NDC offered for a licence was nominal, and that there were criminal allegations against NDC employees for theft of information from IMS. The Commission concluded that these reasons, and those given to AzyX in response to its licence request of 23 April 2001, were incapable of objective justification.

Conclusion

The Commission considered the above findings against the conditions of the European Courts ([1]) for conduct relating to the exercise of a property right being an abuse of a dominant position, namely when:

— the refusal of access to the facility is likely to eliminate all competition in the relevant market;

— the facility itself is indispensable to carrying on business, inasmuch as there is no actual or

([1]) Particularly in the *Magill*, *Ladbroke* and *Bronner* judgements (respectively, Joined Cases 76, 77 and 91/89 R *RTE and Others* v *Commission* [1989] ECR I-1141 ("*Magill*") ; Case T-504/93 [1997] ECR II-923 ; and Case C-7/97 [1998] ECR I-7791). The three criteria listed are from *Bronner*.

potential substitute in existence for that facility; and

— such refusal is not capable of being objectively justified.

Overall, the Commission found a *prima facie* case that use of the 1860 brick structure was indispensable to compete on the German market, and that IMS' unjustified refusal to licence it was likely to exclude all competition from this market, and was an abuse contrary to Article 82.

5. The need for interim measures

Case-law of the European Courts regarding interim measures shows that taking such measures requires a reasonably strong *prima facie* case establishing an infringement; a likelihood of serious and irreparable harm to those applying for interim relief, or intolerable damage to the public interest, unless measures are ordered; and an urgent need for protective measures.

The Commission considered that the facts showed that without a licence NDC's German operation would go out of business. As a result of IMS' behaviour NDC had lost many supply contracts and was making unsustainably large losses in Germany. Without a licence to restore legal certainty to its offerings, it risked defaulting on its current contracts, and in any event losing these customers when the contracts expired. AzyX is much smaller than NDC and even more susceptible to going out of business without a licence. Moreover, the present situation risks the complete foreclosure of the market for the foreseeable future, which was likely to lead to intolerable damage to the public interest. The Commission therefore concluded that an urgent need to prevent serious and irreparable harm also existed, hence interim measures were required.

6. The remedy

The pressing need was to maintain the competition *status quo* by permitting NDC and AzyX to continue to compete on the relevant market. The Commission therefore obliged IMS to licence the 1860 brick structure on a non-discriminatory basis to these firms, for a reasonable fee. To ensure that this happened rapidly, the Commission set the parties deadlines to reach amicable agreements on a fee. Failing that, the fee was to be set in a Commission Decision following a report by independent experts.

7. Suspension of the Decision by the President of the Court of First Instance

On 6 August 2001 IMS lodged an appeal against the Decision, and asked for it to be suspended. After the President of the CFI had provisionally suspended the Decision on 10 August 2001 ([1]), he gave an Order on 26 October ([2]) definitively suspending the Decision until the appeal against it had been decided. In the Order, the President first stated that examining the questions raised by the Decision in detail was well beyond the scope of the suspension proceedings and could only be done in the appeal to the CFI. However, he did consider that a 'serious dispute' existed regarding the correctness of the Commission's view that a refusal to licence by a dominant firm did not have to prevent the emergence of a new product in order to be abusive. For this reason, the President considered that IMS had established a *prima facie* case against the Decision.

On the second criterion for ordering suspension, urgency, the President found that reducing a copyright to merely the right to receive royalties is, in principle, likely to cause potentially serious and irreparable harm to the rightholder. He considered it possible that if the Decision were implemented but were later annulled, pharmaceutical companies would, having become used to having three providers of sales reports on the market, avoid a return to an IMS monopoly by accepting data in a non-1860 compatible format. The harm IMS would suffer would therefore exceed the inevitable short-term disadvantages inherent in an interim measures Decision.

Third, the President found the balance of interests to be in IMS' favour. He stated there was a 'clear public interest' underlying IMS' efforts to enforce and profit from its copyright, and did not consider that the risk of NDC going out of business to be significantly greater than that faced by NDC for not having a licence (with respect to AzyX, the President noted that it was not prevented from competing on the relevant market). The President also gave weight to the fact that the Decision would have no impact on the final consumers of pharmaceutical products.

On 12 December 2001 NDC appealed this Order to the President of the ECJ ([3]), and a ruling from the President is anticipated in Spring 2002.

([1]) Order T-184/01 R 1
([2]) T-184/01 R 2
([3]) Case C-481/01 P (R)

8. Further developments

Finally, on 22 October 2001 the ECJ began proceedings ([1]) in response to a reference for a preliminary ruling from the Frankfurt Court in a case between NDC and IMS relating to the existence of copyright in the 1860 brick structure. The questions referred by the Frankfurt Court relate to issues in the Decision's legal argument. Overall, one can state confidently that this case is far from an overall conclusion.

([1]) Case C-418/01

Green Paper on the Review of the Merger Regulation

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On 11 December 2001, the Commission adopted a Green Paper on the Review of Council Regulation (EEC) No 4064/89, the Merger Regulation. The Paper calls for views on how the effectiveness of the legal framework for EU merger control might be improved, better adapting it to the realities of a globalising economy, against the backdrop of an enlarging and increasingly integrated Community.

The ambition of the review

The Merger Regulation foresees a regular review of certain of its provisions, notably those concerning the scope of the Commission's competence in merger control ([1]). In undertaking the current review, however, the Commission has taken the opportunity to look beyond mere adjustments in jurisdictional matters, and to make a more comprehensive and forward-looking examination of the functioning of the Regulation as a whole.

It must be underlined that the revision proposals build on the Commission's experience in applying the Merger Regulation over more than 11 years. Notwithstanding what is generally regarded as a positive track-record, there is some scope for improving the Regulation's effectiveness, and for better adapting it to the economic realities of today. Accordingly, the review is pursuing a twofold objective:

(i) to consolidate the successful features of the EU merger control system, notably its tight deadlines and transparency;

(ii) to ensure the continuing effectiveness of the Regulation as an instrument of merger control in an internationally globalising business environment and, more importantly, in an enlarged EU with an increasing degree of market and monetary integration.

The Merger Regulation's record so far – some scope for improvement

Economic globalisation, the dismantling of internal frontiers, as well as monetary and financial integration, have strongly contributed to a process of corporate reorganisation in Europe. The Merger Regulation has, since its entry into force in 1990, successfully underpinned this process. The merger control system ensures that the process of corporate reorganisation will not result in lasting damage to competition between enterprises, and that consumers should share in the resulting economic benefits. At the same time, by maintaining a competitive environment in their home markets, effective merger control contributes to enhancing the competitiveness of European companies worldwide.

The number of concentrations notified to the Commission has increased spectacularly during the 1990's, to the point where the Commission now annually reviews more than five times as many cases as in the early years. Only a limited proportion of all notified transactions requires intervention by the Commission. Outright prohibitions are relatively rare: the total of 18 such prohibitions since 1990 represents just under 1% (0.9%) of all notified transactions. Although there has been some variation over the years, the 'prohibition rate' has remained relatively consistent, reaching a peak in 1996 of 2.3%. The five prohibition decisions taken in 2001 represented around 1.5% of the year's notifications, whereas the equivalent statistic for 2000 was 0.6%.

The 'intervention rate', extended to include not just prohibitions but also transactions in which remedies were accepted before clearance at the end of an in-depth ('phase 2') investigation, comes to some 3.8%, a rate which has likewise remained stable over the years ([2]). If one then adds clearances conditional on the acceptance of remedies in »phase 1" to the latter figure, the total rate of intervention since the Merger Regulation entered into force comes to some 7.2%. Looking at individual

([1]) In its Report of 28 June 2000 to the Council on the application of the Merger Regulation thresholds, the Commission concluded that there were strong indications that the existing thresholds should be revised, so as to better cover all concentrations with a Community interest. It moreover set out a number of other jurisdictional, substantive and procedural issues that would merit a more in-depth discussion (see COM(2000) 399 final – 28.06.2000).

([2]) In 2001, it was 4.5%.

years, the annual total intervention rate has remained within ± 2% of this total figure, except in 1992 (when it reached 11.7%) and in 2000 (when it reached 12.2%). In 2001, the total rate of intervention amounted to 8.4% ([1]).

The above statistics confirm the need for an effective Merger Regulation, and for it to be rigorously applied to prevent or rectify the small number of transactions that would otherwise harm European consumers, is as present as ever. As for the many harmless cases that are caught by its thresholds, the ambition must be to simplify the procedures as far as possible. These are the principal objectives of the current reform process.

On the international front, the increasing globalisation of markets has led to a marked increase in the number and scale of large transnational mergers, with the result that such transactions have often to be scrutinised by numerous competition agencies worldwide. The Commission is very conscious of this trend, and has succeeded – over the past ten years – in building a close relationship with foreign competition authorities (and notably with the US antitrust agencies), regarding the treatment of such proposed mergers. Likewise, the Commission recognises the importance of ensuring international convergence in the competition analysis of the effects of these transactions, to the greatest extent possible within the scope of different jurisdictions' respective legal frameworks. In this regard, the Green Paper sets out some possibilities for facilitating such co-operation and convergence.

The proposals

The Green Paper addresses issues of jurisdiction, substance and procedure. In certain areas, the paper puts forward concrete proposals whereas, in others, it simply outlines the issues and welcomes contributions. In all cases, the objective of the paper is to launch a wide debate.

I. A simple and flexible system of case allocation between the Commission and Member States

The system for allocating cases between the Commission and competent national authorities is central to the review exercise. The Merger Regulation provides for the exclusive competence of the Commission to deal with concentrations that have a 'Community dimension' (Article 1 of the Regulation). It provides a 'one-stop-shop' within the European Union for the examination and control of such concentrations, which – as a result – no longer have to be cleared at the national level. A corrective mechanism is also foreseen allowing, in the spirit of subsidiarity, cases to be referred, from the Commission back to Member States at the request of the latter, or from Member States to the Commission (Articles 9 and 22 of the Regulation).

Ensuring that mergers with a Community interest are dealt with by the Commission

Surveys conducted by the Commission have revealed that the 'one-stop-shop' model, at least in recent years, is not being applied as widely as it could. Roughly 10% of cases treated at national level throughout the EU are the subject of notification in two or more national jurisdictions. Such 'multiple filings' generally entail additional costs and delays for merging companies, and may result in an inefficient employment of resources, both by the companies and the authorities concerned. More significantly, the fact that several EU jurisdictions must deal in parallel with a single case may indicate that concentrations with a Community interest may be escaping the exclusive jurisdiction of the Commission.

The review proposed in this paper should be seen as more than a mere technical revision of the current jurisdictional criteria. The forthcoming enlargement of the EU makes a discussion of these issues both topical and urgent, as the case allocation system within the EU needs to be re-balanced in order to ensure, also in an enlarged Community, a proper and efficient application of the subsidiarity principle.

In a nutshell, what the Green Paper proposes is a considerable simplification of the provisions on jurisdictional thresholds, safeguarding a level playing field for merger control in Europe. Of the existing set of jurisdictional thresholds, it is proposed to maintain the basic provision laid down in Article 1 (2) of the Merger Regulation which attributes to the Commission's jurisdiction cases which fulfil certain world- and EU-wide turnover thresholds and other criteria. For the remaining cases, it is proposed to replace the test in Article 1(3), the provision which was introduced in 1997

([1]) None of these 'intervention rate' figures extend to withdrawals of merger notifications, as such withdrawals are very often not attributable to the identification of competition concerns by the Commission. For the sake of completeness, however, the total rate of withdrawals since 1990 (as a percentage of all filings) amounts to some 3.6%, of which 2.9% occurred during phase 1 investigations and 0.7% during phase 2 investigations.

in an attempt to stem the growth in multi-jurisdictional filings in the EU, by providing for automatic Commission competence whenever it is certified that a merger would fall under the jurisdiction of at least three Member States.

Simplifying work-sharing with national authorities

The Green Paper also proposes simplifying the requirements that must be fulfilled before the Commission can refer a case to a national jurisdiction for treatment. This would mean allowing cases whose effects do not, de-facto, extend beyond national borders, but which nonetheless fall under Commission jurisdiction, to be more readily referred to Member States. It is expected that such simplification would also expedite procedures. Similar amendments are suggested in order to facilitate the referral of cases in the opposite direction, from one or more national jurisdictions to the Commission. Despite simplification of the system, it is envisaged that the Commission would maintain discretion in the process, and it is even proposed that it could refer cases to national jurisdictions on its own initiative and without a specific request by Member States in this respect.

The guiding criterion for designing and implementing these amendments in the future must be the guarantee that the authority best placed to carry out the investigation should deal with the case. Where appropriate, this would allow Community interests to be taken into account in the assessment of mergers. The system should guarantee that cases with a significant impact beyond national borders, in terms of the type of markets they affect or the type of barriers to entry they raise, should be dealt with by the Commission.

The Regulation's definition of 'a concentration'

The Green Paper also explores a number of potential adjustments to the concept of a concentration, as defined in the Merger Regulation. In particular, it raises questions about the applicability of the Merger Regulation to acquisitions of minority shareholdings, to strategic alliances, to different types of multiple transactions, to partial function production joint ventures, and to equity stakes taken by venture capital funds. The Paper also considers whether the group concept referred to in Article 5 (4) of the Regulation should be harmonised with the concept of control referred to in Article 3 (3).

II. Launching a debate on the merits of the competition test used for the assessment of concentrations

Now that the Merger Regulation has been in force for more than a decade, the Green Paper takes the opportunity of launching a wide public debate on the merits of the substantive test enshrined in the Regulation, namely that a merger should not be allowed to proceed if it 'creates or strengthens a dominant position'. The Paper in particular invites a discussion on how the effectiveness of this test compares with that used in many other jurisdictions (and notably in the US), namely that mergers should not be allowed to proceed if they engender a 'substantial lessening of competition'. It is felt that such a debate is particularly pertinent at the present time, given the desirability of ensuring that the main jurisdictions required to examine the increasing number of large, cross-border transactions, should be adopting as convergent an approach as possible.

There is moreover an ongoing debate on how, and the extent to which, efficiencies should be taken into account in competition analysis. Accordingly, and independently of the discussion on the substantive test, the Green Paper invites views as to the proper role and scope of efficiency considerations in the field of merger control.

III. Safeguarding due process

Launching a discussion on due process generally

On the broader issue of due process, the Green Paper describes the system of 'checks and balances' inherent in the current merger review process, and in particular the defence rights accorded to companies whose proposed merger is being challenged. Nonetheless, in the interest of enriching the debate, the Green Paper recognises that some consider the current due process guarantees and possibilities for judicial review to be unsatisfactory and ineffective. The Paper accordingly invites views on how the system might be improved. Constructive ideas from companies and practitioners with experience of the system would be particularly welcome (and in particular from those who have voiced critical remarks about the current system). As this review is limited to the Merger Regulation itself, the Green Paper indicates a preference for any such suggestions to be aimed at reform within the general ambit of the present institutional and Treaty framework.

Amendment of the procedure for the proposal and evaluation of remedies

In this spirit, the Green Paper tables proposals aimed at improving the opportunity for the merits of merging companies' remedy proposals to be fully and properly considered by the Commission, by Member States, and by the relevant market participants. Accordingly, the Commission proposes possible adjustments to the time schedule for the submission and discussion of commitments in the first and second phases of a merger investigation. Specifically, the paper suggests that the Regulation could provide for a 'stop-the-clock' provision, which would operate at the parties' request, thereby avoiding any *ex officio* prolongation of the procedure. This proposal takes into account and strives to preserve the tight time schedule which characterises EU merger assessment proceedings.

IV. Other administrative and procedural improvements

The paper points to the success of the recently introduced simplified procedure for the treatment of concentrations that do not raise competition concerns. Views are invited on a number of possibilities that are suggested for consolidating this practice without compromising legal certainty.

The paper also includes, among others, ideas aimed at improving administrative efficiency, at rationalising the investigation timetable, and at facilitating co-ordination with other non-EU jurisdictions. Regarding the latter, the relevant changes would be to the timing and modalities of notifications, as well as to the 'standstill' provisions. The paper considers the introduction of working days for the calculation of deadlines. It is moreover suggested that the enforcement procedures contained in the Regulation might be aligned with the changes proposed by the Commission in relation to the implementation of Articles 81 and 82 of the Treaty ("modernisation"). Finally, the possibility of enabling the Commission to possibly introduce a filing fee for notifications at some point in the future is also discussed.

A full and open debate is sought

The preparatory fact-finding that has led to the formulation of the Green Paper has been conducted in a spirit of openness of mind. All actors affected by merger control have been encouraged to participate in the process and to put forward their views. A series of surveys and questionnaires have been addressed to the business world, both here in Europe and more widely, and Member States have been consulted in a series of informal working groups bringing together their experts with the services of DG COMP. Both business and Member States have broadly endorsed the objectives of the review and have already provided valuable input.

The purpose of the Green Paper is to further stimulate and intensify the discussion, in the same spirit of openness and transparency, by inviting views from across the board. Accordingly, the proposals set out in the Green Paper are now the subject of a wide public consultation (including of the other Community institutions) which will last until the end of March 2002. Comments may be sent to the Commission by ordinary or electronic mail.

The full text of the Green Paper is available on the website of DG Competition:

http://europa.eu.int/comm/competition/mergers/review/

Merger Control: Main developments between 1st September 2001 and 31st December 2001

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Recent cases – Introductory remark

Between September and December 2001, 90 cases were notified to the Commission. This is fewer that the number notified in the previous four-month period (118) and the number notified in the same period in 2000 (114). Due to this reduction in the number of cases notified to the Commission in the final four-month period of 2001, the total for the year (335) was also slightly lower than in 2000 (345). The Commission took 116 final decisions, 10 of which followed in-depth investigations (3 prohibitions, 2 clearances and 5 conditional clearances) and 4 of which were conditional clearances at the end of an initial investigation ('Phase 1'). In total the Commission cleared 102 cases in Phase 1. In this period, 49% of the clearance decisions taken by the Commission were taken in accordance to the simplified procedures introduced in September 2000. In addition, the Commission took three referral decisions pursuant to Article 9 of the Merger Regulation and opened in depth investigations in four cases. As at 31 December 2001, three transactions were subject to ongoing in-depth investigations.

A – Summaries of decisions taken under Article 6(1)(b) and 6(2) where undertakings have been given by the firms involved

Pirelli/Edizione/Olivetti/Telecom Italia ([1])

The Commission approved the joint acquisition by Pirelli SpA and Edizione Holding SpA of the Olivetti SpA and indirectly of the undertakings controlled by the latter, namely Telecom Italia, which in turn owns the country's largest mobile phone operator Telecom Italia Mobile (TIM).

The Commission's investigation, which was carried out in close co-operation with the Italian Antitrust Authority (Autorità Garante della Concorrenza e del Mercato), unveiled serious concerns in the markets for transmission capacity and for mobile telephony, both in Italy.

In the transmission capacity market, the operation will eliminate Autostrade as an important competitor, therefore reinforcing Telecom Italia's dominant position. The Commission was particularly concerned about the possibility that Autostrade Telecomunicazioni and Telecom Italia might adopt a joint commercial strategy towards their respective customers in the transmission capacity market, reducing the degree of competition in the market.

In the Italian market for mobile voice telephony, the investigation showed that the concentration might strengthen a possible dominant position enjoyed by TIM. Besides TIM and Blu there are only two second generation mobile operators in Italy, Omnitel and Wind, and barriers to entry are high given the need to obtain a licence.

To address these competition concerns, the parties undertook to remove the overlap in the transmission capacity market by transferring the exclusive control of Autostrade Telecomunicazioni to one or more independent third-parties, maintaining at most a minority participation, which will be subject to Commission approval. Concerning the market for mobile voice telephony, Edizione undertook to sell its direct and indirect shareholdings in Blu. The implementation of the latter commitment will ensure that Edizione will be prevented from having a controlling position in two of the four Italian second generation mobile operators.

Nordbanken/Postgirot ([2])

The Commission approved, subject to conditions, the acquisition by Scandinavian banking group Nordea of sole control of Sweden's Postgirot Bank AB, a financial services provider currently owned by Posten AB, the Swedish Post Office. Postgirot is a wholly owned subsidiary of state-owned Posten AB. It owns and operates an in-

([1]) COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia, 20.09.2001
([2]) COMP/M.2567 – Nordbanken/Postgirot, 08.11.2001

house giro payment system, which it uses to supply distance payment services to retail and corporate customers. Postgirot also provides giro-related technical services to other banks. Having been awarded a banking licence in 1994, Postgirot provides banking services to household and corporate customers, including deposits, lending, international payments, trade finance and card services.

In its original form, the transaction would have given Nordea full control of the Postgirot payment system. In addition, Nordea already held a significant shareholding in the other main giro payment system in Sweden – Bankgirot. Nordea would thus have had significant influence on both of the main Swedish payment systems.

However, Nordea undertook to reduce its stake in Bankgirot to 10%, a level which will no longer give it decisive influence over the company, and to withdraw from Privatgirot, a company which competes with Postgirot in giro-related technical services. These undertakings enabled the Commission to clear the deal.

Gerling/NCM ([1])

The Commission approved the take-over of the Dutch credit insurance company NCM Holding N.V. ("NCM") by German insurance company Gerling-Konzern Versicherungs-Beteiligungs AG ("Gerling"). The Commission's review found competition concerns in the Dutch and Danish credit insurance markets but the divestments proposed by Gerling removed these concerns. Gerling is an insurance group specialised in services to companies. NCM, the Dutch export-credit agency, is active in the receivable management business, mainly through credit insurance. The companies' credit insurance activities are almost equal in size and currently constitute the third and fourth largest European credit insurers after the German Allianz Group and the French Coface Group. The merger of Gerling and NCM will create Europe's second largest credit insurance company ahead of Coface.

While the geographic scope of Gerling and NCM's activities is complementary in most areas of Europe, the Commission identified serious competition concerns in the Dutch credit insurance market. There the new entity would have likely become the dominant supplier given the inter-alia, marginal position of the remaining players compared to Gerling/NCM in the Netherlands.

Strong concerns were also raised with regard to the Danish market, where the NCM credit insurance arm is vertically integrated with two NCM subsidiaries, Forenede Factors and BG Factoring. The activities of these two factoring banks together represent by far the leading Danish factoring companies. Factoring companies use credit insurance to cover their customers' receivable risk and are consequently largely dependent on the conditions offered by the credit insurance companies. In Denmark Hermes-Euler is, apart from Gerling and NCM, the only established credit insurer. The Commission was therefore concerned about the likelihood that competitors of the NCM factoring companies would have had to face in the near future a situation where they would have only one single alternative source of credit insurance to Gerling/NCM, the parent company of the main players on the Danish factoring market.

In order to remove the competition concerns raised by the merger in the Netherlands and Denmark, Gerling undertook to divest its Dutch and Danish credit insurance branch offices.

B – Summaries of decisions taken under Article 8 of Council Regulation (EEC) No 4064/89

1 – Summaries of cases declared compatible with the common market under Article 8(2) of the ECMR without commitments

UPM-Kymmene/Haindl and Norske Skog/Parenco/Walsum ([2])

Following a thorough investigation, the Commission cleared the proposed take-over of Haindl, a German family-owned paper company, by Finland's UPM-Kymmene and the subsequent sale of two of the Haindl mills to Norwegian paper manufacturer Norske Skog, Parenco in the Netherlands and the Walsum mill in Germany. This case is described in a special feature elsewhere in this Newsletter (see 'Collective dominance in the publication paper industry').

([1]) COMP/M.2602 – Gerling/NCM, 11.12.2001

([2]) COMP/M.2498 – *UPM-Kymmene/Haindl,* 21.11.2001 and COMP/M.2499 – *Norske Skog/Parenco/Walsum,* 21.11.2001

2 – Summaries of cases declared compatible with the common market under Article 8(2) of the ECMR with commitments

Grupo Villar Mir/EnBW/ Hidroeléctrica del Cantábrico ([1])

The Commission authorised, subject to conditions, the acquisition of joint control over the Spanish electricity company Hidroeléctrica del Cantábrico (Hidrocantábrico) by Spanish Grupo Villar Mir and Energie Baden-Württemberg (EnBW), a German company jointly controlled by Electricité de France (EDF). As initially notified to the Commission, the operation would have led to the strengthening of the existing collective dominant position on the Spanish wholesale market for electricity. To eliminate these concerns, EDF and the operator of the French electricity grid, RTE, undertook to substantially increase the commercial capacity up to about 4000 MW on the interconnector between France and Spain, thereby creating the conditions for greater electricity trade volumes to and from Spain to the benefit of Spanish customers.

The transaction consisted of the acquisition by Ferroatlántica of a majority of the shares in Hidrocantábrico, Spain's fourth largest electricity company. Ferroatlántica was fully owned by Spain's Grupo Villar Mir, but will be jointly controlled by Grupo Villar Mir and EnBW after the completion of the transaction.

The Commission started an in-depth investigation in June over concerns that the deal would strengthen the existing collective dominant position on the Spanish wholesale market for electricity held by Endesa and Iberdrola. The more detailed probe confirmed these initial concerns. Having gained a foothold in Spain and with access to Hidrocantabrico's significant electricity generation capacity, EDF would likely resist any increase in the commercial capacity of the interconnector which transmits electricity across the Pyrenean chain. Commercial capacity on the French-Spanish interconnector is already scarce, creating a barrier to Spanish electricity imports and resulting in the market's isolation from other continental electricity markets to the detriment of customers.

In order to solve the competition concerns identified by the Commission, EDF and EDF/RTE committed to take all the necessary steps in order to increase the commercial capacity on the interconnector at the French/Spanish border to about 4000 MW from an existing 1100 MW. The capacity increase will take place gradually over a short-/mid-term period. EDF/RTE, the French Electricity Transport System Operator (Gestionnaire du Reseau de Transport d'Electricité), is a division within EDF which operates the national electricity grid and interconnectors with France's neighbouring countries.

Mitsui/CVRD/Caemi ([2])

The Commission cleared the proposed acquisition of joint control of Brazilian iron ore mining company Caemi by CVRD, another Brazilian iron ore producer, and Japanese trading company Mitsui, subject to conditions. Under the terms of the proposed transaction, Companhia Vale do Rio Doce (CVRD) and Mitsui & Co. Ltd (Mitsui) will acquire joint control of Caemi Mineração e Metalurgia SA (Caemi). Caemi's assets principally consist of Brazilian iron ore mining company Mineração Brasilieras Reunidas (MBR) and a 50-percent stake in Canadian iron ore producer Quebec Cartier Mining Company (QCM).

The competitive impact of the merger was assessed in relation to the supply of 'seaborne' iron ore, as Western European steel producers – due to an absence of local supplies – depend almost exclusively on iron ore imported from mines located a long distance from Europe. Iron ore transported by ship represents about 45% of all traded iron ore, and the main sources of seaborne supply are located in Brazil and Australia. Participation in the seaborne trade requires access to specific infrastructure such as dedicated railways suitable for the transportation of very large tonnages and deep water harbours. CVRD is the world's largest producer of seaborne sinter fines and pellet iron ore, followed by the Australian-based mining companies Rio Tinto and BHP.

The proposed transaction would have led to the creation, if not the strengthening, of a dominant position in the market for the seaborne supply of iron ore pellets and the seaborne market for direct reduction iron ore due to the high market shares that would have been held after the operation and the likelihood that the remaining competitors would have been unable to constrain Mitsui/CVRD/Caemi's behaviour.

([1]) COMP/M.2434 – Grupo Villar Mir/EnBW/ Hidroeléctrica del Cantábrico, 26.09.2001
([2]) COMP/M.2420 – Mitsui/CVRD/Caemi, 30.10.2001

On 5 October 2001, the parties offered a commitment designed to remove the competition concerns identified by the Commission. This consisted in an offer to divest Caemi's 50% interest in QCM, thereby eliminating the «overlap» between CVRD's and Caemi's production of iron ore pellets. As a result, the commitment removes the Commission's competition concerns in relation to the supply of these products, and in relation to the supply of direct reduction ore.

Shell/DEA ([1]) and BP/E.ON ([2])

On 21 December 2001 The Commission approved the acquisition of the German oil and petrochemicals company DEA, which belongs to the RWE group, by Royal Dutch/Shell (UK/NL), and the combination of the petrochemicals businesses of Britain's BP Plc and German company Veba, a subsidiary of the E.ON group after conducting a parallel investigation into the two cases. The two operations would have led to the creation of a collective dominant position of Shell/Dea and BP/Veba on the market for ethylene on the pipeline network «ARG», which links the Netherlands, Belgium and Germany. The commitments offered by all parties were, however, sufficient to rule out these concerns.

The two transactions together lead to an important restructuring of the market for ethylene, which is a core basic petrochemical used for a variety of applications such as polyethylene (PE) and PVC. This market is already highly concentrated, making it all the more essential to protect the remaining competition for the benefit of ethylene users.

After carrying out an in-depth market investigation, the Commission found that the combination of the respective petrochemical activities of Shell and DEA, on the one hand, and of BP and E.ON, on the other hand, would result in the creation of a collective dominant position on the market for the supply of ethylene on the pipeline network called «ARG». This pipeline network and its extensions link various production sites, sea terminals and ethylene consumers in Belgium, the Netherlands and Western Germany.

Both transactions' major impact is the elimination of the only downstream non-integrated ethylene producers from the market, which are also the most important suppliers to the merchant market. This will leave independent ethylene buyers only with suppliers which compete with their customers in the downstream markets.

Both merged entities will control a highly significant proportion of the ethylene market, will not be exposed to comparably strong competitors and would have a unique position with regard to the ARG pipeline. In particular, BP/Veba will have a decisive influence in the company operating ARG, whereas Shell owns one of the five import terminals at the North sea coast, which are the only channel for imports onto the ARG pipeline network.

The Commission concluded that there is a high risk that competition between the two new entities would lapse, and that ethylene buyers would not have access to competitive sources of supply after the two mergers.

In order to address these competition concerns, Shell committed to grant third party access to its import terminal facilities at Moerdijk, Netherlands, for a total aggregate ethylene volume of up to 250 kt per annum for a period of ten years. This will strongly enhance the availability of ethylene on the ARG market from competitive and independent sources and will enable third parties for the first time to import ethylene on a long-term, structural basis for competitive prices. The volumes covered by the commitment are sufficient to prevent the two merged entities from stifling competition. The amount of 250 kt equals the annual capacity of one whole smaller sized ethylene plant, and would enable an increase of the current third party imports by nearly 400%. The terms of access proposed by Shell will allow for non-discriminatory, long term access to the terminal at competitive prices.

BP and E.ON committed to divest two of their three BP/Veba shareholdings in the ARG. For an interim period, until the shareholdings are divested, they commit not to exercise their blocking rights, in particular with regard to decisions on third party access. BP/E.ON further commit that they will guarantee access to a connection pipeline between the ARG network and ethylene consumers located at Herne, western Germany, which is currently controlled by Veba. The divestiture of two ARG shareholdings will entirely eliminate BP/Veba's decisive influence in the ARG company. The entering of new shareholders into the ARG company will also broaden the different shareholders' interests and guarantee the common carrier character of the ARG, without

([1]) COMP/M.2389, 23.08.2001
([2]) COMP/M.2533, 06.09.2001

favouring any particular supplier's or customer's interests.

The open access to the pipeline at competitive cost will allow existing suppliers to compete actively for customers over the whole of the ARG area and will make Shell's commitment to open the import infrastructure fully effective as it assures that the additional volumes can be transported economically to locations all over the ARG.

BP/Veba's commitment to provide access to ARG supplies for the ethylene customers located at Herne removes the remaining bottleneck infrastructure which is under control of BP/Veba. It eliminates any possibility that BP/Veba will remain protected from competitive constraints originating from alternative ARG suppliers with regard to these customers. There are no other ARG connection pipelines under the control of the two new entities which could be used to cut off ethylene consumers from competitive supplies over the ARG.

The assessment of both deals' impact on the downstream oil products markets in Germany were referred to the Bundeskartellamt. The decision to refer the BP/E.ON deal is described below. The Shell/DEA referral decision was described in the previous edition of the Competition Policy Newsletter (03/2001, page 60).

Südzucker/Saint Louis ([1])

Also on 21 December 2001, the Commission approved the acquisition of Saint Louis Sucre SA, France's second-largest sugar manufacturer, by German sugar market leader Südzucker AG. Südzucker's acquisition of Saint Louis was the first major cross-border merger in the European sugar market, which is highly regulated at the EU level under the Common Agricultural Policy with production quotas and intervention, i.e. minimum, prices.

The Commission's investigation revealed that the operation would have strengthened Südzucker's already dominant position in the markets for industrial sugar and retail sugar in southern Germany and Belgium. This is because Saint Louis will cease to exist as an independent and credible potential competitor to Südzucker in these geographical areas, which are close to France, Saint Louis's home market.

The Commission was also concerned that by gaining a considerable foothold on the French market, with direct access to the second largest production capacity, Südzucker would be able to deter other French producers from competing in southern Germany and Belgium by threatening to retaliate in France. The effect of this would have been to perpetuate a partitioning of the European sugar market along national lines.

Furthermore, it would have given Südzucker, already dominant in southern Germany and Belgium and with a monopoly position in Austria, the ability to gain also a strong position in France by being able to offer 'pan-European deals' to large industrial customers, supplying them across national borders.

In order to address these competition concerns, Südzucker offered to divest its majority (68%) shareholding in Belgium's Suikerfabriek van Veurne SA and to place 90 000 tonnes of sugar per year at the disposal of an independent trader in southern Germany. The divestiture of Südzucker's stake in Veurne will reduce the Südzucker group's Belgian sugar production quota by roughly 10% and will thus have a significant pro-competitive effect on the Belgian sugar market.

Similarly, the commitment to make up to 90 000 tonnes a year of quota sugar available on the basis of EU intervention prices will place an independent trader in a position to effectively compete in the southern German sugar market. This tonnage roughly corresponds to 10% of sugar consumed in southern Germany every year. The fact that the independent trader will be charged the intervention price enables him to offer sugar at an attractive price, thus strengthening competition on that market and sufficiently compensating for the disappearance of Saint Louis as a potential competitor.

3 – Summaries of cases declared incompatible with the common market under Article 8(3) of the ECMR

Schneider/Legrand ([2])

The proposed merger between Schneider Electric and Legrand, the two main French manufacturers of electrical equipment, was prohibited on 10 October 2001. The Commission's investigation showed that there were substantial overlaps between the activities of Schneider and Legrand in the markets for electrical switchboards (distribution boards and final panelboards, together with

([1]) COMP/M.2530, 21.12.2001

([2]) COMP/M.2283 – Schneider/Legrand, 10.10.2001

their components, where the combined market share would have been between 40% and 70% depending on the country); wiring accessories (in particular, sockets and switches and fixing and connecting equipment, where combined market shares ranged from 40% to 90%); and certain products for industrial use (industrial pushbuttons and low-voltage transformers) or for more specific applications (for example, emergency lighting).

In France, the merger gave rise to particularly serious problems over virtually the whole range of products concerned and would, in most cases, have resulted in the strengthening of a dominant position. Schneider and Legrand are by far the largest players on the French market, and the Commission's investigation demonstrated clearly that there was little prospect of any significant development in the activity of foreign competitors in the short and medium term. Furthermore, competition problems were also identified in Denmark, Spain, Greece, Italy, Portugal and the United Kingdom.

In an attempt to remedy these competition problems, Schneider submitted an initial series of undertakings to the Commission on 14 September 2001, the deadline for presenting undertakings. However the market investigation carried out by the Commission showed that these initial undertakings were not such as to restore the conditions of effective competition.

Schneider submitted new undertakings on 24 September, ten days after the deadline for submitting undertakings. These undertakings left serious doubts as to the competitive capacity of the entities to be sold off, notably as regards access to distribution in France and the economic risks associated with the actual separation of these entities from the rest of the group to which they belonged. In addition Schneider's proposals did not provide any effective solution as regards a number of geographic markets and/or product markets on which competition problems had been identified.

On 13 December 2001, Schneider launched an appeal in the Court of First Instance against the Commission's decision (ref T-310/01, 13.12.2001).

CVC/Lenzing ([1])

The European Commission prohibited the planned acquisition by CVC Capital Partners Group Ltd (CVC) of Lenzing AG, an Austrian man-made fibres manufacturer. CVC already controls Acordis, Lenzing's principal rival in Europe and only rival in the United States.

The deal related to the fibres sector. There were five relevant product markets taken into account for the competitive assessment, namely: commodity viscose, spundyed viscose, viscose for tampons, lyocell, and lyocell production and processing technology. The Commission considered that all three viscose markets are Europe-wide, since imports into Europe are very low (considerably below 10%), and that the market for lyocell technology is worldwide. As regards lyocell production, it was not necessary to define the geographical market.

The combined entity would have achieved very high combined shares on all three viscose markets (more than 55% in commodity viscose and more than 85% in spundyed viscose and viscose for tampons), and it would have led to a worldwide monopoly on the lyocell production and technology markets. The concentration would have eliminated Acordis' strongest competitor in the viscose market in the EEA and would have left only three smaller competitors: Sniace of Spain, Svenska Rayon of Sweden and Säteri of Finland. The Commission therefore concluded that the concentration would have created a dominant position in the commodity viscose and in the spundyed viscose markets.

As regards the viscose market for tampons, the Commission found that Acordis already holds a dominant position. The merger would therefore have strengthened this position, as the number of manufacturers in Europe would be reduced from three to two.

As regards lyocell, Lenzing and Acordis are currently the only producers of lyocell worldwide and the only two players in the market for lyocell production and processing technology currently able to offer «ready-to-operate» technology. Together, the parties hold the vast majority of all existing patents for lyocell production and treatment, and market entry in this market is difficult. The Commission therefore concluded that the concentration would create a dominant position in the both lyocell production and technology markets.

During the second phase of the review the parties submitted the following commitments: (i) a non-exclusive licence with regard to lyocell; (ii) a toll-manufacturing arrangement whereby the parties would produce lyocell for the licensee; (iii) a non-exclusive licence with regard to Galaxy tampon

([1]) COMP/M.2187 – CVC/Lenzing, 17.10.2001

fibre. The Commission took the view that these commitments were not adequate to eliminate the concerns raised by the concentration.

This case was examined in close co-operation with the United States FTC.

Tetra Laval/Sidel ([1])

On 30.10.2001 the Commission prohibited the acquisition by Tetra Laval B.V., which belongs to the Swiss-based Tetra Laval Group, the owner of the Tetra Pak packaging businesses, of the French company Sidel SA. Tetra holds a dominant position for carton packaging with an overall market share in Europe of over 80 percent. Sidel is the leading manufacturer of plastic PET packaging equipment and in particular stretch blow-moulding (SBM) machines.

The Commission's investigation showed that the combination of the dominant company in carton packaging with the leading company in PET packaging equipment would lead to the creation of a dominant position in the European Economic Area (EEA) in the market for PET packaging equipment, in particular, SBM machines used for sensitive products and to the strengthening of a dominant position in aseptic carton packaging equipment and aseptic cartons in the EEA.

The Commission found that, even though today carton and PET packaging equipment are distinct relevant product markets, the two are closely related neighbouring markets and belong in the same industry sector : liquid food packaging. PET and carton are technical substitutes as PET can be an alternative packaging material for all products that are currently packaged in carton. Already PET and carton are used as packaging materials for common product segments (liquid dairy products, juices, fruit flavoured drinks and tea/coffee drinks).

The combination of Tetra's dominant position in carton packaging and Sidel's leading position in PET packaging equipment would provide the merged entity with the ability and incentives to leverage its dominant position in carton to gain a dominant position in PET packaging equipment. In addition, by eliminating Sidel as a competitor in a closely neighbouring market, Tetra's existing dominant position in cartons would be strengthened. The merged entity's dominant positions in two closely neighbouring markets was found to be likely to further reinforce one another, raise barriers to entry and reduce competition.

On 9 October 2001, Tetra proposed a number of undertakings intended to address these concerns, but these undertakings were considered insufficient. Given the serious competition concerns and the fact that Tetra was unable to resolve them, the Commission had no other choice but to prohibit the merger.

In view of the particular circumstances created by the fact that Tetra Laval has already acquired virtually the whole of Sidel's shares, the Commission is prepared to examine the practical arrangements for restoring effective competition.

C – Summaries of referral decisions taken under Article 9 of the ECMR

BP/E.ON *([2])*

The Commission referred to the Bundeskartellamt the examination of the impact in the downstream markets for refined oil products of a proposed joint venture between Deutsche BP and E.ON. The proposed operation is for BP to acquire a 51-percent shareholding in Veba Oel AG, currently a 100-pct subsidiary of E.ON active in the oil and petrochemicals business, both upstream and downstream (Veba and Aral brands). E.ON has the option to sell the remaining shares to BP transferring sole control over Veba Oel at a later stage.

On 20 August 2001, the Bundeskartellamt asked the European Commission to refer part of the examination in application of Article 9 of the Merger Regulation 4064/89. The Bundeskartellamt argued that the proposed concentration threatened to create or strengthen a dominant position on the market for motor fuels retailing and several other oil product markets. In its analysis, the German authority took into account the proposed combination of the downstream oil business of Shell and DEA (see discussion of case COMP/M.2389 above).

As a preliminary conclusion, the Bundeskartellamt found that the present transaction risks creating a collectively dominant situation between the new entity, a combined Shell/DEA and the other oil majors on the market for motor fuels retailing in Germany. The Commission's findings in its first-phase investigation supported the preliminary analysis made by the German Competition Authority.

([1]) COMP/M.2416 – Tetra Laval/Sidel, 30.10.2001
([2]) COMP/M.2533 – BP/E.On, 06.09.2001

Haniel/Fels ([1]) and Haniel/Ytong ([2])

On 17 October 2001 the Commission referred to the Bundeskartellamt the examination of the impact of part of the proposed acquisition by Haniel Baustoff-Industrie Zuschlagstoffe GmbH of Fels-Werke GmbH ('Fels'), namely that in the German wall building materials markets. At the same time, the Commission decided that the deal's effect in the Dutch wall building materials sector requires further review and started an in-depth investigation.

In its request for referral of the Fels case, the Bundeskartellamt had argued that the proposed concentration threatened to create or strengthen a dominant position on the German market for wall building materials and asked the Commission to refer to them the examination of that aspect of the deal. According to the Bundeskartellamt's preliminary assessment, the transaction risked creating a situation where the new entity would hold a dominant position in particular in brick building materials in several regional markets within Germany.

Shortly after the decisions were taken to open a Phase 2 investigation as well as to refer part of the Haniel/Fels case to the Bundeskartellamt, Haniel was involved in a case with Ytong which involved the same combination of decisions. In this second case, the Commission referred that part of the proposed acquisition of the German cellular concrete producer Ytong which relates to Germany to the German Competition Authority, the Bundeskartellamt on 30.11.2001. On the same date, the Commission decided that the deal's effect in the Dutch wall building materials sector required further review and opened an in-depth investigation.

In its request for referral, the Bundeskartellamt argued that the proposed concentration threatened to create or strengthen a dominant position on the German market for wall building materials and asked the Commission to refer the examination of that aspect of the deal to Germany. According to the Bundeskartellamt's preliminary assessment, the transaction risks creating a situation where the new entity would hold a dominant position in particular in brickwork building materials in several regional markets within Germany. The Commission's findings in its first-phase investigation are in line with the preliminary analysis made by the Bundeskartellamt.

The Commission believed that the Bundeskartellamt was best placed to assess the competitive impact of both these cases on the affected markets in Germany, as this assessment will require the investigation of local (sub-) markets and supply relations. In addition, the Bundeskartellamt has recently investigated this sector in Germany. A relevant factor in deciding to refer the Ytong case to Germany was that the Bundeskartellamt was already investigating the proposed acquisition of Fels in the same sector.

([1]) COMP/M.2495 – Haniel/Fels, 17.10.2001
([2]) COMP/M.2568 – Haniel/Ytong, 30.11.2001

Investigation into possible collective dominance in the publication paper industry

Valérie RABASSA, Stephan SIMON, Thibaut KLEINER, Directorate-General Competition, unit B

1. On 20 June 2000, the Commission received a notification by which the Finnish firm UPM-Kymmene proposed to merge with the German company Haindl. On the same day, the Commission received a notification of a second concentration which concerns the resale of two of the six Haindl mills, Parenco in the Netherlands and the Walsum mill in Germany, by UPM-Kymmene to the Norwegian paper manufacturer Norske Skog. The two concentrations concerned the economic sectors of pulp and publication papers and in particular in the production and sale of wood containing printing paper. The only affected markets were the markets for *newsprint* and *wood-containing magazine paper*. After an in-depth investigation, the Commission cleared both concentrations on 21 November 2001.

2. The market contains some global players, some medium-sized players and some very small players. Top suppliers in the newsprint market are UPM-Kymmene, Stora Enso, Norske Skog, Haindl and Holmen; other companies are principally SCA, M-Real/Myllykoski, and Palm. In the market for wood-containing magazine paper, top suppliers are UPM-Kymmene, Stora Enso, Haindl, and M-Real/Myllykoski; the remaining players are comprised of principally SCA, Burgo, Sappi, and Norske Skog. Note that M-Real/Myllykoski and Norske Skog are considered either top supplier or fringe depending on the considered market.

3. The Commission investigated whether the two proposed concentrations would result in the creation of a collective dominant position ([1]) in the markets for newsprint and wood-containing magazine paper by a subset of large firms called top suppliers. In particular, the Commission analysed:

   1. The impact of the merger on competition;

   2. Whether the characteristics of the market makes the market conducive to tacit co-ordination;

   3. The sustainability of the co-ordination, that is to say:

      — whether any one of the top suppliers would have the ability and incentive to deviate from the co-ordinated outcome, considering the ability and incentives of non-deviators to retaliate;

      — whether buyers/fringe players/new entrants have the ability and incentive to challenge the top suppliers' anti-competitive behaviour.

   In addition, the Commission has examined the nature of past competition.

Market characteristics

4. The publication paper industry is characterised by long-run competition in capacity and short-run competition on prices under capacity constraints. That is to say that in these markets, the level of capacity and average demand determines the long-run average price level whereas short-run demand determines the short-run price at a given capacity level. These characteristics are very similar in the market for newsprint and in the market for wood-containing magazine paper and can be summarised as follows: i) both newsprint and the main grades of wood-containing magazine paper can be considered as homogeneous products, although some variations within the different paper grades exist; ii) there has been some degree of fluctuations in the market shares of the top suppliers, in the markets for newsprint and wood-containing magazine paper respectively. These variations in terms of market share are limited for wood-containing magazine and more pronounced for newsprint; iii) there exists a high degree of transparency on capacities, deliveries, on average prices but lack of transparency in relation to investment decisions, iv) demand is inelastic and cyclical; v) there is some uncertainty to the degree of cost symmetry, espe-

([1]) Collective dominance is usually associated with the joint exercise of market power through the tacit co-ordination of market behaviour of a group of firms.

cially in the newsprint market; vi) there is a high level of multi-market contacts and links; vii) buyer power is limited; viii) an up-to date technology is easily available; ix) the pulp & paper industry has the characteristics of a sunk cost industry (i.e. high entry barriers).

Assessment

Impact of the proposed operations on the market structure

5. In the newsprint market, the Commission has examined whether the operations may have led to the creation of a collective dominant position by the four companies UPM-Kymmene/ Haindl, Stora Enso, Norske Skog and Holmen resulting in a four-firm concentration ratio of [60-70%] in terms of sales. In terms of capacities the four-firm concentration ratio would be [70-80%]. In the market for wood-containing magazine paper, *post-mergers*, the top three suppliers companies, UPM-Kymmene/Haindl, Stora Enso, M-Real/Myllykoski would still account for of [60-70%] of the market in terms of capacity and of [60-70%] in terms of sales. The proposed transactions reduced the number of the leading firms in this industry from five to four in the newsprint market/ from four to three in the wood-containing magazine and eliminated a significant competitor from the market. Haindl's cost structure is somewhat different from the other top suppliers, especially in the newsprint market, in the wood-containing magazine paper market, Haindl has been particularly active in the last five years as it accounts for a large part of the total increase in capacity.

The characteristics of the markets and their conduciveness to collective dominance

6. The operations would result in a relatively more transparent and less uncertain market, which is reflected in the reduction from respectively five to four for the newsprint market, from four to three for the wood-containing magazine paper market. When examining market characteristics, the Commission found some elements that might have led to collective dominance and some others that do not.

7. The Commission considered that among the elements that might have led to the creation of a collective dominant position were the following market characteristics: products are sufficiently homogeneous, demand is highly inelastic, buyer power is limited and barriers to entry are very high. However, and after carefully considering the parties' reply, the Commission recognised that other elements were not conducive to the creation of a collective dominant position. In particular, the limited stability of market shares, the lack of transparency on capacity expansion projects prior to a committed announcement and the lack of symmetry in cost structures with regard to the various components point in another direction.

Possibility to co-ordinate

8. Co-ordination might have occurred through two mechanisms:

   - first through the co-ordination of investment in new capacities, in order to limit capacity in the market place raising thus the level of average prices in the long-run;
   - second, through co-ordination of output downtimes to support short-run prices during a slowdown of demand (there is no need to co-ordinate in the short-run in a period of a high level of demand).

9. Co-ordination of investment in new capacities might have operated along a process of announcements and counter-announcements. All market players have a series of potential investment projects, that is to say prospective sites where they could build new paper machines. Investment decision-making usually involves a number of parameters, and is ultimately related to return on investment. The Commission, after examining the elements brought forward by the parties, concluded that it was unlikely for oligopolists to be able to use announcements to co-ordinate tacitly and that it is unlikely that they could detect a potential deviator. In particular, the Commission considered that the oligopolists would require sufficient transparency in order to judge whether a project would have the required rate of return. Otherwise, announcements would not be taken seriously by the other firms and would not have any impact on their investment decision-making.

10. Regarding co-ordination on down-times, the parties first argued that this mechanism had no impact on prices. They then claimed that it is not possible to either define or detect down-time, because of a lack of transparency. They sustained that down-time may take so many forms that it would not be possible for firms to recognise when to co-ordinate; it would also be very difficult to define an optimal operating

rate at a given time. They also said that it is not possible to detect a deviator. Consequently, there would be high incentives for the oligopolists to cheat, as soon as they have an opportunity to do so. Finally, they argued that the punishment of a deviator from an agreement on downtime would be extremely costly and not credible.

11. However, the Commission did not share the view of the parties that co-ordination of downtime was not a possible co-ordination mechanism in the newsprint and wood-containing magazine paper markets respectively. First, the Commission did not find that downtime has no impact on prices. Also, it was difficult to argue that down-time could be hidden from market players, since there was transparency on downtime through various channels. Suppliers normally tell their customers about forthcoming downtime on machines which supply such a particular customer. This has been confirmed by a submission of one of the major competitors. Due to customers' multi-sourcing policies, the oligopolists very often deliver the same clients. Moreover, there are statistics available in the market about stock levels and downtime levels.

12. Secondly, retaliation tools appeared credible. When a competitor deviates, the remaining top suppliers can take aggressive actions without having to change prices for all their remaining customers. This may induce some customers to switch all or part of their demand away from the deviator and to substitute supply from the other top suppliers, and may drive down the price paid by important customers of the deviator. Moreover, in a period of low demand, capacities are available if needed to support retaliation. These capacities may be used to target important customers of a deviator without affecting the whole market. This is credible as the main customers of the top suppliers are usually well-known by the other ones. Moreover, the number of swing machines and their corresponding capacities are not marginal and export sales are not mainly based on long-term contracts. Both can be used as potential sources of capacities and therefore as a credible punishment device.

13. The Commission concluded that the mechanism identified above for the co-ordination of investments would not sustain the creation of a tacit co-ordination in the markets for newsprint and wood-containing magazine paper respectively. However, it maintains that tacit co-ordination of downtime is a possible co-ordination mechanism, which could support the creation of a collective dominant position of the four (respectively three) top suppliers in the newsprint market (respectively the market for wood-containing magazine paper).

14. However, any such co-ordination would likely be undermined by action of fringe players. Indeed, the Commission believed that the remaining fringe players can play an active role in their respective markets and make tacit co-ordination unsustainable. These fringe players are SCA, Abitibi, Sappi, Palm and Burgo. These players could break co-ordination by investing when the oligopolists would try to refrain investment to reach higher prices and by increasing production when the oligopolists would try to shut down their machines temporarily – the definition of downtime). These firms would have the means to take advantage of the tacit co-ordination among top players, to improve their competitive positioning and increase their market shares.

Politique des aides d'État

La Commission contribue à plus de sécurité juridique pour le financement des Services d'intérêt économique général

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Le Conseil européen de Nice des 7, 8 et 9 décembre 2000, avait demandé à la Commission de lui présenter un rapport lors du Conseil européen de Laeken de décembre 2001, sur les actions entreprises dans le domaine des Services d'intérêt général (SIG). La demande du Conseil européen portait en particulier sur les moyens propres à assurer une plus grande prévisibilité et une sécurité juridique accrue dans l'application du droit de la concurrence. Le Conseil européen avait notamment approuvé une déclaration du Conseil Marché intérieur du 28 septembre 2000, demandant que soit précisée l'articulation des modes de financement des services d'intérêt général avec l'application des règles relatives aux aides d'Etat.

La Commission a adopté le 17 octobre 2001, son rapport à l'intention du Conseil européen de Laeken ([1]). Il convient de souligner que celui-ci ne remplace pas les Communications de la Commission de 1996 et 2000 sur les Services d'intérêt Général ([2]), mais vise uniquement à les compléter sur les aspects soulevés par le Conseil européen et le Conseil Marché intérieur du 28 septembre 2000.

L'importance des Services d'intérêt général et la liberté des Etats membres

La Commission rappelle tout d'abord l'importance qu'elle attache aux SIG, qui restent une composante essentielle du modèle de société européen. Cette importance doit être soulignée non seulement pour les citoyens des Etats membres actuels, mais également pour les citoyens des pays candidats à l'adhésion. Pour ces derniers, un bon fonctionnement des SIG est indispensable à l'intégration en douceur dans l'Union européenne.

Ce rôle fondamental des SIG a été consacré non seulement par l'article 16 du traité CE, mais également par l'article 36 de la Charte des droits fondamentaux de l'Union européenne, qui dispose que «l'union reconnaît et respecte l'accès aux services d'intérêt économique général tel qu'il est prévu par les législations et pratiques nationales, conformément au traité instituant la Communauté européenne, afin de promouvoir la cohésion sociale et territoriale de l'Union».

La Commission souligne par ailleurs dans son rapport, la *liberté importante* dont disposent les Etats membres. Liberté tout d'abord pour décider s'ils souhaitent assurer eux-mêmes les SIG, directement ou indirectement via d'autres entités publiques, ou s'ils préfèrent confier cette tâche à des tiers. Liberté également, en l'absence de dispositions communautaires pertinentes, pour définir les SIG qu'ils souhaitent mettre en place. Il est en effet constant que pour de nombreux SIG, les Etats membres ou les collectivités locales sont mieux placés que les autorités communautaires pour apprécier les besoins des citoyens au niveau local.

Les Services d'intérêt général soumis aux règles de concurrence

Les règles de concurrence du traité CE, qu'il s'agisse des règles antitrust ou des règles relatives aux aides d'Etat, ne s'appliquent qu'aux activités économiques. Il est donc essentiel d'identifier les Services d'intérêt *économique* général, pour lesquels les règles de concurrence sont d'application.

La Commission a été invitée à préciser les critères permettant de distinguer les activités économiques et non économiques, et de fournir éventuellement une liste d'activités échappant à la qualification d'activités économiques ([3]).

Dans son rapport au Conseil européen de Laeken, la Commission a rappelé que la notion d'activité économique a fait l'objet d'une jurisprudence étoffée de la part du Tribunal de Première Instance et de la Cour de Justice. D'une façon générale, constitue une activité économique, «toute activité consistant à offrir des biens ou des services sur un

([1]) COM(2001)598 final. Disponible sur le site internet de la Commission

([2]) JO C 281 du 26/10/1996, p.3, et JO C 17 du 19/01/2001, p.4

([3]) Notamment Résolution du Parlement Européen du 13/11/2001 sur la Communication de la Commission sur les SIG de 2000, et avis du Comité des Régions du 19/09/2001 sur la Communication susvisée.

marché donné» ([1]). L'Avocat Général Jacobs a précisé à ce sujet que «la question essentielle consiste dès lors à se demander si l'entité en cause exerce une activité qui serait, à tout le moins en principe, susceptible d'être celle d'une entreprise poursuivant un but lucratif» ([2]). Dans ce cadre, le statut de l'entité en cause est indifférent: il peut s'agir d'une société, mais également d'une association, d'un club de sport…L'élément déterminant est l'activité poursuivie.

Ceci ne signifie bien sûr pas que toute activité soit de nature économique. Il résulte en particulier de la jurisprudence de la Cour, que l'article 87 du traité n'est pas applicable lorsque l'Etat intervient en «exerçant l'autorité publique» ([3]), ou lorsque des autorités émanant de l'Etat agissent «dans leur qualité d'autorités publiques» ([4]). On peut considérer qu'un organisme agit en exerçant l'autorité publique lorsque l'activité en cause «constitue une mission d'intérêt général qui relève des fonctions essentielles de l'Etat», ou «par sa nature, son objet et les règles auxquelles elle est soumise, se rattache à l'exercice de prérogatives…qui sont typiquement des prérogatives de puissance publique» ([5]). D'une façon générale, les activités qui relèvent intrinsèquement des prérogatives de l'Etat et qui sont prises en charge par l'Etat, comme par exemple la sécurité intérieure et extérieure, la justice, l'enseignement de base, ne constituent pas des activités économiques au sens des règles de concurrence.

Les règles de concurrence, ne sont pas non plus applicables à des activités réalisées par des entités qui n'offrent pas des biens ou des services sur un marché donné, et qui ne seraient pas en principe, susceptibles d'être offertes par une entité poursuivant un but lucratif. La Cour de Justice a ainsi considéré qu'une activité de gestion de sécurité sociale fondée sur le principe de la solidarité nationale, dépourvue de tout but lucratif, ne constitue pas une activité économique ([6]).

Si la jurisprudence apporte des enseignements utiles sur la notion d'activité économique, il apparaît toutefois que l'établissement de critères définitifs, ou l'établissement d'une liste définitive d'activités non économiques, n'est pas possible. La notion d'activité économique est évolutive, et son contenu dépend en partie de choix politiques effectués par chaque Etat membre. L'établissement d'une liste, outre le fait qu'elle serait soumise à la censure éventuelle de la Cour de Justice, aurait pour effet de «geler» une situation, et ne prendrait pas en considération les évolutions souhaitées par certains Etats membres.

Pour renforcer la transparence en matière de politique de concurrence, la Commission s'est toutefois engagée à consacrer dorénavant une partie spécifique de son rapport annuel sur la politique de concurrence, aux SIEG, dans laquelle elle décrira l'application des règles de concurrence à ces services. Il convient par ailleurs de rappeler que ce rapport annuel comporte un résumé de toutes les décisions adoptées par la Commission, et présente donc de façon claire la doctrine suivie en la matière.

Le financement des services d'intérêt économique général

De nombreux prestataires de SIEG bénéficient d'un soutien public à titre de compensation pour les obligations de service public qu'ils supportent. A la lumière de la jurisprudence du Tribunal de Première Instance en vigueur lors de l'adoption du rapport de la Commission, ces compensations peuvent constituer des aides d'Etat au sens de l'article 87 du traité CE ([7]). Toutefois, ces aides d'Etat peuvent être déclarées compatibles avec le traité en application de l'article 86 paragraphe 2, si elles n'excèdent pas ce qui est nécessaire pour permettre à l'entreprise d'exploiter son service dans des conditions d'équilibre économique. Le montant de l'aide qui dépasse ce qui est nécessaire constitue une aide incompatible.

La Commission rappelle en particulier que les Etats membres disposent d'une grande liberté pour assurer la compensation. Celle-ci peut prendre la forme de subventions annuelles, d'un traitement fiscal préférentiel, d'un allègement de cotisations…L'élément décisif est que la valeur totale de ces avantages ne doit pas excéder ce qui est nécessaire à l'entreprise en cause pour accomplir sa mission. A ce sujet, la Commission considère que lorsque le SIEG a été attribué à l'issue d'une procédure équitable, transparente et non discriminatoire, en ce qui concerne les services à fournir et

([1]) Arrêt de la Cour dans l'affaire C-180-184/98 Pavel Pavlov. Rec 2000. I-6451
([2]) Conclusions jointes du 28/01/1999, aff C-67/96, C-115/97 à C-117/97, C-219/97, point 311.
([3]) Arrêt du 16 juin 1987 Commission contre Italie. Aff 118/85, points 7 et 8
([4]) Arrêt du 4/5/1988. Bodson. Aff 30/87, point 18
([5]) Arrêt du 19/01/1994 SAT Fluggesellschaft Aff C-364/92 point 30
([6]) Arrêt du 17/02/1993 Poucet et Pistre Aff C-159/91 et C-160/91
([7]) Arrêt du 27/02/1997, FFSA Aff T-106/95, et arrêt du 10/05/2000, SIC Aff T-46/97

le montant de la compensation, le montant de celle-ci est normalement jugé compatible avec l'article 86.2 dès lors que la procédure a été réellement concurrentielle.

Ces aides d'Etat, même si elles remplissent les conditions de l'article 86 paragraphe 2, doivent toutefois faire l'objet d'une notification préalable à la Commission conformément aux dispositions de l'article 88 paragraphe 3 du traité. Cette obligation de notification préalable ne s'applique pas dans deux cas : d'une part lorsqu'il s'agit d'aides « de minimis » remplissant les conditions du règlement de la Commission n° 69/2001 du 12 janvier 2001 ([1]), et d'autre part lorsqu'il s'agit de compensations accordées conformément aux dispositions du règlement du Conseil n° 1191/69 du 26 juin 1969, relatif à l'action des Etats membres en matière d'obligations inhérentes à la notion de service public dans le domaine des transports par chemin de fer, par route et par voie navigable.

Indépendamment des questions de procédure liées à la notification préalable, le droit communautaire garantit donc aux entreprises chargées d'exploiter les SIEG, les ressources dont elles ont *effectivement besoin* pour accomplir leur mission. Par contre, le droit communautaire s'oppose, en toute logique, à ce que ces entreprises bénéficient de ressources non nécessaires, en particulier lorsque celles-ci sont susceptibles d'être utilisées pour intervenir sur des marchés ouverts à la concurrence.

La Commission est toutefois consciente du fait que la sécurité juridique peut être améliorée au profit des Etats membres et des entreprises chargées d'exploiter des SIEG. C'est la raison pour laquelle elle envisage d'établir, courant 2002, en collaboration avec les Etats membres, un cadre communautaire pour les aides d'Etat octroyées aux entreprises chargées d'exploiter les SIEG. L'objet de ce cadre sera de préciser les conditions dans lesquelles les compensations de service public sont compatibles avec le droit communautaire. Ce cadre devrait en particulier apporter des précisions sur les modalités de calcul de la compensation afin d'éviter des surcompensations constitutives d'aides incompatibles. A ce sujet, la Commission devrait encourager le recours à la procédure de l'appel d'offres, qui permet de s'assurer que le montant de la compensation correspond aux conditions du marché lors de son attribution.

Dans un deuxième temps, la Commission évaluera l'expérience acquise par l'application de ce cadre, et si cela est nécessaire et justifié par l'expérience, pourrait adopter un règlement d'exemption par catégorie pour les compensations de service public. Le champ d'application de ce règlement reste à établir; celui-ci pourrait être limité à certaines catégories de SIEG.

La Commission devra également évaluer la portée et les conséquences de l'arrêt de la Cour de Justice du 22 novembre 2001 dans l'affaire Ferring SA ([2]). Dans cette affaire relative au secteur particulier de la distribution en gros de médicaments, la Cour a considéré qu'une exonération de taxes au profit de grossistes répartiteurs chargés d'obligations de service public, ne constitue une aide d'Etat au sens de l'article 87 paragraphe 1, que dans la mesure où son montant excède les surcoûts liés aux obligations de service public.

L'application des règles communautaires à la sélection des prestataires de SIEG

Dans son rapport, la Commission rappelle que les Etats membres sont libres de choisir la manière dont le service doit être assuré: soit par eux-mêmes, soit par un tiers. Toutefois, dans la second hypothèse, les règles communautaires relatives à la sélection du prestataire doivent être respectées. Ces règles sont issues du traité et de la jurisprudence de la Cour ([3]), et s'appliquent même si les directives communautaires relatives aux marchés publics ne sont pas applicables. Les Etats membres doivent en particulier respecter les principes relatifs à la libre prestation de services, à la liberté d'établissement, ainsi que les principes de transparence, d'égalité de traitement, de proportionnalité et de reconnaissance mutuelle. Le respect de ces principes implique en général, sauf circonstances particulières, que soit garanti en faveur de tout soumissionnaire potentiel, un degré de publicité adéquat permettant une ouverture du marché des services à la concurrence.

La Commission estime que l'application de ces principes, outre le fait qu'elle permet de réduire considérablement les risques de conflit avec les règles de concurrence, ne peut que conférer des avantages aux usagers et aux opérateurs.

([1]) JO L 10 du 13/1/2001. P.30
([2]) Aff C-53/00
([3]) Notamment arrêt Telaustria du 7/12/2000, Aff C-324/98

Conclusion

Le rapport de la Commission au Conseil européen de Laeken n'a pas vocation à répondre à toutes les questions relatives au fonctionnement des SEIG. Il permet toutefois de réaffirmer que la réalisation du Marché intérieur et la libéralisation de certains secteurs d'activités ne sont pas antinomiques avec le fonctionnement efficace des services d'intérêt économique général. Le droit communautaire requiert certes, plus de transparence et de rigueur dans la mise en place et le fonctionnement de ces services, mais ces exigences constituent des avantages et non des inconvénients pour les citoyens. Le fonctionnement des obligations de service public dans le secteur du transport aérien offre à ce propos un bon exemple ([1]).

La Commission continuera à travailler selon les orientations définies dans son rapport, comme le Conseil européen de Laeken l'a invité à faire.

([1]) Voir notamment en ce sens «Les obligations de service public dans les transports aériens», par Alexandra Subrémon. Revue du Marché commun et de l'Union européenne, n° 432, octobre 1999

Aides fiscales: la Commission procède à l'examen approfondi du critère de la sélectivité dans le domaine de la fiscalité directe des entreprises

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Dans sa communication du 11 novembre 1998 sur l'application des règles en matière d'aides d'État aux mesures relevant de la fiscalité directe des entreprises ([1]), la Commission s'est engagée, d'une part, à examiner les projets d'aides fiscales et les aides illégalement mises en œuvre et, d'autre part, à réexaminer les régimes fiscaux préalablement approuvés. Suite à cet engagement, la Commission adoptait le 11 juillet 2001 11 décisions ouvrant la procédure formelle d'examen et 4 propositions de mesures utiles; ces 15 décisions concernent un total de 12 États membres ([2]).

L'examen des aides sous forme fiscale ne constitue cependant pas une innovation juridique. En effet, l'article 92 du traité CEE (devenu 87 CE) ne distingue pas selon les causes ou les objectifs des interventions, mais les définit en fonction de leurs effets de telle sorte que ni le caractère fiscal, ni le but social d'une mesure prise par un État membre ne suffisent à écarter l'application des règles en matière d'aides d'État ([3]). Les aides prenant la forme d'avantages fiscaux, ne sont donc pas fondamentalement différentes des aides distribuées sous d'autres formes (subventions, garanties, etc).

Par ailleurs, la Commission dispose d'une longue expérience dans le traitement des cas d'aides sous forme fiscale. Toutefois, force est de constater que la plupart des cas en la matière examinés par la Commission jusqu'à une période récente étaient caractérisés par une sélectivité sectorielle ou régionale.

L'intérêt des 15 décisions adoptées par la Commission le 11 juillet 2001 réside dans le fait que si certaines d'entre elles s'appuient sur les critères traditionnels de spécificité sectorielle et régionale, d'autres critères sont également utilisés. En outre, la détermination de l'avantage dans le cadre de certains de 15 décisions précitées peut également résulter non pas d'exonérations fiscales classiques, mais de pratiques administratives discrétionnaires voire de modalités alternatives de détermination du bénéfice imposable.

En effet, si certaines mesures remplissent ou semblent remplir le critère de la spécificité régionale, certaines de leurs caractéristiques permettent d'appréhender d'autres éléments de spécificité liés à une typologie horizontale des activités économiques (commune à de nombreux secteurs: coordination, gestion de trésorerie, etc) ou au contexte dans lequel elles sont exercées (activité intra groupe, caractère multinational, activités *offshore* ([4])). C'est notamment le cas de certains régimes fiscaux à Gibraltar ([5]) dont le bénéfice est limité aux seules entreprises exerçant des activités *offshore*, et détenues par des non-résidents. C'est également le cas du régime fiscal du centre de Trieste qui prévoit quant à lui des exonérations fiscales uniquement en faveur des entreprises implantées à Trieste (spécificité régionale) et exerçant une activité financière (spécificité sectorielle) dans les pays d'Europe centrale et orientale ou ceux issues de l'ancienne Union soviétique (activités *offshore*). De même, le régime des sociétés d'assurance en Suède prévoyait un régime fiscal spécial en matière de détermination du bénéfice imposable limité aux seules entreprises d'assurance étrangères (spécificité fondée sur la nationalité).

Certaines autres mesures sont limitées uniquement aux groupes de sociétés répondant par exemple à certains critères en termes d'implantation géographique internationale. Ainsi, le régime fiscal néerlandais des «activités de financement international» permet-il aux groupes de sociétés établis dans au moins quatre pays ou deux continents de constituer certaines réserves en franchise d'impôt. Le fait que ce régime qui ne comporte certes aucune limitation sectorielle, ne soit pas accessible aux sociétés ou groupes de sociétés ne répondant pas aux critères susmentionnés a amené la Commission à exprimer ses doutes quant à la compatibilité avec l'article 87 CE de cette mesure.

([1]) JO C 384 du 10.12.1998, p. 3.
([2]) IP/01/982.
([3]) Cf. Aff. 173/73.
([4]) Activité économique exercée hors du territoire de l'Etat qui offre le régime fiscal.
([5]) Il s'agit en l'occurrence des régimes fiscaux des *exempt companies* et *qualifying companies*.

L'analyse de la spécificité, tant en matière fiscale que dans d'autres domaines, tend à être perçue avec de plus en plus de rigueur, et ceci semble conforté par la jurisprudence récente de la Cour et du Tribunal de première instance. Ainsi, dans son arrêt *Confederación Española de Transporte de Mercancias* ([1]) (CETM), le Tribunal de première instance a estimé qu'une mesure s'appliquant à l'ensemble des entreprises d'un État membre à l'exception des grandes entreprises remplissait le critère de la sélectivité, et dans son arrêt *Adria-Wien Pipeline GmbH* ([2]), la Cour a également estimé que la limitation du remboursement d'une taxe sur l'énergie aux seules entreprises du secteur manufacturier remplissait également ce critère. La jurisprudence *Maribel bis/ter* ([3]) souligne quant à elle que «ni le nombre élevé d'entreprises bénéficiaires, ni la diversité et l'importance des secteurs auxquels ces entreprises appartiennent ne permettent de considérer une initiative étatique comme une mesure générale de politique économique» dès lors que certaines entreprises en sont exclues.

Enfin, si la détermination de l'avantage fiscal peut paraître évidente si celui-ci prend la forme d'exonérations, d'abattements, tel n'est pas le cas s'il résulte de l'application de méthodes alternatives de détermination de la base imposable du type coût de revient majoré (*cost plus*). De telles méthodes ne posent pas de problème de principe du point de vue des aides d'État. Elles sont par ailleurs, dans un autre contexte, recommandées par l'OCDE. Cependant, le recours à de telles méthodes ne saurait avoir pour objectif de réduire la base imposable des entreprises assujetties par rapport aux entreprises soumises au régime fiscal général. C'est parce que tous les coûts n'étaient pas inclus dans le calcul du *cost plus* de certains régimes de type «centre de coordination» ou «quartiers généraux» et/ou en raison des modalités de l'exercice du pouvoir discrétionnaire de l'administration fiscale dans le cadre de ces régimes que la Commission a ouvert la procédure formelle d'examen dans cinq cas répartis dans quatre États membres (France, Luxembourg, Allemagne, Espagne).

Naturellement, s'agissant des ouvertures de procédures, la Commission n'a, à ce stade, formulé que des doutes et posé des questions tant sur la présence d'aide que sur la compatibilité de ces mesures. Les procédures en cours permettront donc de répondre à ces questions.

En conclusion, si la nature de certaines activités ou la taille de certains groupes nécessitent des méthodes particulières ou des régimes d'imposition spéciaux, il est difficilement justifiable par la nature ou l'économie du système que ces régimes particuliers donnent lieu à des avantages non ouverts aux autres entreprises soumises au régime fiscal général. La pratique de la Commission, confortée par la jurisprudence, va dans le sens d'un examen toujours plus approfondi de la spécificité, notamment quant celle-ci à trait à la taille des entreprises.

([1]) T-55/99
([2]) C143-99
([3]) C-75/97

Waste treatment, recycling and state aid

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1. Introduction

Treatment and recycling of waste is a growing economic activity. National authorities, on their own initiatives or in accordance with European Directives, are implementing all kinds of systems to ensure treatment and recycling of all kinds of materials. There is substantial regulation in this area, both at the national and EU level. Such regulation concerns not only environmental aspects, but also the rules on free circulation of goods and services and the rules on competition, both anti-trust ([1]) and State aid. The number of parties involved can be high, which usually adds to the complexity.

As interesting as the rules in other areas are, this article only deals with the State aid aspects. It builds on recent experience, in particular the decisions on waste disposal systems in the Netherlands, for PVC façade elements (N484/00), paper and cardboard (NN87/00) and car wrecks (C11/01), the waste oil collection system in Germany (N387/01) and a Dutch scheme for treatment of sludge (N812/01) ([2]). At the moment of writing the Commission has not yet decided on this last case.

2. In which circumstances may State aid arise?

The definition of State aid in Article 87(1) contains four elements: there must be a *selective advantage* financed by *State resources* that *affects trade* between Member States and (*threatens to) distort competition*. In general, the Commission considers that recycling systems affect trade between Member States and that they are capable of distorting competition. Despite various restrictions, trade in waste generally exists and the companies involved may have international activities. The other elements in the definition appear to be more complex.

Selective advantage, but to whom?

The leading principle for the Commission's assessment is the 'polluter pays principle'. In the Dutch cases mentioned above, the polluters are the companies that sell or import the products that, at a later stage, turn into waste ('producer responsibility'). The consumer may be held responsible for delivery of the waste at certain collection points ('consumer responsibility'), but the cost of waste treatment and/or recycling is to be considered as a normal company cost for the producers, in particular when they are legally obliged (under national or European law) to bear such costs. Consequently, when producers (and importers) do *not* bear the costs, a selective advantage may exist.

Waste treatment and recycling systems may also provide a selective advantage to the waste treatment and recycling companies. National authorities may award financial contributions that have the effect of lowering the cost of these companies, enabling them to offer their services at lower prices. Whether or not the advantage of such a lower price is 'passed on' to the polluters, depends on the actual arrangements. This may not be the case, in particular, when no polluter can be held responsible.

Waste treatment and recycling companies may receive a selective advantage also when a system leads to contributions to these companies that surpass the market price ('overcompensation'). Even if the service of treatment and recycling itself is considered as an advantage to the polluters, the overcompensation may still constitute an advantage to the treatment and recycling companies.

State resources

Only if a selective advantage is financed by State resources, may it constitute State aid. State resources are clearly present when a government directly grants money to the polluters or to the treatment or recycling companies. The situation is also clear if such a grant is given to a fund or organisation that takes care of the system. More complicated is the case of a fund or organisation that is being financed by contributions from the

([1]) See e.g. '*The Commission defines principles of competition for the packaging waste recovery markets*', by M. Gremminger, M. Laurila and G. Miersch, Competition Policy Newsletter No. 3, October 2001, p. 29.

([2]) The decisions not to raise objections for the cases N484/00, NN87/00 and N387/01 are published in the authentic language on the Commission's web site: http://europa.eu.int/comm/secretariat_general/sgb/state_aids. The decision to initiate the procedure of Art. 88(2) in case C11/01 was published in OJ C111 of 12.4.2001, p.2. The final decision has not been published yet. Depending on the outcome of the current discussion, the decision for the case N812/01 will be published on the web or in the Official Journal.

producers and importers. When the national authorities make such a levy obligatory, it has the characteristics of a para-fiscal tax, of which the proceeds are normally to be considered as State resources. The use of such proceeds is normally assessed separately from the payments.

However, in the specific situation of the Dutch recycling systems, the Commission came to the conclusion that the effect of the obligatory levy and the other arrangements is only to oblige the producers and importers to internalise all of the true environmental costs associated with their activities. The levies they pay correspond to the costs of treatment and recycling for which they are responsible. Taking these and other circumstances into account, the Commission concluded that there is no State aid in favour of the producers and importers.

3. Compatibility

In many cases aid for treatment or recycling will take the form of operating aid. Section E.3.1 of the guidelines on environmental aid ([1]) contains the rules applicable to such aid. The main requirements are that such measures should be degressive and temporary. However, as long as polluters cannot be identified or held legally responsible, treatment or recycling systems are likely not to respect these requirements.

In the case of sludge treatment, the Dutch authorities invoked Article 86(2), claiming that the contributions to the sludge treatment companies constitute a (partial) compensation for a service of general economic interest. They referred to a Court decision in Case 209/98 that confirmed that the management of a waste might be considered as a service of general economic interest ([2]). However, the Commission may consider that the service of sludge treatment does not have a general character as it is closely tied to the dredging. The contributions may have to be considered to benefit the dredging parties in the first place, and in that case, as explained below, there will be no need to invoke Article 86(2). Whatever the decision will be, the Commission may accept the application of Article 86(2) in other cases when the service of waste treatment and recycling has a genuine general character. ([3]) A necessary, but not sufficient, condition is the absence of polluters that can be held responsible for the waste concerned.

4. Recent experience

In the Netherlands various systems are based on a voluntary agreement between the companies involved, to pay a levy into a fund that is used for financing the cost of recycling, transport, sorting and dismantling, etc. in as far as these costs cannot be recovered under normal market conditions. The Minister of Environment declares these agreements generally binding on all companies in the sector, including those that did not subscribe the agreement, in order to ensure that all 'polluters' pay the levy. As explained above, the Commission came to the conclusion that none of the notified systems constituted State aid.

The German waste oil scheme is financed by direct grants from the government, therefore State aid was involved. The aid was considered to favour the waste oil regeneration companies. It was found compatible under the exemption of Article 87(3)(c), as explained below.

The Dutch scheme for treatment of sludge (supporting treatment of contaminated sludge beyond what is required by legal standards) is also financed by direct grants from the government. However, the contributions may be considered to favour the public and private authorities that are responsible for the dredging, because the treatment is closely tied to the procurement of the dredging and treatment. Most of the dredging is done by public bodies under their public responsibilities, but such public bodies carry out economic activities, the subsidies may still be considered as State aid. The advantages to private parties remain below the *de minimis* threshold. As indicated, the Commission has not yet come to a conclusion at the time of writing.

The following considerations are worth mentioning:

- The contribution for recycling PVC façade elements was established after an open tender procedure. The contributions for paper and cardboard treatment and car dismantling were based on studies on the actual costs of these companies. Despite the absence of tender procedures, the Commission could view these contributions as 'market prices'. In the car wrecks case the Commission initially had doubts on this particular issue, as the cost of dismantling varied substantially among car dismantling companies.

([1]) OJ C37 of 3.2.2001, p. 3.

([2]) Court judgement of 23.5.2000, Sydhavnens Sten & Grus, C-209/98, ECR p. I-3743.

([3]) Court judgement of 22.11.2001, Ferring vs ACOSS, C-53/00 casts doubts on the issue whether or not a compensation for the cost of providing a service of general economic interest constitutes State aid in the meaning of Article 87(1). If there is no overcompensation, there would be no advantage, and hence no State aid.

The Dutch authorities submitted detailed information before these doubts were allayed.

- Various Directives were concerned and these contained varying clauses on responsibility and costs. Article 5(4) of the End-of-life vehicles directive ([1]) is most clear: producers and professional importers have to bear all or a significant part of the costs of the dismantling and recycling in as far as it cannot be passed on to the last owner or holder of the car. The directive on packaging and packaging waste ([2]) is much less clear. It refers in a general way to the polluter pays principle, but rather stresses close cooperation of all partners and shared responsibility. The directive on waste oils ([3]) mentions the polluter pays principle, but Article 14 stipulates that Member States may grant indemnities to collection and disposal undertakings for the service rendered. For the German scheme for regeneration of waste oils it meant that the Commission could approve direct grants to compensate for the losses, despite the fact that they do not fully comply with the criteria in the environmental aid guidelines ([4]). A similar reasoning would certainly not hold for similar grants in the car wrecks case.
- The Commission also took into account the potential competition between the recycled and 'virgin' material. In the Dutch cases it was concluded that the remuneration to recycling and treatment companies did not allow for such a distortion of competition. In any event, any general effect on producers of the virgin materials that might materialise would be no more than a typical result of regulations requiring all environmental costs to be internalised by the industry as a whole.
- The Commission normally requires that importers are exempted from para-fiscal charges and that exports are taxed equally as domestic sales. However, imports do add to the domestic waste problem, whereas exports do not. As the Dutch systems focussed on the domestic waste, the Commission accepted that importers are obliged to pay the same charge as domestic producers, whereas exports are exempted.
- The Commission can find aid compatible with the common market provided that it does not infringe other provisions in the Treaty ([5]). Of particular relevance may be national restrictions on trade in waste. If aid is dependent on such restrictions, the Commission may have to establish whether these restrictions are compatible with the provisions on the free circulation of goods and services, before it can find aid compatible with the common market.

5. Conclusions

National authorities and the private parties involved should be well aware of State aid aspects when setting up systems for treatment and recycling of waste. Of course, in case of doubt as to the existence of State aid, the golden rule is to notify the system to the Commission.

([1]) Directive 2000/53/EC of the European Parliament and the Council of 18.9.2000 concerning end-of life vehicles, OJ L 269 of 21.10.2000, p.34.
([2]) Directive 94/62/EC of the European Parliament and the Council of 20.12.1994 on packaging and packaging waste, OJ L 365 of 31.22.1994, p. 10.
([3]) Directive 87/101/EC of the Council of 22.12.1986 on the disposal of waste oils, OJ L 42 of 12.2.1987, p.43.
([4]) In the past the Commission considered similar schemes for waste oil not to constitute State aid, this based on a very specific Court ruling. This approach was changed in the German case due to other Court rulings on public services. However, also the recent Ferring ruling (see footnote above) may be relevant for this case.
([5]) See e.g. Court judgment of 15.6.1993, in case C225/91, Matra vs Commission, ECR 1993, p. I-3203.

State aid:
main developments between 1 September and 31 December 2001

Italie – les interventions en faveur de la régularisation de l'économie souterraine constituent des mesures générales

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Le 13 novembre 2001, la Commission européenne a adopté une décision dans laquelle, après une analyse portant sur la notion d'aide d'Etat au sens de l'article 87, paragraphe 1er, du traité CE, qualifie de mesures générales les interventions italiennes en faveur de la régularisation de l'économie souterraine.

Ces mesures visent à lutter contre un phénomène, celui de l'économie souterraine, qui est très difficile à saisir. Ce phénomène, en effet, présente la caractéristique fondamentale de concerner une partie inconnue de l'économie, en ce sens qu'elle sort des données statistiques ordinaires et qu'elle n'est pas déclarée aux autorités fiscales. Il existe néanmoins des estimations, qui montrent qu'il s'agit d'un phénomène de grande ampleur.

La Communication de la Commission sur le travail non déclaré du 7 avril 1999 ([1]) révèle qu'en moyenne la taille de l'économie non déclarée de l'Union européenne est comprise entre 7 et 16% du PIB de l'Union européenne. Si les estimations de l'économie souterraine varient sensiblement selon la méthode utilisée, elles permettent néanmoins de distinguer certains groupes de pays. Dans un premier groupe, l'économie non déclarée avoisinerait le 5% du PIB (pays scandinaves, Irlande, Autriche et Pays-Bas). Dans un deuxième groupe (Italie et Grèce), elle est estimée à plus de 20%. Plus au moins à mi-chemin entre ces deux extrêmes, il existe deux groupes intermédiaires: celui formé par le Royaume-Uni, l'Allemagne et la France et, un peu au-dessus, celui formé par la Belgique et l'Espagne.

Dans ce contexte, l'Italie est donc l'un des pays les plus touchés par le phénomène de l'économie souterraine. En 1999, le travail irrégulier a intéressé environ 3,5 millions d'unités de travail à temps plein, c'est-à-dire 15% des emplois totaux. Le nombre d'unités de travail irrégulier en 1999 est augmenté de 349.000 unités (+11%) par rapport à l'année 1998, où le pourcentage du travail irrégulier représentait 13,4% des emplois totaux. Certaines données montrent que dans le secteur agricole le phénomène de l'économie souterraine se manifeste avec une intensité d'environ 30% des unités de travail. D'autres secteurs sont moins touchés par l'économie souterraine: 17% dans le secteur des services, 16% dans les constructions et 6% dans l'industrie *strictu sensu*. Il s'agit toutefois d'un phénomène qui paraît intéresser tous les secteurs de l'économie nationale, ce qui montre son caractère horizontal.

L'Italie avait déjà adopté deux régimes d'aide visant à lutter contre l'économie souterraine, qui avaient fait l'objet d'une appréciation favorable de la part de la Commission ([2]). Dans son appréciation la Commission avait qualifié ces mesures d'aides au maintien de l'emploi, tout en estimant qu'elles étaient compatibles avec le marché commun, en vertu de la dérogation prévue à l'article 87, paragraphe 3, point a), du traité CE. La Commission a ainsi apprécié les deux régimes sur la base des lignes directrices concernant les aides à l'emploi ([3]). Ces deux régimes d'aides concernaient uniquement les régions du «Mezzogiorno» (sud de l'Italie), admises à la dérogation prévue par la disposition précitée de l'article 87 du traité CE. Les aides au maintien de l'emploi, en effet, s'apparentent à des aides au fonctionnement et peuvent être autorisées, sous certaines conditions, dans les seules régions pouvant bénéficier de ladite dérogation ([4]).

Les mesures italiennes approuvées par la Commission le 13 novembre 2001 constituent une nouvelle approche dans la lutte contre l'économie souterraine, en ce sens qu'elles poursuivent les efforts

([1]) Document COM(1998) 219.
([2]) Décisions de la Commission des 3 mars 1999 (aide d'Etat N 545/98) et 4 octobre 2000 (aide d'Etat N 236/A/2000).
([3]) JO C 334 du 12.12.1995.
([4]) Cf. point 22 des lignes directrices concernant les aides à l'emploi.

accomplis dans le passé mais en généralisant leur application, notamment, à tout le territoire italien. Elles prévoient des interventions principales et subsidiaires en faveur des entreprises bénéficiaires.

Les interventions principales comportent deux volets. Le premier porte sur un impôt de substitution des prélèvements prévus par le régime de droit commun sur les revenus des personnes physiques et morales (IRPEF, IRPEG et IRAP), de l'ordre du 10%, 15% et 20% respectivement pour la première, deuxième et troisième période d'imposition. Cet impôt s'applique uniquement à l'augmentation du revenu imposable déclaré par rapport à l'année précédente. La base imposable à taux réduit est plafonnée à un montant égal au triple du coût du travail régularisé. Le deuxième volet comporte le versement d'une contribution de substitution des charges sociales normalement dues par les entreprises, de l'ordre du 8%, 10% et 12% respectivement pour la première, deuxième et troisième période d'imposition.

Comme intervention subsidiaire, les mesures prévoient notamment que la déclaration des entreprises est également valable pour la détermination des taxes et des charges sociales non payées («concordato tributario e previdenziale»), si elle est présentée avant les contrôles éventuellement effectués. Cet accord comporte le payement, pour la période d'illégalité, d'un impôt de substitution de l'IRPEF, de l'IRPEG, de l'IRAP, de la TVA et des charges sociales de l'ordre du 8% du coût du travail irrégulier utilisé et déclaré, sans application de sanctions et d'intérêts.

Enfin, les mesures prévoient des interventions en faveur des travailleurs qui s'engagent dans le programme d'émersion. Il s'agit d'un impôt de substitution des prélèvements normalement opérés sur les revenus des personnes physiques (IRPEF), se chiffrant à 6% pour la première année, 8% pour la deuxième année et 10% pour la troisième année; de l'exclusion des contributions sociales qui gravent sur les travailleurs; de l'extinction des dettes fiscales et des charges sociales liées au travail irrégulier à travers le payement d'une contribution de substitution.

Afin d'évaluer si les mesures constituent des aides d'Etat au sens de l'article 87, paragraphe 1er, du traité CE, la Commission a vérifié si elles procurent un avantage à ses bénéficiaires, en favorisant certaines entreprises ou certaines productions, si cet avantage découle d'aides accordées par l'Etat ou au moyen de ressources d'Etat et si les mesures en cause sont susceptibles d'affecter les échanges entre les Etats membres. Si l'un de ces critères n'est pas rempli, la mesure ne peut pas être qualifiée d'aide d'Etat. Il s'agit d'une appréciation objective que la Commission effectue avant de se pencher sur l'analyse de l'aide. Comme l'a précisé le Tribunal de première instance, «*la notion d'aide est une notion objective et fonction de la seule question de savoir si une mesure étatique confère ou non un avantage à une ou certaines entreprises*» ([1]). Si les mesures notifiées par les Etats membres ne constituent pas des aides d'Etat aux sens de l'article 87, paragraphe 1er, en d'autres termes, la Commission ne doit pas se pencher sur leur compatibilité avec le marché commun.

Parmi les critères d'examen mentionnés, celui de la spécificité est à la base de la distinction entre aide d'Etat et mesure générale. En effet, au sens dudit article 87, afin d'être qualifiées d'aide d'Etat les interventions étatiques doivent favoriser «certaines entreprises ou certaines productions». C'est pourquoi la généralisation de l'intervention, notamment à tout le territoire italien, constitue un changement fondamental par rapport aux régimes d'aides approuvés par la Commission en 1999 et 2000 ([2]). Cela n'aurait toutefois pas suffit pour qualifier de générale les mesures notifiées par l'Italie.

La Communication de la Commission sur l'application des règles relatives aux aides d'Etat aux mesures relevant de la fiscalité directe des entreprises précise la distinction entre les notions d'aide d'Etat et de mesure générale: *«les mesures fiscales ouvertes à tous les acteurs économiques opérant sur le territoire d'un Etat membre constituent en principe des mesures générales»* ([3]). Ces mesures doivent être effectivement ouvertes à toutes les entreprises sur la base d'une égalité d'accès et leur portée ne peut être *de facto* réduite, par exemple, par le pouvoir discrétionnaire de l'Etat dans leur octroi ou par d'autres éléments qui restreignent leur effet pratique.

La spécificité peut être appréciée par référence à certains éléments, tels que, la taille de l'entreprise concernée ou son secteur d'activité. Cette spécificité peut aussi se manifester à différents niveaux: au niveau du dispositif même de la mesure, lorsqu'elle désigne certains bénéficiaires spécifiques; au niveau de l'application du dispositif,

([1]) Arrêt du 27 janvier 1998, affaire T-67/94, Recueil p. II-1.

([2]) Cf. *supra*, note 2, p. 86.

([3]) Communication de la Commission sur l'application des règles relatives aux aides d'Etat aux mesures relevant de la fiscalité directe des entreprises, point 13 (JO C 384 du 10.12.1998).

lorsque la mesure attribue aux autorités publiques un pouvoir discrétionnaire; au niveau du résultat à atteindre par la mesure qui, bien que générale dans son dispositif, pourrait concentrer ses effets et avantager de fait certaines entreprises ou certaines productions.

Les mesures approuvées par la Commission le 13 novembre 2001 sont susceptibles de s'appliquer à toutes les entreprises, dans tous les secteurs et sur tout le territoire italien. Les pouvoirs publics ne disposent d'aucun pouvoir discrétionnaire dans sa mise en œuvre en dehors de la simple gestion d'un budget selon des critères objectifs. Par ailleurs, ces mesures sont tout à fait atypiques, s'adressant à des bénéficiaires qui sont *a priori* complètement inconnus. Ainsi, elles n'établissent aucune discrimination systématique ni au niveau du dispositif, en désignant des bénéficiaires spécifiques, ni au niveau de son application, en attribuant aux autorités publiques des pouvoirs discrétionnaires.

C'est alors sur la base de ces éléments que la Commission a considéré que les mesures ne constituent pas des aides d'Etat et elle les a qualifiées de mesures générales.

Denmark – Commission approves grants to large energy consumers

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On 6 June 2001 the Commission decided not to raise any objections to the extension of a scheme comprising measures in favour of companies with high energy consumption, and therefore a high CO_2 and energy tax burden.

A brief description of the basic features of the Danish green tax scheme is necessary in order to place the notified extension of the scheme in its context. The core of the green tax package is the imposition of a CO_2 tax on energy products and electricity. The tax rate is related to the carbon content of the energy product. In the case of electricity, the tax rate is related to the carbon content of coal, since most power stations in Denmark are coal-fired. When fuel is used for production processes the CO_2 tax rate is DKK 100 (about € 13.40) per tonne CO_2 emitted, and when fuel is consumed for space heating and hot water, the sum of the CO_2 tax and the energy tax due is DKK 780 (about € 104.80) per tonne as from 1 January 2002.

The Danish authorities have always considered that companies with particularly high energy consumption need partial refunds of the CO_2 tax in order to maintain their international competitiveness. These refunds are granted under a system based on the concept of 'heavy' and 'light' production processes, referring to their energy intensity ([1]). There is an exhaustive process list annexed to the law containing all processes considered to be 'heavy' (currently 35). The Danish authorities attempt to avoid distortions of competition since competing products can be produced with more or less energy-intensive processes. Thus, certain processes are not included in the list, although they would have met the criteria, and vice-versa. The process list is revised annually to take account of such effects and of technological developments.

All production processes not contained in the process list are considered to be light processes. In some cases, space heating and hot water may be considered part of a light production process. For light processes the refund amounts to 10% of the tax. This refund is available to all VAT registered companies and has been considered to constitute a general measure. For heavy processes the refund amounts to 75% of the tax. This refund only benefits certain companies, and has therefore been considered to be State aid.

The possibility to enter voluntary agreements with the authorities is only available to companies with heavy processes and to the most energy-intensive of those with light processes. Under such agreements, companies undertake to reduce their emissions by improving the energy efficiency of their production processes. In return they receive an additional refund of the CO_2 tax, so that the total refunds cover 97% of the tax for companies with heavy processes, and 32% of the tax for companies with light processes (the basic refund plus 22%). These refunds have also been considered to constitute State aid.

As a part of the green tax package implemented in 1996, companies had to start paying a CO_2 tax and an energy tax on fuels used for space heating and hot water. These taxes were phased in during a first period running from 1996 to 1998. In 1998, the Danish authorities undertook a major adjustment of the tax system, whereby the energy tax on electricity and fuels used for space heating and hot water was to be increased by 20% on average. The phasing in of this increase began mid 1998 and was to be completed by the end of 2001.

New voluntary agreements for space heating and hot water

An evaluation undertaken in 1998-1999 showed that the actual tax burden on the energy-intensive companies that had entered voluntary agreements was still considerably higher than expected. The main cause was the tax burden resulting from energy consumption for space heating and hot water, which was 50% higher than estimated. The Danish authorities therefore proposed to allow companies to conclude additional voluntary agreements in order to receive grants covering 22% of the amount of CO_2 and energy taxes due on fuels used for space heating and hot water. The refund would be available both to companies with light processes and companies with heavy processes, although the criteria would be slightly different.

([1]) The process list is drafted on the basis of a statistical assessment of energy-intensity of production processes. A production process is considered energy-intensive for the purpose of the list if a tax of DKK 50 per ton CO_2 emitted implies a financial burden on production costs exceeding 3% of the value added and exceeding 1% of the production value.

As a counterpart, they would have to undertake investments improving their energy efficiency with regard to space heating and hot water use.

Assessment

The Commission assessed the Danish scheme on the basis of the Community guidelines on state aid for environmental protection ([1]), in particular section E.3.2 which sets out the rules applicable to all operating aid in the form of tax reductions or exemptions. The Commission noted that the refunds to be granted in return for the voluntary agreements for space heating and hot water related not only to the CO_2 tax, but also to the energy tax, for which no refund had been granted before. Therefore, the fact that a refund was to be granted for the energy tax did not fulfil the requirement under point 51.2 (b) of the guidelines, that the "derogation for the firms concerned must have been decided on when the tax was adopted". However, point 52 of the guidelines states that where an existing tax is increased significantly and where the Member State concerned takes the view that derogations are needed for certain firms, the conditions set out in point 51.1 are applicable by analogy. In this case, the Danish authorities in 1998 had decided to increase the energy tax rates significantly, namely by 20% on average.

The CO_2 tax, being a tax for which refunds were foreseen from the beginning, fulfilled the requirement in point 51.2 (b). The CO_2 tax scheme had been shown to have a positive environmental effect in the form of a 3.8 % reduction of emissions as compared to the 1988 levels, and it therefore fulfilled the criterion on the environmental effect in point 51.2 (a).

Next, both refunds were assessed under point 51.1 (a), and were found to comply with the requirements. The modification permitted companies with high energy consumption for space heating and hot water to conclude voluntary agreements with the Energy Agency. The new voluntary agreements would be subject to the same rules currently applicable to voluntary agreements linked to energy consumption for production processes. As a counterpart for the tax refunds granted, companies would be under a strict obligation to undertake investments to improve their energy efficiency. In addition, the Energy Agency has extensive powers to monitor the fulfilment of the obligation and to penalise companies that do not conform.

Since these measures in favour of companies with high energy consumption complied with the guidelines on State aid for environmental protection, the Commission was able to grant the Danish scheme a 10-year exemption under Article 87(3)(c) of the EC Treaty.

([1]) OJ C 37, 3.2.2001, p. 10.

Ireland – Commission approves a support granted by the Irish government to the Electricity Supply Board in compensation for an obligation to generate electricity out of peat

Brice ALLIBERT, Directorate-General Competition, unit G-2

The European Commission decided on 30 October to approve support granted by the Irish government to the Electricity Supply Board (ESB) to compensate for the requirement imposed on ESB by the State to have in its possession a certain quantity of electricity generated from peat.

In order to ensure a level of security of electricity supply in Ireland, the Irish Government plans to put an obligation on ESB to have at its disposal a specific quantity of electricity from generating stations which use peat as their primary energy source. This quantity will not exceed 15% of the overall primary energy necessary to produce the electricity consumed in Ireland on an annual basis.

ESB has examined a number of industrial options that could allow it to fulfil this obligation in the next years while meeting the Community and Irish safety and environment regulations. It was decided that the most economical option was to accelerate the closure of the six existing peat powered plants and replace them by two new and more efficient ones.

Although the new plants will be more efficient, the cost of the electricity that they will generate will still be much above the average electricity market prices, resulting in losses for ESB.

The support notified by the Irish authorities to the Commission aims at compensating the charges incurred by ESB in relation to the fulfilling of the obligation. The compensations are based on the difference between the generation cost for electricity out of peat and the mean electricity market price on the production market, as computed each year by the Irish electricity system regulator. In the coming years, before the planned total opening market of the Irish electricity market, the mean market price benchmark will be replaced by an estimate of a best new entrant generated electricity price. This price will be established annually under the control of the Irish electricity system regulator.

The compensations will be financed through a levy on the connection to the electricity grid. The levy will vary depending on whether the holder of the connection is a domestic or a commercial consumer.

It was estimated by the Irish authorities that compensations should amount to a total of approximately 570 M€ for the 2001-2019 period, with an approximate mean value of 30 M€ per year.

The Commission decided that in the event that the system constituted a State aid, it could be authorised as a compensation for a service of general economic interest as regards security of supply according to Article 86(2) of the EC Treaty, in the light of Articles 3(2) and 8(4) of Directive 96/92/EC of the European Parliament and of the Council concerning the common rules for the internal market for electricity.

United Kingdom – Commission approves UK government reimbursable advance to Rolls-Royce for the development of two new engines

Brice ALLIBERT, Directorate-General Competition, unit G-2

The European Commission decided on 30 October to approve the United Kingdom proposal to grant Rolls-Royce plc a 250 million GBP reimbursable advance for the development of two new large aircraft engines, the TRENT 600 and TRENT 900.

These two engine projects are very challenging turbomachine programmes as they will have to comply for instance with very strict pollutant emission, fuel consumption, safety and noise regulations, while keeping a reasonable weight.

The advance will be reimbursed by Rolls-Royce to the United Kingdom Government in case of success of the programme, based on a levy reflecting engine deliveries and maintenance and support activity.

The Commission has analysed the project in the light of the community framework for State aid for research and development. It concluded in particular that the project eligible costs were in line with the framework criteria, that the aid intensity was compatible with the threshold applicable to reimbursable advances in relation to precompetitive development activity, and that the aid had a clear incentive effect, especially in view of the ambition and the important technological challenges carried by the programme. The Commission concluded that the aid project was in line with the framework and could therefore be authorised in application of Article 87(3)c of the EC Treaty.

Germany – Commission takes two final partially negative decisions with recovery obligation with regard to aid to two sawmills in Mecklenburg-Vorpommern

Anne FORT, Directorate-General Competition, unit H-2

On 15 January 2002 the Commission decided to close, with two partially negative decisions, the procedures laid down in Article 88(2) EC with regard to aid to Pollmeier GmbH Malchow and aid to Klausner Nordic Timber GmbH & Co. KG.

In the course of 1999, the Commission received several complaints relating to aid in favour of the establishment of new investments in the sawmill industry in Germany. The complainants expressed their concern about the distortive effect due to the new large capacities that threaten the structure of the sawmill sector, characterised mostly by SMEs. The complaints concerned in particular regional aid in favour of the establishment of a new sawmill in Malchow by the company Pollmeier GmbH Malchow and the creation and the extension of a sawmill in Wismar by the company Klausner GmbH & Co. KG.

In both cases Germany has alleged that the investment aid was granted on the basis of regional aid schemes approved by the Commission. Both projects have benefited from the bonus granted to SMEs and were granted aid with an intensity above 35%. However the Commission had doubts whether the aid complied with the conditions of the schemes and in particular whether the beneficiaries of the aid were genuine SMEs.

The issue at stake was the extent of the relevant undertaking beneficiary of the aid. For the purposes of competition law, undertakings are to be identified with 'single economic units' as defined by the ECJ in its case-law (see ECJ Case of 14.11.1984, Intermills/Commission, 323/82, ECR 3808). The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity. To define the relevant undertaking, it is necessary to examine various factors such as the shareholding of the companies, the identity of the managing directors and the degree of economic integration.

The Commission therefore opened the formal investigation procedure of Article 88(2) EC with regard to aid to Pollmeier GmbH Malchow in March 2001 and with regard to Klausner Nordic Timber GmbH & Co. KG in June 2001.

Pollmeier GmbH Malchow is a company of the Pollmeier group. The Pollmeier group which was established in the mid-80s in Rietberg is composed of several companies all linked through a common main shareholder, Ralf Pollmeier. The Commission has considered that the beneficiary of the aid could not be considered as being the sole legal entity Pollmeier GmbH Malchow. In view of the ownership structure and the degree of economic integration between the different companies of the group, the beneficiary was defined as comprising the European and the American sawmills of the group.

At the time of the granting of the aid in 1998, the beneficiary did not have the SME status as defined by the Commission recommendation of 3 April 1996 concerning the definition of small and medium sized enterprises (OJ L 107 of 3.04.1996, p. 4). Therefore it was not entitled to benefit from measures with an aid intensity of 48.18% which exceeds the maximum aid intensity allowed for big companies in Mecklenburg-Vorpommern according to the German regional aid map. Consequently aid of € 3 650 860 (corresponding to the additional aid intensity of 13.18% in excess of the regional aid ceiling of 35%) had to be assessed as new aid. This aid could not be justified by any regional problem since it exceeded the regional aid ceiling; nor could it be justified on other grounds. Therefore the Commission concluded that the aid was incompatible and closed the formal investigation procedure with a partially negative decision. It also decided that the aid had to be recovered from its recipient.

Klausner Nordic Timber GmbH & Co. KG is a company 100% owned by Fritz Klausner. In 1997 it established a new sawmill plant in Wismar and extended the plant in 1998. Fritz Klausner also holds shares in other companies active in the wood-processing industry and in particular in Klausner Holz Thüringen GmbH & Co. KG which operates a sawmill in Friesau. The Commission has considered that the beneficiary of the aid could not be limited to the legal entity Klausner Nordic Timber GmbH & Co. KG but also encompasses Klausner Holz Thüringen GmbH & Co. KG. Information from the web-sites of the companies as well as information from competitors have shown

that both companies are linked through common shareholders and managers and that they are acting on the market as one player.

In 1997 and 1998 when the different measures for the creation of the sawmill in Wismar were granted, the beneficiary as defined above had the SME status according to the Commission recommendation. Therefore the Commission concluded that aid with an intensity of 43.2% (including the SME bonus) of eligible costs of € 22.4 million was covered by approved aid schemes and constituted existing aid. The aid granted in 1998 for the extension project and representing an aid intensity of 48.58% of eligible costs of € 11.8 million was also covered by approved aid schemes.

In 1999 the beneficiary benefited from two further aid measures. At the time of award of these measures, the beneficiary had lost its SME status. Therefore the Commission considered that the guarantee to secure a loan of € 29 750 000 with an aid element of 0.5% was not covered by an approved aid scheme and that it did not fulfil the criteria to be considered compatible with the common market. The Commission also concluded that part of an investment tax premium for 1999 exceeding € 2 027 982 was not covered by an approved aid scheme and did not fulfil the criteria to be considered compatible. Consequently the Commission closed the formal investigation procedure with a partially negative decision and ordered the recovery of the incompatible aid.

In both cases big enterprises were granted aid exceeding the maximum allowable aid for big enterprises. These cases have to be seen in conjunction with other cases where the Commission wants to ensure that legal arrangements in which separate legal units form an economic group much stronger than an SME are not accepted in order that only genuine SMEs benefit from more favourable rules.

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New documentation

European Commission
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This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: http://europa.eu.int/comm/ competition/ speeches/index_2001.html

Speeches by the Commissioner 27 September 2001 – 31 December 2001

Does EC competition policy help or hinder the European audiovisual industry? – Mario MONTI – British Screen Advisory Council – London – 26.11.2001

Antitrust in the US and Europe: a History of convergence – Mario MONTI – General Counsel Roundtable – American Bar Association – Washington DC - 14.11.2001

Competition and Consumer: the case of Pharmaceutical Products – Opening Speech – Mario MONTI – European Competition Day – Antwerp – 11.10.2001

Market definition as a cornerstone of EU Competition Policy – Mario MONTI – Workshop on Market Definition – Helsinki Fair Centre – Helsinki – 05.10.2001

Competition Policy and the Enlargement of the European Union – Mario MONTI – Friedrich Ebert Stiftung – Berlin – 27.09.2001

Speeches and articles, Directorate-General Competition staff, 26 September 2001 – 31 December 2001

La politique européenne de concurrence dans le secteur audiovisuel – Jean-François PONS – Conférence organisée par la présidence belge: L'audiovisuel public face aux phénomènes de concentration et de diversification des services – Bruxelles – 15.11.2001

Collective Management and EU Competition Law – David WOOD – Vth SGAE conference on intellectual property, competition and collective management – Madrid – 12.11.2001

La gestión colectiva y el Derecho de la competencia comunitario – David WOOD – V conferencia de la SGAE sobre propiedad intelectual, competencia y gestion colectiva – Madrid – 12.11.2001

Recent developments in commission policy and practice – Maria REHBINDER – EC State Aid Conference – 02.11.2001

Network utilities – the EU institutions and the Member States – Pierre-André BUIGUES, Olivier GUERSENT, Jean-François PONS – Regulating network utilities: the European experience – Oxford University Press – 01.11.2001

Alternative models for future regulation – Pierre-André BUIGUES, Olivier GUERSENT, Jean-François PONS – Regulating network utilities: the European experience – Oxford University Press – 01.11.2001

Energy Liberalisation and EC Competition Law – Michael ALBERS – Fordham 28th Annual Conference of Antitrust Law and Policy – New York City – 26.10.2001

Continued focus on reform – Recent developments in EC competition policy – Alexander SCHAUB – Fordham Corporate Law Institute – Twenty-eighth Annual Conference On International Antitrust Law and Policy – New York City – 25.10.2001

How to Enforce & Promote competition in the Global Transport Market – Jean-François PONS – The 6th Annual European Shippers' Council Conference – Copenhagen – 24.10.2001

Sport et politique européenne de la concurrence: «règles du jeu» et exemples récents d'application – Jean-François PONS – Forum européen de la concurrence – Bruxelles – 18.10.2001

Die Liberalisierung der Märkte für Gas und Strom und die Wettbewerbspolitik der Europäischen Kommission – Alexander SCHAUB – Düsseldorf – 10.10.2001

Les services d'intérêt économique général dans l'Union européenne: subsidiarité, contrôle et libéralisation – Jean-François PONS – Paris – 08.10.2001

Minderheitsbeteiligungen und personelle Verflechtungen zwischen Wettbewerbern – Zur Anwendung von Artikel 81 und 82 EG-Vertrag (Minority Shareholdings and Interlocking Directorships under Articles 81 and 82 EC) – Alexander WINTERSTEIN/Enzo MOAVERO MILANESI – Rolfes/Fischer (Hrsg.), Handbuch der Europäischen Finanzdienstleistungsindustrie, Fritz Knapp Verlag, Frankfurt a.M. – 01.10.2001

Europäisches Wettbewerbsrecht und anwaltliches Berufsrecht (European competition rules and professional rules of lawyers) – Alexander SCHAUB – Parlamentarischen Abends des Deutschen Anwaltsvereins (DAV) – 26.09.2001

The Direction of Competition Policy: Reconciling National and International Objectives – Alexander SCHAUB – Annual Fall Conference on Competition Law – Ottawa – 21.09.2001

Community Publications on Competition

New publications and publications coming up shortly

- XXX report on competition policy, 2000
- Competition policy newsletter, 2002, Number 2

Information about our other publications can be found on the on the DG Competition web site: http://europa.eu.int/comm/competition/publications

Except if otherwise indicated, these publications are available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Some publications, including this newsletter, are available in PDF format on the web site.

Press releases
1 October 2001 – 14 January 2002

All texts are available from the Commission's press release database RAPID at: http:// europa.eu.int/rapid/start/ Enter the reference (e.g. IP/02/14) *in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.*

ANTITRUST

IP/02/14 – Date: 07-01-2002
Competition policy: Commission opens debate on block exemption for licensing agreements

IP/02/13 – Date: 07-01-2002
Competition policy: new Notice on agreements of minor importance (de minimis Notice)

IP/01/1899 – Date: 21-12-2001
High-speed Internet access: Commission suspects Wanadoo (France) of abusing its dominant position

IP/01/1898 – Date: 21-12-2001
Rebalancing tariffs in Spain: Commission refers case to Court of Justice

IP/01/1892 – Date: 20-12-2001
Commission fines ten companies for carbonless paper cartel

IP/01/1832 – Date: 14-12-2001
Commission announces intention to clear partnership between Austrian Airlines and Lufthansa

IP/01/1797 – Date: 11-12-2001
Commission fines six companies in zinc phosphate cartel

IP/01/1796 – Date: 11-12-2001
Commission fines five German banks for fixing the price for the exchange of euro-zone currencies

IP/01/1781 – Date: 10-12-2001
Commission publishes a study on the future of car distribution

IP/01/1775 – Date: 10-12-2001
Commission clears the creation of Eutilia and Endorsia electronic-marketplaces

IP/01/1743 – Date: 05-12-2001
Commission fines five companies in citric acid cartel

IP/01/1740 – Date: 05-12-2001
Commission fines Luxembourg brewers in market sharing cartel

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Antitrust decision against De Post – La Poste aims to protect competitive postal service from the monopoly

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Commission proposes to approve the revised TACA liner conference

IP/01/1659 – Date: 26-11-2001
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Commission settles Marathon case with Thyssengas

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Commission imposes fines on vitamin cartels

IP/01/1529 – Date: 31-10-2001
Commission names new Hearing Officer in competition policy area

IP/01/1523 – Date: 30-10-2001
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The Commission adopts a Decision on the monitoring of relations between La Poste and mail-preparation firms in France

IP/01/1433 – Date: 19-10-2001
IATA agrees to end the joint setting of cargo rates within the EEA

IP/01/1415 – Date: 15-10-2001
Commission warns Deutsche Bahn about discriminating against a private competitor

IP/01/1394 – Date: 10-10-2001
Commission imposes fine of nearly 72 million on DaimlerChrysler for infringing the EC competition rules in the area of car distribution

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'Competition and the Consumer – The Case of Pharmaceutical Products' – European Competition Day, Antwerp, 11 October

IP/01/1355 – Date: 02-10-2001
Commission fines six companies in sodium gluconate cartel

STATE AID

IP/01/1353 – Date: 02-10-2001
Commission initiates formal investigation with respect to proposed aid in favour of Hamburger AG.

IP/02/12 – Date: 07-01-2002
Commission publishes second EU Scoreboard on State aid

IP/01/1884 – Date: 20-12-2001
Scrapping of single hull oil tankers : Commission initiates investigation of proposed Italian State aid

IP/01/1883 – Date: 20-12-2001
Airlines left without insurance following the attacks in the United States: the Commission authorises the aid measures introduced by Austria, Danmark, France, Germany and Spain

IP/01/1882 – Date: 20-12-2001
Air transport: the Commission authorises rescue aid for the German air transport company LTU

IP/01/1879 – Date: 20-12-2001
Commission approves substantial State aid to Technologie Diesel Italia SpA

IP/01/1878 – Date: 20-12-2001
Commission slightly reduces planned aid to DaimlerChrysler for new engine plant in Kölleda (Germany)

IP/01/1877 – Date: 20-12-2001
Commission decides that asset sale of Gröditzer to Georgsmarienhütte does not involve State aid

IP/01/1876 – Date: 20-12-2001
Commission opens inquiry into Italian aid planned for Iveco's Foggia plant.

IP/01/1875 – Date: 20-12-2001
Commission decides three tax-aid schemes in the Basque provinces are incompatible with the common market

IP/01/1799 – Date: 11-12-2001
Commission decides on reserves for nuclear power plant decommissioning

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Commission rules that fiscal advantages to Italian banks are incompatible with State aid rules

IP/01/1793 – Date: 11-12-2001
Freight transport : Commission authorises Flemish financial support aiming at boosting the use of inland waterways

IP/01/1792 – Date: 11-12-2001
Commission authorises aid to the Spanish coal industry

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IP/02/34 – Date: 11/01/2002
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IP/02/22 – Date: 09/01/2002
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IP/02/4 – Date: 03/01/2002
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IP/01/1901 – Date: 21-12-2001
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IP/01/1436 – Date: 17-10-2001
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This information is extracted from the 'New Cases' listing in the Proceedings of the Court of Justice and the Court of First Instance. The proceedings can be consulted on the website of the Court of Justice at:

Proceedings of the Court of Justice and the Court of First Instance of the European Communities – New Cases:
http://europa.eu.int/cj/en/act/index.htm

Please note: the listing is given in French, which is the most up-to date version of the Proceedings. (At the time of going to press, the proceedings are available up to 14 December 2001).

For the French version of the proceedings of the Court, see:

Les Activités de la Cour de justice et du Tribunal de première instance des Communautés Européennes – Affaires introduites:
http://europa.eu.int/cj/fr/act/index.htm

Affaires introduites devant la Cour et le Tribunal dans le domaine de la concurrence – 24 septembre au 14 décembre 2001

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Commission / France
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