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La politique européenne de la concurrence dans les services postaux hors monopole

Jean-François PONS, Direction Générale Concurrence, Directeur Général Adjoint, et Tilman LUEDER, Direction Générale Concurrence, unité H-3

Les services postaux en Europe (et dans la plupart des pays tiers) se caractérisent en général par la coexistence d'un secteur sous monopole (pour le service général de la poste aux lettres) et d'un secteur concurrentiel, en particulier pour les services à valeur ajoutée (courrier express par exemple). Le cadre juridique communautaire est régi par la Directive postale de 1997 ([1]) et par les règles de la concurrence qui s'appliquent pleinement aux secteurs hors monopole.

Dans ce contexte, la Commission européenne a pris deux décisions importantes à six mois d'intervalle qui visent à assurer une concurrence équitable pour les services hors monopole, autrement dit à éviter leur monopolisation par les opérateurs postaux nationaux auxquels les États membres ont accordé des droits exclusifs pour fournir le service général de la poste aux lettres.

Après avoir rappelé brièvement le contenu de ces deux décisions, le présent article essaiera d'en dégager des leçons pour l'avenir en ce qui concerne la politique européenne de concurrence dans ce secteur spécifique.

1) La décision de la Commission relative à la fourniture, en Italie, de nouveaux services postaux (base juridique: art. 86 § 3; date: 21 décembre 2000)

Le 21 décembre 2000, la Commission a adopté une décision relative à la prestation en Italie des nouveaux services postaux. ([2]) Les nouveaux services de « courrier hybride » se caractérisent par une série de prestations à valeur ajoutée par rapport au service général de la poste aux lettres. Dans le cas d'espèce, la phase de livraison du «courrier hybride» prévoit une série de prestations à valeur ajoutée, notamment la garantie contractuelle que l'envoi crée électroniquement par le client arrive à une date ou à une heure prédéterminée par ce client. Selon l'appréciation de la Commission, le «courrier hybride», ([3]) avec livraison à une date ou à une heure prédéterminée, constitue un marché distinct et très différent du service général de la poste aux lettres.

Dans ces circonstances, la Commission a estimé que (1) le décret législatif italien ([4]) qui a établi la réservation de ces services contrevient à l'article 86 §1 en liaison avec l'article 82 du Traité et que (2) que la concurrence en ce qui concerne la remise garantie à date ou heure prédéterminées ne compromettrait pas l'équilibre financier de l'opérateur public. À la suite de la décision du 21 décembre 2001, le gouvernement italien a adopté une circulaire selon laquelle la livraison à une date ou à une heure prédéterminée qui fait partie intégrale de la prestation du «courrier hybride» ne fait pas partie des services susceptibles d'être réservés. ([5])

La décision du 21 décembre 2000 fait suite a une plainte déposée à l'encontre de l'État italien par des petites et moyennes entreprises italiennes qui ont établi l'infrastructure nécessaire pour ce type de «courrier hybride». La réservation a effectivement empêché ces fournisseurs privés de fournir le courrier hybride dans son intégralité y inclus la phase de livraison à date ou heure prédéterminées. Les mesures prises par le gouvernement italien afin de transposer la décision en ordre juridique national, visent à créer la certitude juridique nécessaire pour des opérateurs privés quant à la phase de livraison à une date ou une heure certaine. Il est intéressant de noter que le gouvernement italien et l'opérateur historique ont finalement décidé de ne pas poursuivre leurs appels contre la décision du 21 décembre 2000.

Conformément à l'article 86 § 2, du traité, les règles du Traité, et en particulier les règles de concurrence, s'appliquent à l'opérateur postal historique chargé d'un service d'intérêt écono-

([1]) Journal Officiel No L 15 du 21 janvier 1998, page 14.
([2]) Journal Officiel No L 63 du 3 mars 2001, page 59.
([3]) Le courrier hybride est une forme de courrier dans lequel les envois postaux sont générés et transmises par des moyens électroniques pour être ensuite remise à l'adresse indiquée sous forme physique.
([4]) Décret n°261 du 22 juillet 1999.
([5]) Lettre «circulaire» du Ministre des communications N° DGRQS/1225 du 18 mai 2001.

mique général, à moins que leur application ne fasse obstacle à l'accomplissement en droit ou en fait de la mission particulière qui lui a été impartie. Selon la décision, l'application des règles de concurrence et l'ouverture du service en question à des opérateurs privés ne reviendrait pas à «écrémer» les revenus de l'opérateur public et ne fait donc pas obstacle à l'accomplissement de sa mission de service public. D'abord, l'opérateur historique, prestataire du service universel, n'a pas fourni, à l'état actuel, un tel service et ne subirait donc pas de manque à gagner. Ensuite, la remise à date ou à heure prédéterminées répond à une demande très particulière qui n'était pas satisfaite auparavant. La remise de ces envois génère un *accroissement* du volume total de correspondance, et ne de substitue pas au courrier sous monopole. Dès lors, la Commission a estimé qu'il n'y a pas de raison pour le réserver au prestataire du service universel.

2) La décision de la Commission sur l'abus de position dominante de Deutsche Post dans l'envoi de colis (base juridique: art. 82; date: 20 mars 2001)

Le 20 mars 2001, la Commission a conclu une enquête ouverte à l'encontre de Deutsche Post AG («DPAG») pour abus de position dominante en décidant que l'opérateur postal allemand a abusé de sa position dominante: (1) en accordant des rabais de fidélité et (2) en pratiquant des prix d'éviction (ou «prédatoires») sur le marché des services d'envoi de colis de la «vente par correspondance» («VPC»). ([1]) À la suite de cette procédure, DPAG s'est engagée vis-à-vis de la Commission de séparer son service d'envoi de colis de son monopole.

La décision du 20 mars a fait suite à une plainte déposée par United Parcel Service («UPS»), une entreprise privée opérant dans le secteur de l'envoi de colis partout en Europe. Dans cette plainte UPS a allégué que DPAG utilisait les recettes de son monopole postal pour financer une stratégie des prix d'éviction dans le secteur des colis, qui est ouvert à la concurrence. Sans les subventions croisées à partir du secteur réservé, DPAG n'aurait, selon UPS, pas été en mesure de financer ces ventes à perte pendant très longtemps. Il convient de noter que ni DPAG ni la plaignante UPS n'ont fait appel contre la décision du 20 mars 2001.

2.1. Les rabais de fidélité

Dans sa décision, la Commission condamne d'abord le système de rabais de fidélité sur les envois de colis VPC, activité non réservée. L'enquête de la Commission a révélé que de 1994 à octobre 2000, DPAG avait accordé des rabais substantiels à ses gros clients du secteur de la VPC à condition que ceux-ci fassent transporter par DPAG l'intégralité, ou du moins la plus grande partie, de leurs envois de colis. Or, un tel système de rabais de fidélité élimine la concurrence. Le système en question a eu pour conséquence principale d'empêcher tout concurrent privé d'atteindre la «masse critique» (estimée à un chiffre d'affaires annuel de 100 millions de colis) qui lui permettrait de pénétrer avec succès sur le marché allemand de l'envoi de colis pour le secteur de la VPC. Cela est confirmé par le fait qu'entre 1990 et 1999, DPAG a conservé une part stable, en volume, du marché de l'envoi de colis pour la VPC, supérieure à 85 %.

Compte tenu de la fermeture du marché qui a résulté de ce système de rabais de fidélité pratiqué depuis longtemps et conformément à une jurisprudence traditionnelle à l'égard des rabais de fidélité, la Commission lui a imposé une amende de 24 millions d'euros. Il s'agit de la première décision formelle adoptée par la Commission dans le secteur des postes en vertu de l'article 82 du traité CE, qui interdit les abus de position dominante et de la première amende dans ce secteur.

2.2. Les prix d'éviction

Par ailleurs, pour la première fois dans le secteur postal, la décision de la Commission impose un critère pour mesurer les «subventions croisées» entre le secteur sous monopole et les activités concurrentielles, qui débouchent sur des prix d'éviction dans ce dernier secteur: tout service fourni en concurrence par le bénéficiaire d'un monopole doit couvrir au moins les coûts supplémentaires ou les coûts incrémentaux propres aux prestations concurrentielles. La Commission estime que tout prix de vente inférieur à ces coûts incrémentaux constitue un prix d'éviction contraire à l'article 82 du Traité CE. La décision établit en effet une distinction entre les coûts liés au maintien de la capacité du réseau et les coûts d'utilisation du réseau. La Commission estime que les coûts supportés par DPAG pour maintenir un réseau permettant de donner à chacun la possibilité d'envoyer des colis à un tarif uniforme fait partie de l'obligation de service universel de DPAG. Les

([1]) Journal Officiel No L 125 du 5 mai 2001, page 27.

économistes appellent cette obligation de service universel l'obligation d'être un «opérateur de dernier recours». Le fait d'habiliter une société à être un opérateur de dernier recours contraint celle-ci à maintenir certaines capacités de réserve afin de pouvoir répondre à la demande en période de pointe. A la différence d'une entreprise qui peut disposer librement de toute la palette de ses services, un opérateur de dernier recours supporte en toute hypothèse des coûts de réserve de capacité, même s'il se retire de toute activité concurrentielle. Ces coûts ne sont donc pas propres aux prestations concurrentielles et sont considérés comme les coûts fixes de l'entreprise. ([1]) En plus, le critère des coûts incrémentaux a été choisi pour tenir compte des coûts que DPAG doit supporter du fait de sa mission de service public. Afin que les coûts de maintien du réseau soient justement pris en compte, seule la couverture des coûts incrémentaux est exigée pour les activités de DPAG dans le secteur des services de transport de colis pour la VPC. Ces activités ne sont donc pas grevées des coûts généraux de maintien du réseau qui sont imposés à DPAG par sa mission de service public.

La raison pour laquelle aucune amende n'a été imposée pour cette infraction est que les concepts économiques en matière de coûts utilisés pour identifier des prix d'éviction n'avaient pas été suffisamment développés au moment où l'abus a eu lieu. En outre, DPAG a aujourd'hui résolu ce problème de façon satisfaisante (voir sous 2.3.).

2.3. La séparation du service concurrentiel d'envoi de colis du monopole postal

À la suite de cette procédure, DPAG créera une société distincte pour les services de transport de colis commerciaux (colis pour la VPC et colis «entreprise vers entreprise»). Le système de prix transparents et axés sur le marché qui sera mis en œuvre conjointement par DPAG et la nouvelle entité pour les produits et les services qu'elles pourraient se fournir réciproquement constitue une garantie, pour les concurrents de DPAG dans le secteur des colis commerciaux, que les recettes issues du monopole détenu par DPAG dans le secteur du courrier ne seront pas utilisées pour financer ces services. Cette transparence des relations financières entre le secteur réservé et les services d'envoi de colis ouverts à la concurrence est indispensable pour garantir que les recettes des services ouverts à la concurrence couvrent les coûts incrémentaux liés à leur production.

Afin de garantir le niveau de transparence requis, DPAG s'est engagée vis-à-vis de la Commission à créer une société distincte («la nouvelle société») pour fournir les services d'envoi de colis commerciaux. La nouvelle société sera libre d'acheter les «intrants» nécessaires à ses services (par exemple le tri, le transport et la distribution des colis) soit à DPAG ou à des tiers, ou encore de les produire elle-même. Au cas où la nouvelle société choisirait de les acheter à DPAG, celle-ci devrait lui fournir l'ensemble des biens et services concernés aux prix du marché. En outre, DPAG s'est engagée à ce que tous les intrants qu'elle fournira à la nouvelle société soient également fournis aux concurrents de celle-ci, aux mêmes prix et conditions. De ce fait, DPAG ne sera pas incitée à facturer à la nouvelle société des prix inférieurs à ceux du marché.

3) Les leçons à tirer de ces deux décisions pour la politique européenne de concurrence dans les services postaux hors monopole

Les deux décisions diffèrent sur la base juridique (art. 86, 3 dans le premier cas, art. 82 dans le second) et sur les activités couvertes («courrier hybride» en Italie, transport de colis pour le secteur de la VPC en Allemagne).

Les deux décisions possèdent aussi trois caractéristiques communes intéressantes.Elles ont été prises sur la base des plaintes, dont le nombre dans le secteur postal est croissant, elles portent sur des activités hors monopole et elles ne font pas objet d'appels.

Les deux décisions convergent surtout en ce qui concerne *les principales leçons à en tirer pour la politique européenne de la concurrence dans les activités postales hors monopole:*

(1) la Commission sera vigilante dans son souci de protéger la concurrence dans des marchés distincts et différents du service général couvert par le monopole

(2) la Commission a développé une approche cohérente ce qui concerne les «subventions croisées» entre des activités sous monopole et des activités concurrentielles, en tenant compte des coûts supplémentaires que

([1]) Voir notamment William J. Baumol et J. Gregory Sidak, *Toward Competition in Local Telephony*, (MIT Press 1994), p. 108 à 109: «*These obligations are appropriately treated as sources of common fixed costs for the firm…*».

l'opérateur historique doit supporter du fait de sa mission de service public.

Les deux décisions ne mettent donc pas en cause la définition des missions de service public que les États membres confient à leurs opérateurs postaux historiques, leur liberté de définir l'étendue de telles missions et l'équilibre financier des opérateurs chargés des services d'intérêt économique général.

Elles visent, par contre, à éviter que les monopoles ne «re-monopolisent» toute une série des services nouveaux à valeur ajoutée et à forte potentialités de croissance et d'innovation, liés notamment à Internet et au commerce électronique. Dans ces activités, les nouveaux entrants sur ces marchés, parfois des PME, satisfont des besoins spécifiques de telle ou telle clientèle: banques, compagnies d'assurances, avocats, experts comptables et sont souvent plus innovateurs, plus imaginatifs que les opérateurs historiques. La Commission n'a certes pas l'intention d'interdire aux opérateurs historiques d'intervenir sur ces marchés ouverts à la concurrence, mais de s'assurer qu'ils le font à égalité de conditions de concurrence.

D'autres procédures sont d'ailleurs en cours. Les décisions qui seront prises continueront à clarifier encore plus l'application des règles de concurrence aux secteurs postaux hors monopole.

General Electric/Honeywell — An insight into the Commission's investigation and decision

Dimitri GIOTAKOS, Laurent PETIT, Gaelle GARNIER and Peter DE LUYCK, Directorate-General Competition, Directorate B

On 3 July 2001, the European Commission declared the proposed merger between the U.S. companies General Electric ('GE') and Honeywell incompatible with the common market. This decision came at the end of an in-depth investigation which resulted in the finding that the combination of the leading aircraft engine maker with the leading avionics/non-avionics manufacturer would create/strengthen a dominant position in various relevant markets in which the merging companies are active. One of the critical factors of the competitive assessment of the case was the combination of GE's financial strength and vertical integration into aircraft purchasing, financing and leasing with Honeywell's leading positions on various markets such as corporate jet engines, avionics and non-avionics products.

The General Electric Company is a diversified industrial corporation active in fields including aircraft engines, appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting (through the NBC media channel), financial services and transportation systems. Honeywell is an advanced technology and manufacturing company serving customers worldwide with aerospace products and services, automotive products, electronic materials, speciality chemicals, performance polymers, transportation and power systems as well as home, building and industrial controls.

The proposed merger affected two broad categories of industrial sectors, namely aerospace products and industrial systems. The product markets affected in the aerospace sector were the markets for jet engines, avionics, non-avionics and engine starters. The product market affected in the industrial systems sector was the market for small marine gas turbines.

Jet Aircraft Engines and Related Markets

The Commission examined three categories of jet engines markets, namely jet engines for large commercial aircraft, jet engines for regional jet aircraft and jet engines for corporate jet aircraft, as well as their related markets for maintenance, repair and overhaul ('MRO'). Buyers of aircraft (airlines, leasing companies, etc.) place orders for the type of aircraft they wish to acquire and, when possible, they separately chose the engine as well as the other systems (avionics, non-avionics) that will equip the aircraft.

The investigation showed that engines for large commercial aircraft could be considered as constituting a single product market, whereas engines for regional and corporate aircraft can be subdivided into distinct markets, namely for large and small regional jets as well as for light, medium and heavy corporate jets. The concentration did not create any horizontal overlap in the market for jet engines for large commercial aircraft. However, it created such overlaps in the markets for jet engines for large regional aircraft and for medium corporate aircraft. All the above markets were deemed to have a worldwide dimension.

Market Shares

In order to calculate market shares, the Commission assessed the installed base of jet engines as well as the order backlog of engine suppliers. The installed base is an indication of the current incumbency positions of engine suppliers, whereas the order backlog is an indication of their immediate future incumbency. Owing to the benefits of engine commonality, incumbency of engine suppliers is better assessed in terms of the installed base of engines on aircraft that are still in production. Nevertheless, to the extent that the revenue streams that engine suppliers can use to finance future engine developments, and thus future competition in the market, derive from the engines in service today, the overall installed base of engines was assessed (i.e., including engines on aircraft both still and no longer in production). The Commission also calculated market shares on the basis of the number of platform competitions won be each engine manufacturer.

Large Commercial Aircraft Engines

The three major engine suppliers in this market are GE, Pratt & Whitney (P&W) and Rolls-Royce (RR). They manufacture engines either independently or within joint ventures that include sub-

contractors (such as SNECMA, MTU, etc.). To the extent that such sub-contractors have no independent manufacturing capability and presence in the market, the market shares of joint ventures were attributed to the prime contractors. This is the case for the 50:50 joint venture between GE and SNECMA that is responsible for manufacturing the CFM56 engine that powers, among others, the best-selling aircraft of all times, the Boeing 737. Several factors supported this allocation of market shares. Although in legal terms GE and SNECMA jointly control CFMI, the only meaningful attribution of market shares for the purposes of analysing the transaction could only be made to GE, to the extent that SNECMA is not an independent supplier of civil jet engines for large commercial aircraft. The analysis of the joint venture and of SNECMA's participations in other GE engine programmes indicated that SNECMA would act jointly with GE as a profit maximising entity. This analysis has been confirmed by GE and Honeywell's own documentation, public and private, in which they characterise CFM engines as GE engines. As a consequence, the Commission allocated the market shares of CFMI to GE, whereas the market share of IAE was equally split between the independent prime contractors, that is RR and P&W.

On the market for large commercial aircraft engines, GE was found to hold by far both the largest *installed base* of engines on large commercial aircraft still in production as well as the largest *order backlog*. The *evolution of the installed base* over the last five years indicated that GE had displayed the highest growth rate, which resulted in widening the gap with its competitors. GE also was found to account for the largest part of the revenue streams derived from the *overall installed base* of engines. This indicated that GE was expected to generate more revenues from its overall installed base than its competitors. For the reasons outlined below, GE was found to hold a dominant position in this market.

Large Regional Aircraft Engines

GE and Honeywell are the only engine suppliers whose engines have been certified for large regional jets that are still in production. There are four manufacturers of large regional jets, namely Embraer, Bombardier, Fairchild-Dornier and BAe Systems. This market is the fastest growing of all the jet markets and the parties forecast sales of over 4 000 aircraft over the next 20 years. Through the combination of factors described below, GE won all the recent engine competitions held for new platforms and secured 90% of the orders of engines for large regional jet aircraft. As indicated above, Honeywell is the other supplier to that market. Together the two companies therefore accounted for the totality of this market.

Medium Corporate Jet Aircraft Engines

Honeywell is already the leading player, well ahead of GE, P&W and RR. The merger would have created a horizontal overlap. As far as medium corporate jet engines are concerned in particular, Honeywell's leading position would have been strengthened.

Factors Contributing to GE's Dominance

GE's current dominant position on the markets for engines for both large commercial and large regional jet aircraft results from the combination of a series of factors. These are, inter alia, GE's consistently high and increasing market shares, its vertical integration into aircraft purchasing, financing and leasing, its financial strength through GE Capital, its financial arm, as well as its strong position on the aftermarket services.

Besides its high market shares, GE can be characterised as a unique company. In addition to having the world's largest market capitalisation ([1]), GE offers a combination and range of complementary products and services to customers. Indeed, GE is not only a leading industrial conglomerate active in many areas including aerospace and power systems, but also a major financial organisation through *GE Capital*. GE's financial arm contributes around half of the GE Corporation consolidated revenues and manages over USD 370 Bio, more than 80% of GE's total assets. If GE Capital were an independent company, it would, on its own, rank in the Top 20 of the Fortune 500 largest corporations.

GE Capital offers the GE business enormous financial means almost instantaneously and enables GE to take more risk in product development programmes than any of its competitors. The Commission's investigation confirmed that this ability to absorb product failures in an industry characterised by long term investments is critical.

GE has also taken advantage of the importance of financial strength in this industry through the use of heavy discounts on the initial sale of the

([1]) Market capitalisation of USD 480 Bio as of 1 June 2001 (far greater than any other company active in the commercial aircraft market such as Boeing with around USD 56 Bio, UTC with USD 39 Bio and RR with USD 5 Bio).

engines. This practice has resulted in moving the break-even point of an engine project further away from the commercial launch of a platform. Given its enormous balance sheet, GE has been in a position to increase rivals' funding cost by delaying their inception of cash flows and consequently increasing their need to resort to external financial means further raising their leverage (debt/equity ratio) and resulting borrowing costs ([1]). By entertaining this situation, GE has managed to make its competitors very much vulnerable to any down cycle or strategic mistake.

Furthermore, the Commission's investigation revealed that thanks to its financial strength and incumbency advantages as an engine supplier, GE can afford to provide significant financial support to airframe manufacturers under the form of platform-programme development assistance that competitors have not been historically in a position to replicate. GE has indeed used this direct financial support to obtain exclusivity for its products on those airframes that it has financially assisted ([2]), thereby depriving competitors from access to such airframes.

GE's enormous financial capacities also contribute to further grow and strengthen its position on the very lucrative part of the engine business by investing massive amounts of money for several years into the aftermarket through the purchase of a significant number of repair shops all over the world.

Another factor contributing to GE's dominance is its vertical integration into aircraft purchasing, financing and leasing activities through GE Capital Aviation Services ('GECAS'). *GECAS* is the largest purchaser of new aircraft, ahead of any individual airline or other leasing company. It has the largest single fleet of aircraft in service, as well as the largest share of aircraft on order and options.

Unlike any other independent leasing company, *GECAS* does not select equipment on the aircraft that it purchases in accordance with market demand. As a result of GECAS' policy of selecting only GE engines when purchasing new aircraft, 99% of the large commercial aircraft ordered by GECAS are GE-powered ([3]).

The Commission's in-depth investigation indicated that GECAS has the incentive and the ability to enhance the market position of GE Aircraft Engine division ('GEAE') through several means. As a launch customer ([4]), GECAS can influence the aircraft equipment selection by the airframe manufacturers and therefore constitute, in combination with other GE features, the element that can tilt the balance in favour of GE as equipment and service supplier. GEAE's competitors are unable to guarantee these purchases and therefore to offer launch or boost orders to airframe manufacturers. The role of GECAS as a launch or boost customer has proven particularly effective in obtaining access/exclusivity to new aircraft platforms as illustrated by GE's exclusive position on the Boeing 777X. In addition, GECAS has also proven a very effective tool in strengthening GE's position with airlines on those platforms where there is engine choice.

The market investigation further showed that GECAS has the ability to standardise fleets around GE-powered aircraft and convince an airline that would not otherwise have leased a GE-powered aircraft to accept such an aircraft. Finally, the ability of GECAS to shift market shares by seeding airlines with GE-powered aircraft has, given the existence of commonality, a multiplying effect in that those airlines will continue to purchase its engines in the future, therefore multiplying GE's engine sales.

Unlike any other engine manufacturer, GE can afford to encourage and pay for exclusivity and capture aftermarket, leasing and financial revenues. From an airframe manufacturer's perspective, selecting GE allows the airframe manufacturer to access the largest customer base of airlines and secure a significant, either launch or boost, order of its aircraft by GECAS. No other engine manufacturer has the size, financial strength or vertical integration to replicate such offers. By using the purchasing leverage of GECAS, GE has been able to shift jet engine market shares to the benefit of GEAE.

The Commission could not share the contention that the influence of GECAS could be replicated easily and rapidly by GE's competitors through, inter alia, the setting-up of their own aircraft leasing subsidiaries. The Commission's investigation confirmed that such a counter-move on behalf

([1]) One illustration of this significant competitive advantage enjoyed by GE over its industrial rivals resides in its AAA credit rating which extends to all its subsidiaries and enables them to raise finance cheaper and quicker than competitors.
([2]) GE has secured a total of ten exclusive positions out of the last twelve that were granted by airframe manufacturers. GE did not take part in the other two.
([3]) The remainder is accounted for by 8 Boeing 757s for which GE has no engine on offer.
([4]) GECAS is one of the two leasing companies that operate as launch customers as these companies can order multiple aircraft at one time, and wait the extra time for delivery of a new airframe.

of competing engine manufacturers could not constrain GE's leadership on the engines markets.

The vertical integration of GE also extends to other aerospace business segments. Through its GE Engine Services ('GEES') subsidiary, GEAE also has a global network of MRO shops servicing its own large commercial engines as well as those of other Original Equipment Manufacturers ('OEM') on a worldwide basis. GEAE also sells turboprop and turboshaft engines and related replacement parts for use in military and civilian aircraft. Finally, GE's aircraft engines are also used as the basis of derivatives for industrial and marine gas turbines.

As far as customers are concerned, the market investigation revealed that GE's financial strength is particularly critical in an industry where raising external finances can prove very difficult especially for smaller customers that are limited by their balance sheet and own financial performance. Even larger airlines, especially those that are already important purchasers of GE products and services are not likely to exert countervailing buying power. This is for instance the case of those airlines that depend heavily on GE to carry out their activities. Such customers (essentially the bulk of European airlines) would equally not run the risk of jeopardising a specific commercial relationship with GE and end-up at a competitive disadvantage as compared to their direct airline competitors.

As for airframe manufacturers, they are all subject to the airlines' derived demand for aircraft and engines and cannot disregard such a demand. Furthermore, especially when developing new platforms, airframe manufacturers are always in need for financial assistance, which GE has been able to provide on several occasions. Finally, airframe manufacturers cannot afford to disregard the possibility of GECAS placing large orders for their products and therefore of contributing to their industrial and financial viability. As a consequence, GE is in a position to influence the ability of airframe manufacturers to compete on the sales of aircraft to airlines. This affects seriously their incentives to exercise countervailing power with a view to favour competing engine manufacturers.

Given the nature of the jet engines market, characterised by high barriers to entry and to expansion, GE's incumbent position with many airlines, its incentive to use GE Capital's financial power with customers, its ability to leverage its vertical integration through GECAS, the limited countervailing power of customers and the weak position of competitors, GE was considered to be in a position to behave independently of its competitors, customers and ultimately consumers and thus to be a dominant firm on the markets for large commercial jet aircraft engines and for large regional jet aircraft engines.

Avionics and Non-Avionics Markets

Avionics products relate to the range of equipment used for the control of the aircraft, for navigation and communication as well as for the assessment of flying conditions. The avionics markets were previously analysed in the AlliedSignal/Honeywell decision ([1]) and can be subdivided into avionics for large commercial aircraft, on the one hand, and for regional/corporate aircraft, on the other hand. Non-avionics products relate to a variety of (sub)systems such as, among others, auxiliary power units ('APU'), environmental control systems ('ECS'), electric power, wheels and brakes, landing gear and aircraft lighting, all of which are key to the operation of an aircraft.

Depending on their selection process, avionics and non-avionics products can be divided in buyer-furnished equipment ('BFE'), supplier-furnished equipment ('SFE') and SFE-option. BFE is equipment that can be selected by the buyer of the aircraft at the moment of the purchase. SFE is equipment selected by the airframe manufacturers at the moment of the development of a new platform. As opposed to BFE, SFE is selected on an exclusive basis and remains on the aircraft for its entire life cycle. As far as SFE-option is concerned, airframe manufacturers obtain certification for several product makes while giving the buyer the option of the final selection.

The markets for avionics products are highly concentrated with three players accounting for more than 90% of the market. Another 35 manufacturers are small and specialised and may qualify as niche players. Overall, Honeywell accounts for over half of the worldwide sales of avionics and holds particularly strong market positions on a number of 'key' avionics products. Rivals such as Rockwell Collins, primarily a BFE supplier, and Thales, share the remainder.

Honeywell is also the leading supplier of non-avionics products (accounting for between 40% and 70% of each product line), followed by Hamilton Sundstrand ([2]). Other suppliers such as

([1]) See Case COMP/M.1601 – AlliedSignal/Honeywell.

([2]) Hamilton Sundstrand belongs to United Technology Corporation and is therefore a sister company of P&W.

BF Goodrich, SNECMA and Liebherr compete on a limited product range.

Following the creation of its range of products after its merger with Allied Signal, Honeywell is in a position to offer all avionics and non-avionics products, either independently or as part of strategically targeted or integrated packages.

The market investigation showed that no individual competitor is able to replicate complete offerings as those put together by Honeywell. The merging parties' contention that competitors could team up in order to offer equally performing solutions was not confirmed by the market investigation. Past teaming-up attempts to compete against Honeywell's breadth of products and services have either failed or not materialised. The lack of economic integration among the members of the team and the practical difficulty to implement cross-subsidisation and to share profits made rivals' teaming-up a more expensive strategy and therefore an unattractive solution for customers.

Engine Starters

Honeywell holds a particular position in the market for engine starters, an essential input to jet engines. Hamilton Sundstrand is the other main engine starter manufacturer. However, Hamilton Sundstrand was not considered as a competitor of Honeywell since its starters were found to be used exclusively on P&W engines and were therefore not made available to the market. Excluding Hamilton Sundstrand's captive sales, Honeywell remained as the only large independent supplier of engine starters. Although GE is not active in these markets, the merger would have created a vertical relationship stemming from GE's dominant position in the downstream market for jet engines and Honeywell's leading position in the upstream market for engine starters.

Small Marine Gas Turbines

Gas turbines are derived from aerospace engines and provide power for industrial and marine applications. Distinct markets were identified on the basis of power output and final applications. The small marine gas turbine market is a concentrated market on which P&W Canada, RR/Allison, Honeywell and GE compete. Honeywell is the leading supplier of small marine gas turbines and GE is its closest competitor. The merger would have combined the two strongest players in the market, creating an entity four to five times larger than the second player. In addition to this horizontal overlap, Honeywell's leading position would have been strengthened by its combination with GE's financial strength and vertical integration in financial and aftermarket services. Finally, as Honeywell is a supplier of key components to marine gas turbine projects that are in competition with GE, the merged entity would have had an important stronghold further up in the supply chain.

THE COMPETITIVE EFFECTS OF THE PROPOSED MERGER

The proposed merger would have led to the creation/strengthening of dominant positions on several markets as a result of horizontal overlaps between some of the parties' products and the combination of Honeywell's leading market positions with GE's financial strength and vertical integration in aircraft purchasing, financing, leasing and aftermarket services. The merged firm's incentive and ability to foreclose competition through, inter alia, bundling/tying and other anti-competitive means would have also contributed to the creation/strengthening of dominant positions on several of the relevant markets.

Following the proposed transaction the merged firm would have become dominant on the markets for BFE, SFE and SFE-option avionics and non-avionics markets as well as on the market for corporate jet aircraft engines. GE's existing dominant positions on the markets for large commercial and large regional jet aircraft engines would have also been strengthened. The following paragraphs set out in detail the various relevant product markets where dominance was either created or strengthened.

SFE Avionics & Non-Avionics

Creation of A Dominant Position

Foreclosure through the Vertical Integration of Honeywell with GE

The main effect of the proposed transaction on the markets for SFE avionics and non-avionics products would have been the combination of Honeywell's activities with GE's financial strength and vertical integration into aircraft purchasing, financing and leasing as well as into aftermarket services.

SFE are products selected on an exclusive basis by the airframe manufacturer and supplied as standard equipment for the life cycle of an aircraft. Consequently, for a supplier of SFE, its initial selection on a platform can guarantee a long-term

source of revenues. Following the proposed merger, Honeywell would have immediately benefited from GE Capital's incentive and capability to secure exclusive supply positions for its products.

In addition to that and similarly to GE engines, as a result of the proposed transaction, Honeywell's products would have also benefited from the role of GECAS as a significant purchaser of aircraft and from its business practices to promote GE products and services. Post-merger, GECAS would indeed have had a strong incentive to extend its GE-only policy from engines to avionics and non-avionics.

Furthermore, thanks to GE's strong generation of cash flows resulting from the conglomerate's leading positions on several markets, following the merger, Honeywell would have been in a position to benefit from GE's financing surface and ability to cross-subsidise its different business segments, including the ability to engage in predatory behaviour.

In the light of the above, the strategic use by GE of the market access enjoyed by GECAS and of the financial strength of GE Capital in favour of the products of Honeywell would have positioned Honeywell as the dominant supplier on the markets for SFE avionics and non-avionics where it already enjoyed leading positions.

By the same token, rival avionics and non-avionics manufacturers would have been deprived from future revenue streams generated by the sales of the original equipment and spare parts. As already explained, future revenues are needed to fund development expenditures for future products, foster innovation and allow for a potential leapfrogging effect. By being progressively marginalised as a result of the integration of Honeywell into GE, Honeywell's competitors would have been deprived of a vital source of revenue and see their ability to invest for the future and develop the next generation of aircraft systems substantially reduced, to the detriment of innovation, competition and thus consumer welfare.

Foreclosure through Bundling/Tying of GE and Honeywell Products and Services

As it will be explained below, the above-described situation would have been compounded by the new entity's ability to engage into a number of foreclosure practices vis-à-vis airframe manufacturers (see next paragraph on BFE and SFE-option).

BFE (and SFE-option) Avionics & Non-Avionics

Creation of A Dominant Position

Foreclosure through Bundling/Tying of GE and Honeywell Products and Services

Given the parties' dominant and/or leading positions in their respective markets, and the wide combination of complementary products that it could it could have offered, the merged entity could have engaged in a number of foreclosure practices. Sales of BFE and SFE-option products are made to airlines on a regular basis, in particular each time an airline replaces or complements its fleet of aircraft. On each of these occasions, the merged entity could have foreclosed the selection of Honeywell's competing BFE and SFE-option products by selling its own products, for instance, as part of a broader package comprising engines and GE's ancillary services such as maintenance, leasing, finance, training, and so forth.

The sale of complementary products through packaged deals may take several forms. It may include, for instance, mixed bundling whereby complementary products are sold together at a price which, owing to the discounts that apply across the product range, is lower than the price charged when they are sold separately. It may also take the form of pure bundling whereby the entity sells only the bundle but does not make the individual components available on a stand-alone basis. Pure bundling may also take the form of technical bundling, whereby the individual components only function effectively as part of the bundled system, and cannot be used alongside components from other suppliers, that is to say, they are made incompatible with the latter components.

As a result of the proposed merger, the merged entity would have had the financial and technical ability as well as the economic incentive to price its packaged deals in such a way as to induce customers to buy GE engines and Honeywell BFE and SFE-option products over those of competitors, thus increasing its combined share on both markets. This would have occurred as a result of, inter alia, the ability of the merged entity to cross-subsidise discounts across the products composing the packaged deal.

The incentives for the merged entity to sell bundles of products could have evolved over the short to medium term. For instance when new generations of aircraft platforms and aircraft equipment would be developed, the merged entity could have also

been expected to engage in technical bundling – that is, to make its products available only as an integrated system that is incompatible with competing individual components.

In the short term, the merger would have affected suppliers of BFE and SFE-option products. As BFE products are sold and purchased on a regular basis, the merged entity's packaged offers would manifest their effects immediately after the consummation of the merger. Because of their lack of ability to match the bundled offers, rival component suppliers would lose market shares to the benefit of the merged entity and experience an immediate damaging profit shrinkage. As a result, the merger was likely to lead to market foreclosure on those existing aircraft platforms and subsequently to the elimination, or a substantial lessening, of competition in these areas.

Foreclosure through the Vertical Integration of Honeywell with GE

In addition to the implementation of bundling on the markets for BFE avionics and non-avionics products, the combination of Honeywell with GE's financial strength and vertical integration in aircraft purchasing, financing and leasing as well as in aftermarket services would have contributed to the foreclosure effect already described for SFE avionics and non-avionics.

Engines For Large Commercial Aircraft

Strengthening of A Dominant Position

Foreclosure through Bundling/Tying of GE and Honeywell Products and Services

Given the complementary nature of the GE and Honeywell products and services and their either dominant or leading respective market positions, the merged entity would have had the ability to engage in foreclosure practices, such as the bundling of engines, avionics and non-avionics products as well as related services towards airlines. On the market for engines, the proposed transaction would therefore have had the effect of strengthening GE's existing dominance.

In addition, GE could have strengthened its dominant position through, inter alia, bundling or tying vis-à-vis airframers. The foreclosure of GE's competitors through their inability to counter GE's success in obtaining any platform exclusivity was expected to increase and could have occurred as early on as the launch of the next aircraft platform.

Foreclosure through the Vertical Integration with Honeywell Engine Starters

Quite apart from the above mentioned foreclosure effects, the proposed transaction would have strengthened GE's dominant position on the market for large commercial aircraft engines as a result of the vertical foreclosure of the competing engine manufacturers that would have resulted from the vertical relationship between GE as an engine manufacturer and Honeywell as a supplier of engine starters to GE and its competitors.

The merged entity's incentive and ability to profitably raise the price or limit the output of engine starters as a result of this vertical relationship would raise the costs of rival engine manufacturers and would therefore contribute to their further foreclosure from the market for large commercial aircraft engines, thus strengthening GE's dominant position.

Engines For Large Regional Jet Aircraft

Strengthening of A Dominant Position

Horizontal Overlap on Existing Platforms

The first effect of the proposed transaction on the market for large regional jet aircraft engines was to create a horizontal overlap between GE's and Honeywell's products that would have led to the strengthening of GE's already dominant position on that market.

With regard to competition between existing platforms in production, the combination of GE and Honeywell as the only engine suppliers currently on the market for large regional jet aircraft would have prevented customers from enjoying the benefits of price competition (e.g., in the form of discounts) between suppliers.

Effects on Future Platform Competitions

Similar to the market for large commercial aircraft engines, the market for large regional jet aircraft engines would have been affected by the proposed merger through the implementation of package offers or cross-subsidisation by the merged entity.

As a result of their inability to put together competing bundled offers to those proposed by the merged entity or to cross-subsidise as between engines and avionics or non-avionics, either independently or with other component manufacturers, the rivals' chances of placing engines on future

large regional jet airframes would have significantly declined.

As a direct consequence of the foreclosure effect, rivals in the market for large regional jet aircraft engines would have most probably been forced to reassess the opportunity, both in commercial and financial terms, to continue competing and investing on that specific market. Following their inability to compete on the merits with the merged entity and in the absence of any financial return from that market, the most likely outcome for rivals would have been to withdraw from the manufacturing and marketing of engines for large regional jet aircraft.

Engines For Corporate Jet Aircraft

Creation of A Dominant Position

Horizontal Overlap

The immediate effect of GE's proposed acquisition of Honeywell on the market for corporate jet aircraft engines was to create a horizontal overlap that would have led to the creation of a dominant position.

Foreclosure through the Vertical Integration of Honeywell with GE

Together with the creation of the horizontal overlap, the proposed merger would extend the benefit of GE's financial strength and vertical integration into aircraft purchasing, financing and leasing as well as into aftermarket services, to Honeywell's activities as an engine supplier for corporate jet aircraft.

In addition to that, as a result of the proposed transaction, Honeywell's engines and related services would have also benefited from GE's aircraft leasing and purchasing practices to promote GE's products and services as well as from its instrumental leverage ability to secure marketing and placement of GE products. The proposed transaction would indeed bring together the leading engine supplier, Honeywell, with GE's corporate jet aircraft leasing company GE Capital Corporate Aircraft Group ('GECCAG').

The effect on rival corporate jet engine manufacturers could have been expected to be in the range of what had already taken place, by the effect of GE alone, on the market for large regional jet aircraft engines. Foreclosure and inability to invest in the development of the next generation of corporate jet aircraft engines was likely to result from the integration of Honeywell with GE.

Foreclosure through Bundling/Tying of GE and Honeywell Products and Services

The foreclosure effect identified above on the market for corporate jet aircraft could have been increased by the implementation of foreclosure practices by the merged entity.

Following their inability to replicate, rivals would have progressively lost their capacity to secure platform exclusivity for their engines and be foreclosed from that market as soon as future platforms would have been developed. As their cash flows would have dried out and financial return dropped, the shareholders of those suppliers would have had to make the rational decision to stop investing and competing on the market for corporate jet aircraft engines.

UNDERTAKINGS PRESENTED BY THE PARTIES

On 14 June 2001 (i.e., the legal deadline for the submission of remedies), GE proposed a number of undertakings, including the divestiture of certain BFE and SFE avionics, APUs for small aircraft, the European ECS related to corporate and regional aircraft, the divestiture of a regional aircraft engine under development and certain behavioural undertakings on GECAS and bundling. The Commission considered these undertakings as insufficient to remove the competition problems identified. The scope of the divestitures was insufficient to address the vertical and the conglomerate effects of the merger. In addition, the market investigation indicated that the assets proposed for divestiture could not constitute viable and stand alone businesses. Some behavioural commitments proposed would have been a mere promise not to abuse the dominant positions that the proposed combination of GE and Honeywell would have created or strengthened and were considered, in any event, extremely difficult to be effectively implemented. The remedial package was therefore considered insufficient, especially in the absence of a structural undertaking on GECAS, which could have significantly reduced the need for the divestiture of Honeywell assets.

On 28 June 2001, two weeks later and well beyond the deadline for the submission of undertakings, GE proposed a new set of remedies. Apart from the fact that these remedies were not adequate to deal with the competition concerns, they were submitted at a very late stage in the procedure and continued to present a series of technical shortcomings. Indeed, according to the Commission's

Notice on remedies acceptable under the Merger Regulation, the Commission can only accept modified commitments when these solve the competition concerns in a clear and straightforward manner without the need for a further market test. The offer submitted by GE on 28 June did not meet this condition.

The remedies proposed post-deadline were not sufficiently clear-cut to solve the identified competition concerns in a straightforward manner and could therefore not be accepted. As a result of the above procedure, the Commission declared the proposed merger incompatible with the Common Market.

B2B e-marketplaces and EC competition law: where do we stand?

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One year ago, the European Commission received the first notification of a Business-to-Business (B2B) e-marketplace. ([1]) Twelve months later, it approved the largest e-marketplace operating today. Covisint, a joint venture between General Motors, Ford, Daimler Chrysler, Renault, Nissan, Oracle and i2, received a negative clearance 'comfort letter'. ([2]) In view of the experiences gathered so far, this might be an appropriate moment to summarise the Commission's approach to these electronic exchanges.

B2B e-marketplaces are software systems that allow industrial buyers and sellers to transact business online over the Internet through a central node. The number of such markets has exploded in the last years. Today, industry observers consider that up to 500 of these Internet marketplaces exist. While only 0.5 to 1.5 per cent of all business-to-business transactions are currently conducted through these exchanges, this number is generally expected to increase sharply.

In the antitrust community, the development of B2B e-marketplaces has generated a large amount of interest. This was due to two reasons: First, they were seen as an instrument that would potentially revolutionise purchasing and supply chain management, thus creating huge efficiency gains. Secondly, however, they were also considered as an instrument that could create a number of competition problems, ranging from the exchange of confidential information to foreclosure problems.

The European Commission has from the beginning followed a twin-track approach towards this new phenomenon. On the one hand, it has begun to develop and publicise the principles for the assessment of e-marketplaces in a series of conferences ([3]) and public speeches given by Commissioner Mario Monti ([4]) and Director-General Alexander Schaub ([5]). On the other hand, it has increasingly gained practical experience through a number of notifications, both under Article 81 and the European Community Merger Regulation. These cases concerned a wide array of industries. Clearances were given in relation to B2B exchanges for office equipment ([6]), foreign currency options ([7]), aircraft components ([8]), mutual funds ([9]), public administration services ([10]), services to the chemical industry ([11]), plant & mechanical engineering ([12]), second-hand forklifts and other equipment ([13]), office supplies ([14]), and car components ([15]).

Before looking at principles of assessment that can be derived from these cases, one should take note of two preliminary observations: First, it is important to bear in mind that all these cases have been cleared. Undertakings were only required in one case. The lessons that can be drawn from these cases are of a preliminary nature. Secondly, as

([1]) M.2027 – Deutsche Bank/SAP/JV

([2]) 'Commission clears the creation of the Covisint Automotive Internet Marketplace', Commission Press Release IP/01/1155 of 31 July 2001.

([3]) Conference 'The e-Economy in Europe: Its potential impact on EU enterprises and policies' on 1-2 March 2001 in Brussels, Conference report available at http://europa.eu.int/comm/enterprise/events/e-economy/doc/e_economy_report.pdf. Conference 'E-marketplaces: new challenges for enterprise policy, competition and standardisation' on 23-24 April 2001 in Brussels, Conference report available at http://europa.eu.int/comm/enterprise/ict/e-marketplaces/workshop_final_report.pdf.

([4]) 'European Competition Policy for the 21st Century', The Fordham Corporate Law Institute – Twenty-eight Annual Conference on International Antitrust Law and Policy, New York, 20 October 2000; 'Competition in the New Economy', 10th International Conference on Competition of the Bundeskartellamt, Berlin, 21 May 2001. Both available on the Internet at http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commissioner.html.

([5]) 'Kartellrechtliche Probleme des elektronischen Marktplatzes aus Sicht der EU-Kommission', XXXIV. FIW-Symposium, Innsbruck, 2 March 2001. Available on the Internet at http://europa.eu.int/comm/competition/speeches/index_2001.html.

([6]) M.2027 – Deutsche Bank/SAP/JV

([7]) 38.866 – Volbroker (Deutsche Bank/UBS/Goldman Sachs/Citibank/JP Morgan/Natwest)

([8]) M.1969 – UTC/Honeywell/i2/MyAircraft.com

([9]) M.2075 – Jupiter/M&G/Scudder/JV

([10]) M.2138 – Siemens/SAP/JV

([11]) M.2096 – Bayer/Deutsche Telekom/Infraserv Hoechst

([12]) M.2172 – Babcock Borsig/mg technologies/SAP Markets/ec4ec; M.2270 – Babcock Borsig/mg technologies/SAP Markets/Deutsche Bank/VA Tech/ec4ec

([13]) M.2398 – Linde/Jungheinrich/JV

([14]) M.2374 – Telenor/Ergogroup/DNB/Accenture/JV

([15]) 38.064 – Covisint (GM, Ford, DaimlerChrysler, Renault, Nissan)

these cases did not raise competition problems, the definition of the relevant market has been left open. Therefore, they offer only limited guidance as regards market definition.

In particular, the definition of the relevant product market for B2B e-marketplaces raises interesting questions: Do electronic marketplaces compete with 'traditional' bilateral sales or do they constitute a separate, narrower product market? And can distinctions be drawn between different marketplaces, based on their industry focus and position in the value chain?

So far, both questions have not been answered in the Commission's decisions. The 'MyAircraft'-decisions suggests that this marketplace constituted part of a wider market for airline equipment at the time of the decision. This question was, however, ultimately left open. Many industry observers predict that in the future transactions in B2B e-marketplaces will replace other ways of doing business and become the prevalent form of B2B transactions.

The second question concerns the degree of substitution between 'vertical' exchanges, which are set up to cater to a given industry, but which may be open to outside buyers, and 'horizontal exchanges', which cut across industries but only offer certain goods or services. The existence of these different business models suggests that the demand side might be faced with a continuum of choices, depending on the number and nature of B2B e-marketplaces that allow trading in a specific good.

With these observations in mind, one can turn to the lessons that can be learnt from the cases assessed so far. They do allow to deduce a number of rules that companies setting up e-marketplaces may want to follow to ensure that EC competition rules are not infringed. Elements of such 'guidelines' are:

— credible data protection and safeguards against the exchange of information;

— structural separation between the exchange and its parents which is supported by 'Chinese walls';

— joint purchasing or joint commercialisation only within the boundaries of the horizontal guidelines;

— no provisions which directly or indirectly try to impose the exclusive use of the exchange by its participants;

— open, non-discriminatory access from all interested buyers and sellers.

Adherence to these principles will remove most of the theoretical concerns that have been formulated against B2B e-marketplaces.

Credible data protection and safeguards against the exchange of information address concerns regarding the exchange of sensitive information between competitors. Theoretically, electronic marketplaces could facilitate collusive practices, as buyers or sellers could use them to discover or exchange sensitive information on prices and quantities. Enforcement practice shows, however, that marketplace operators are well aware of the need to ensure data protection and to impede improper information exchanges. They are therefore setting up 'firewalls' and use other technical means that ensure that data flows are limited to the necessary and that they can be controlled.

The structural separation between the exchange and its parents which is supported by 'Chinese walls' aims at removing concerns that are raised if a few market participants have privileged access to certain information in their capacity as market-owners. This issue has been addressed in the Volbroker case, concerning a B2B exchange for foreign currency options. The case raised problems regarding the access to confidential information by the parent companies. To remove them, the owners of the exchange undertook towards the Commission to build 'Chinese Walls' between the exchange and the parent companies, which are active as market participants. ([1])

Joint purchasing or joint commercialisation should be limited to what is permissible under the Commission's horizontal guidelines. ([2]) The guidelines create in particular a safe haven for joint purchasing by companies with a combined market share of less than 15 per cent on both the purchasing and the selling market. Joint purchasing would normally also be permissible for indirect inputs, as long as it does not create buying power or lead to co-ordination on the downstream market.

The absence of provisions which directly or indirectly try to impose the exclusive use of the exchange by its participants ensures that problems of market dominance are reduced. ([3]) Market-

([1]) 'Commission approves the Volbroker.com electronic brokerage joint venture between six major banks', Commission Press Release IP/00/896 of 31 July 2000.

([2]) Guidelines on the applicability of Article 81 of the Treaty to horizontal co-operation agreements (OJ C 3, 06.01.2001, p.2).

([3]) Such provisions may, however, be acceptable for a limited time period if they can be shown to be directly related to and necessary for the creation of an e-marketplace.

places could try to use exclusivity provisions to enhance network effects in order to create a dominant position. This problem is mitigated if users are not locked into one exchange.

Open, non-discriminatory access from all interested buyers and sellers reduces possible problems of foreclosure. It ensures that all industry participants have access to the electronic market, which is particularly important if one marketplace develops into the dominant provider of such services.

EC enforcement experience shows that many e-marketplaces seem to follow these principles. The press release issued on occasion of the Covisint clearance states for instance that '…the agreements show 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, including firewalls and security rules.' ([1])

Adherence to these principles may also explain the relatively small number of notifications under Regulation 17/62. Most companies setting up e-marketplaces seem to assess themselves whether or not Article 81(1) is infringed and arrive at the conclusion that their agreement is not restrictive of competition. The Commission should generally welcome this development as it corresponds to its proposals for the future application of Article 81. ([2]) It obviously has the option of examining any such non-notified agreement, either on its own initiative or following a complaint, if an e-marketplace threatens to create competition problems.

B2B e-marketplaces have up to now not created serious competition problems. A word of warning is nevertheless appropriate: So far, in the large majority of cases examined by the Commission, several e-marketplaces competed heavily even in a narrowly defined market. This may change in the future. A shake-out phase, leading to a reduction in the number of marketplaces, is widely expected, leaving the question of possible market power of the surviving marketplaces. The world of B2B e-marketplaces will therefore require further attention by the Commission.

([1]) 'Commission clears the creation of the Covisint Automotive Internet Marketplace', Commission Press Release IP/01/1155 of 31 July 2001.

([2]) Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 («Regulation implementing Articles 81 and 82 of the Treaty») (OJ C365 19.12.2000).

Ports italiens: Les meilleures histoires ont une fin

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1. Introduction

Le 23 mai 2001, la Commission a classé la procédure d'infraction contre l'Italie relative à sa législation portuaire. Cette décision clôture de fait un différend d'une durée quasi décennale, marqué par une intense activité judiciaire, législative et politique tant Communautaire que nationale. On ne dénombre en effet pas moins de cinq mises en demeure et une décision de la Commission, deux arrêts de la Cour de Justice et deux lois, une vingtaine de décrets lois et différents règlements d'application de la part de l'Etat membre.

Le présent article entend répondre à deux questions : d'une part, quel est le cadre juridico-économique issu de cette saga législative et, d'autre part, quelles conclusions peut-on tirer de cette affaire pour les autres secteurs.

2. Historique

2.1. Le marché des opérations portuaires en Italie au début des années '90

Pour caricaturer, on pourrait affirmer que le marché des opérations portuaires en Italie au début des années '90 n'avait pas subi de modifications sensibles par rapport au marché qu'aurait connu le Gênois le plus fameux de l'Histoire, Christophe Colomb, il y a cinq siècles.

A cette époque, ce juteux marché des opérations portuaires (c'est à dire le chargement et déchargement des navires) faisait l'objet d'un partage entre autorités publiques et corporations de dockers. Pour simplifier, un armateur souhaitant décharger son navire n'était pas autorisé à le faire lui-même mais devait s'adresser à une entreprise portuaire, détenue par les autorités locales. Cette entreprise portuaire contrôlait les quais et possédait les infrastructures nécessaires aux opérations (grues, moyens mécaniques, etc…). Toutefois, l'entreprise portuaire ne disposait de la main d'œuvre nécessaire et devait s'adresser, à son tour, à la corporation de dockers locale qui jouissait du droit exclusif d'offrir du travail portuaire (c'est à dire les «bras»). Ainsi, le client final devait supporter à la fois les coûts du monopole du capital et les coûts du monopole du travail.

Dans un arrêt du 10 décembre 1991 ([2]), la Cour de Justice a, en substance, déclaré que le Traité (article 86 CE lu en combinaison avec l'article 82 CE) s'oppose à une législation qui organise un marché de la sorte ([3]). La Cour a constaté, en particulier, que ce système induisait les entreprises monopolistes à abuser de leur position dominante et notamment à exiger le paiement de services non requis, à exiger des prix exagérément élevés, à pratiquer des prix discriminatoires ou à freiner le développement technologique.

2.2. La réforme portuaire italienne

L'Italie a donc réformé sa législation portuaire, en adoptant la loi n° 84 du 28 janvier 1994 (successivement modifiée par la loi n° 647 du 23 décembre 1996). L'Italie a mis un terme au système vieux de cinq siècles dénoncé par la Cour de Justice. Toutefois, il est rapidement apparu que cette loi n'avait réalisé que la moitié de la besogne.

D'une part, la loi en question libéralise le marché des opérations portuaires: elle ouvre l'accès au marché aux opérateurs indépendants et prévoit la possibilité d'auto-production (c'est à dire la possibilité pour l'armateur de faire décharger son navire par du personnel de bord). En outre, elle interdit aux autorités locales de s'engager (y compris par le biais de participations) dans le marché des opérations portuaires et limite leur rôle au seul exercice de la puissance publique.

Mais, d'autre part, la nouvelle loi introduit deux mesures en faveur des compagnies de dockers locales (les *Compagnie portuali*) qui réduit sensiblement l'impact de cette libéralisation:

— elle transforme ces compagnies de dockers en entreprises portuaires pour la fourniture d'opérations portuaires, en concurrence avec les opérateurs indépendants;

— elle aménage un nouveau monopole (le monopole sur la main d'œuvre temporaire) et

([1]) Au moment des faits l'Auteur était le Rapporteur de l'affaire au sein de la Direction générale de la Concurrence

([2]) Arrêt du 10.12.1991, affaire C-179/90 Merci Convenzionali Porto di Genova spa contre Siderurgica Gabrielli spa, Rec. I-5889 (dit arrêt «Port de Gênes»)

([3]) L'arrêt en question constate d'autres incompatibilités, qui ne sont toutefois pas pertinentes dans le cadre du présent article

l'octroie aux anciennes Compagnies de dockers transformées ([1]).

En outre, dans la plupart des cas, les autorités locales ont adopté des mesures d'application qui ont favorisé les anciennes compagnies de dockers lors de leur transformation en leur concédant les meilleurs quais et les meilleurs équipements. Ainsi, les Compagnies de dockers transformées ont de fait hérité les positions dominantes détenues jusque lors par les entreprises publiques locales.

L'impact de ces mesures doit être apprécié à la lumière de deux éléments.

— D'une part, le fait que le marché des opérations portuaires est un marché marqué par de fortes fluctuations de demande imprévisibles (la demande étant en fait déterminée par l'arrivée des navires). De ce fait, la plupart des entreprises portuaires, ne pouvant pas supporter le coût d'une main d'œuvre permanente dimensionnée sur les pics de demande, recourent massivement à la main d'œuvre temporaire.

— D'autre part, comme les opérations portuaires sont un service à très haute intensité de main d'œuvre (plus de 90%), la main d'œuvre temporaire représente une partie substantielle de la valeur ajoutée de tout opérateur portuaire.

La nouvelle loi a donc placé les opérateurs portuaires indépendants dans l'inconfortable situation de devoir se procurer la principale source de leur valeur ajoutée auprès d'un concurrent (plus exactement de leur *principal* concurrent). Autant dire que leur capacité d'exercer une concurrence effective était assez limitée.

La Commission a formellement constaté l'incompatibilité de cette nouvelle organisation réglementaire du marché avec le droit communautaire par une décision du 21 octobre 1997 au titre de l'article 86, paragraphe 3 CE ([2]). La Cour de Justice a fait de même quelques mois plus tard ([3]). Dans les deux cas, il a été constaté que la nouvelle loi portuaire violait l'article 86, paragraphe 1 CE lu en combinaison avec l'article 82 CE, parce qu'elle plaçait l'ancienne compagnie de dockers transformée en situation de conflit d'intérêt et l'induisait, de ce fait à abuser de sa position dominante.

3. La nouvelle réforme portuaire italienne résoud le problème du conflit d'intérêt

L'Italie a proposé (et la Commission accepté) de modifier la loi portuaire de manière telle à prévenir tout conflit d'intérêt potentiel. Pour ce faire, l'Italie a adopté une nouvelle loi ([4]) (clarifiée par une déclaration gouvernementale interprétative ([5]) et un Règlement d'application ([6]) promulgué par le Ministre des transports) qui impose une stricte séparation des rôles. En pratique, la nouvelle loi:

— confirme la libéralisation du marché des opérations portuaires (y compris en ce qui concerne le droit à l'auto-production) ([7]);

— confirme le monopole sur la main d'œuvre temporaire,

— introduit le principe de l'incompatibilité *absolue* des rôles de fournisseur d'opérations portuaires et de fournisseur de main d'œuvre temporaire

S'agissant de la libéralisation du marché des opérations portuaires, la Commission a salué l'introduction d'un nouveau mécanisme en matière de délivrance des autorisations: le principe du «silence vaut autorisation» (*silenzio — assenso*). En vertu de ce principe, les autorités portuaires locales sont tenues de délivrer ou de motiver le rejet de toute demande d'autorisation dans un délai de 90 jours, faute de quoi l'autorisation est réputée délivrée. Il s'agit d'un important principe que les autorités italiennes ont introduit afin de mettre un terme aux pratiques douteuses de certaines autorités locales qui, par leur inaction ou leurs lenteurs administratives, ont retardé l'ouverture du marché au profit des anciennes compagnies (qui ont vu leur monopole de fait se maintenir, faute de concurrents autorisés). L'introduction de ce mécanisme devrait donc favoriser l'accélération du mouvement de libéralisation.

([1]) La loi n°84 telle que modifiée prévoyait un certain nombre d'hypothèses d'organisation de marché qui, toutes, pouvaient être reconduites au cas de figure exposé ci-dessus. Il ne semble pas utile de décrire ici les différents schémas prévus par la législation italienne. Une analyse plus détaillée est fournie par la décision de la Commission du 21 octobre 1997 (cf.infra).

([2]) Décision de la Commission du 21 octobre 1997, 97/744/CE, JOCE L301 du 5.11.97, page 17. Voir également l'article «Ports Maritimes et Concurrence» par C. Dussart-Lefret et E.M. Armani, Competition Policy Newsletter n° 1, février 1998

([3]) Arrêt de la Cour du 12 février 1998, Affaire C-163/96, Procedimento penale contro Silvano Raso, Rec. page I-0533

([4]) Legge 30 giugno 2000, n°186, GURI n° 157 du 7.7.2000

([5]) Déclaration de M. Occhipinti, Sous secrétaire d'Etat aux transports, devant la Chambre le 12 mai 2000

([6]) Decreto 6 Febbraio 2001, n. 132, GURI 19.04.2001 n°91

([7]) Par ailleurs, la loi définit et ouvre le marché des services portuaires, c'est à dire des tâches qui sont complémentaires aux opérations portuaires.

S'agissant du maintien du monopole sur la main d'œuvre temporaire, la Commission a accepté la proposition italienne au vu du raisonnement suivant:

1) En interdisant le cumul des rôles, la loi italienne exclut les risques de conflit d'intérêts dénoncés par la Commission et la Cour de Justice. De ce fait, l'Italie a donné une suite utile aux injonctions qui lui avaient été faites. En outre, même si elle maintient une situation de monopole, cette loi est conforme aux règles communautaires de concurrence. Comme la Cour l'a souvent indiqué ([1]), le traité ne s'oppose en soi pas à l'octroi de droits exclusifs. Un tel octroi n'est contraire au Traité que lorsque l'entreprise bénéficiaire de ces droits exclusifs est conduite, par le simple exercice de ses droits, à abuser de sa position dominante.

   Or, dans le cas d'espèce, le titulaire des droits exclusifs non seulement n'est pas conduit à abuser de sa position dominante mais la loi même prévoit des garde-fous afin de prévenir de tels abus.

2) En effet, une disposition précise d'abord que les fournisseurs de main d'œuvre temporaire ne sont pas des entreprises chargées de la gestion de services d'intérêt général (et ne peuvent donc pas se prévaloir de l'exception visée à l'article 86, paragraphe 2 CE). L'Italie a ainsi fait siennes les déclarations en ce sens de la Cour de Justice et de la Commission que le travail portuaire ne présente pas les caractéristiques de service d'intérêt général.

   Ensuite, la loi charge les autorités portuaires locales de veiller au respect du comportement sur le marché des fournisseurs exclusifs de main d'œuvre temporaire (notamment en matière de non-discrimination entre clients et de niveaux de prix pratiqués) ([2]).

   Enfin, la loi introduit l'obligation de sélection du fournisseur exclusif de main d'œuvre temporaire selon un mécanisme ouvert et transparent (procédure d'appel d'offre accessible à toutes les entreprises de l'UE).

3) Enfin, l'Italie a fait valoir que, compte tenu des caractéristiques du marché (et plus particulièrement la fluctuation imprévisible de la demande) la solution du fournisseur exclusif de main d'œuvre temporaire était vraisemblablement plus efficace qu'une libéralisation tant du point de vue économique (répartition optimale du «risque d'inactivité») qu'en matière de sécurité du travail (garantie de formation des travailleurs) et qu'en matière de respect des droits sociaux des individus (conjurer tout risque de course au rabais des salaires).

   En outre, la loi autorise le monopoliste à faire appel, à son tour, à des travailleurs intérimaires, ce qui devrait permettre de garantir la continuité du service à un coût raisonnable. En effet, le fournisseur exclusif de main d'œuvre temporaire sera ainsi toujours en mesure de répondre à la demande (y compris lors de pics exceptionnels) sans risquer d'être asphyxié par un volume d'effectifs anormalement élevé.

4. La leçon de l'affaire port de Gênes en matière d'infrastructures essentielles: l'incompatibilité des rôles de gestionnaire d'une infrastructure essentielle et d'opérateur sur un marché aval

4.1. Cette affaire pourrait permettre d'accomplir un pas en avant significatif dans l'application de la théorie des infrastructures essentielles. En effet, tant la Commission que la Cour de Justice ont posé un principe nouveau (ou, tout du moins, l'ont explicité) dont la portée pourrait s'étendre bien au-delà du simple secteur des opérations portuaires.

Dans sa décision du 21 octobre 1997, la Commission a constaté qu'un Etat membre enfreint les dispositions de l'article 86, paragraphe 1, CE lu en combinaison avec l'article 82 CE lorsqu'il octroie à une entreprise titulaire le droit exclusif d'offrir un facteur de production essentiel (la main d'œuvre temporaire) et qu'il l'autorise en même temps à opérer sur le marché qui utilise ce facteur de production (les opérations portuaires).

La Cour de Justice affirme le même principe dans son arrêt Raso ([3]). La Cour rappelle que le système établi par la loi de 1994 «non seulement octroie à l'ancienne compagnie portuaire (…) le droit exclusif de fournir de la main-d'œuvre temporaire aux concessionnaires de terminaux et aux autres entreprises autorisées à opérer dans le port, mais, en outre, lui permet (…) de les concurrencer sur le

([1]) Voir par exemple point 16 de l'arrêt «port de Gênes», cf. supra
([2]) La loi précise également que ce contrôle s'ajoute et ne se substitue pas à la surveillance exercée par les autorités de concurrence
([3]) Cf. supra

marché des services portuaires, place le titulaire des droits exclusifs en situation de conflit d'intérêts. Celui-ci, par le simple exercice de son monopole, se trouve en effet en mesure de fausser à son profit l'égalité des chances entre les différents opérateurs économiques agissant sur le marché des services portuaires. Ainsi, la compagnie en cause est amenée à abuser de son monopole en imposant à ses concurrents sur le marché des opérations portuaires des prix excessifs pour la fourniture de main-d'œuvre ou en mettant à leur disposition une main-d'œuvre moins adaptée aux tâches à accomplir».

La Cour ajoute que «un cadre juridique tel que celui qui résulte de la loi de 1994 doit être considéré comme étant, en lui-même, contraire à l'article 86, paragraphe 1 CE, lu en combinaison avec l'article 82 CE. A cet égard, il importe peu que la juridiction de renvoi n'ait pas relevé d'abus effectif de l'ancienne compagnie portuaire transformée.» ([1])

Il est évident que ce raisonnement de la Commission et de la Cour de Justice ne peut être réduit au cas d'espèce mais doit être étendu à toute situation analogue. Parmi celles-ci, les plus proches sont celles ayant trait aux «infrastructures essentielles» (qui constituent souvent un facteur de production essentiel au même titre que la main d'œuvre temporaire dans le cas d'espèce). Deux principes de base peuvent être retenus:

— en premier lieu, que les situations où un gestionnaire d'infrastructure essentielle est également présent sur le marché aval des opérateurs qui utilisent cette infrastructure peuvent être, en soi, abusives. Cela est notamment le cas lorsque la détention de l'infrastructure offre à son détenteur la possibilité de fausser l'égalité des chances sur le marché aval (ou de nuire à ses concurrents sur le marché aval).

— en second lieu, l'obligation pour les États membres de prévenir de telles situations lorsqu'ils octroient des droits exclusifs ou spéciaux aux gestionnaires et aux utilisateurs de ces infrastructures.

À notre avis, les plaintes concernant des abus commis par des gestionnaires d'infrastructures présents sur le ou les marchés aval pourront être désormais appréhendées avec l'optique nouvelle qu'il convient d'exiger le désengagement du gestionnaire d'infrastructures de ses activités aval. Une telle approche devrait se révéler beaucoup plus efficace que la simple constatation d'abus effectivement perpétrés, notamment parce qu'elle conjure tout risque de répétition des abus.

4.2. Du point de vue de la technique juridique, deux voies semblent pouvoir être explorées en vue de mettre en œuvre cette approche nouvelle.

Une première voie consisterait à contester la légalité des autorisations délivrées par les États membres aux gestionnaires d'infrastructures et/ou des actes octroyant le droit exclusif de la gestion de l'infrastructure. Dans ce cadre, la Commission dispose des moyens juridiques adéquats (notamment l'article 86, paragraphe 3 CE) afin d'imposer aux États membres concernés l'obligation d'inclure, dans tout acte d'autorisation ou d'octroi d'exclusive, une clause d'interdiction d'exercice des activités aval.

Une deuxième voie (qui, en première analyse, semble cependant moins aisée que la précédente) consisterait à contester directement aux entreprises gestionnaires d'infrastructure qui se sont entachées de comportements abusifs la légalité de leur double activité. La Commission pourrait, dans ce cas, recourir aux dispositions de l'article 82 CE et exiger la séparation des activités de gestion de l'infrastructure des activités aval sur la base de la constatation que le cumul des activités est en soi abusif car frappé de conflit d'intérêt.

4.3. L'incompatibilité des rôles visée ci-dessus doit toutefois être maniée avec prudence, parce qu'il s'agit d'une mesure qui limite la liberté d'entreprise du gestionnaire de l'infrastructure essentielle. Or, toute atteinte à la liberté d'entreprise n'est acceptable qu'à la double condition que la limitation trouve sa justification dans la nécessité de protéger l'intérêt général et qu'il n'existe pas de moyens moins contraignants pour obtenir le même résultat (principe de proportionnalité).

Le traitement de cette matière exige donc, de la part des autorités de surveillance, une approche adaptée aux circonstances spécifiques de chaque cas. Ce principe de prudence ne doit pas exclure *a priori* la possibilité de recourir à la séparation forcée des activités dans deux entreprises distinctes, mais doit laisser ouverte la porte à des solutions alternatives lorsque celles-ci sont satisfaisantes.

Ainsi, on pourra considérer que, dans certaines circonstances, une simple séparation comptable accompagnée d'une obligation de transparence en matière de données financières de l'entreprise constitue une réponse adéquate pour prévenir tout risque d'abus. Cela est principalement le cas

([1]) Points 28 et suivants de l'arrêt.

lorsque l'on est en présence uniquement de risques de subsidiation croisée ou de pratiques de prix excessifs. En outre, une telle solution n'est envisageable qu'à condition d'avoir la certitude que l'entreprise en question communiquera aux autorités de contrôle des informations financières complètes, suffisamment détaillées et à jour.

Néanmoins, l'expérience montre que, le plus souvent, les risques d'abus ne se limitent pas aux simples jeux d'écritures comptables. En effet, c'est par la discrimination en matière de qualité du service offert aux différents opérateurs que le gestionnaire d'infrastructure peut réussir le mieux à influencer la structure des marchés aval. Dans ces cas, seule une séparation structurelle est à même de prévenir tout risque d'abus (voir, à titre d'exemple, l'approche retenue en matière de séparation des infrastructures ferroviaires).

Conclusion

L'affaire «Législation portuaire italienne» s'est traduite par un marathon procédural d'une durée de presque dix ans. Après tant d'efforts déployés, il semble légitime de se poser la question: «en valait-il la peine?».

La réponse est sans conteste oui, à deux points de vue.

Du point de vue de l'Etat membre, l'Italie peut désormais se vanter d'avoir une législation portuaire non seulement conforme au Traité, mais également moderne. Les résultats de cette modernisation ont commencé à ce faire sentir dès la première réforme de 1994 et ce, tant en termes de volumes de trafic que d'emplois dans les ports et, surtout, leur hinterland. Or, il est certain que, sans l'impulsion de la Commission (et plus particulièrement des trois Commissaires qui se sont succédés au portefeuille de la Concurrence durant ces dix ans: Sir Leon Brittan, Karel Van Miert et Mario Monti) une telle réforme n'aurait pas été possible, face aux réflexes corporatistes locaux.

Du point de vue de l'Union, toute la problématique liée au monde portuaire italien aura fourni une source inégalée de jurisprudence pour l'avancée du droit communautaire. Il suffit de consulter les rapports annuels publiés par la Direction Générale de la Concurrence et les Recueils des arrêts du TPI et de la Cour de Justice pour s'en rendre compte, et ce dans des domaines différents comme le pilotage, l'amarrage, le remorquage, le travail portuaire, l'auto-production, etc…

Il reste maintenant à espérer qu'après cette longue phase de maturation, les acteurs des marchés et les autorités publiques en question appliqueront pleinement les nouvelles règles.

BASF/Pantochim/Eurodiol: Change of direction in European merger control?

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In the context of competition policy, probably nothing can be discussed with greater relish than the concept of the rescue package merger, known as 'failing firm defence'. The debate begins by considering whether a merger leading to a dominant market position – approved within the merger control mechanism by applying the failing firm defence – can be regarded as consistent with the general principles of competition policy. Following on directly but in somewhat more specific terms, there tends to be a great deal of controversy about whether and to what extent a rescue function concept can be applied at all within the legal framework of the EU's merger control regulations. Finally, there are bound to be differences of opinion about the extent to which the Commission's M.2314 BASF/Pantochim/Eurodiol decision taken in July 2001 has led to the drafting of a new model for future cases involving insolvent companies. The author has no illusions that the debate on this issue will be silenced by his contribution (that would be a rather boring prospect). He is simply expressing *his* personal view – as opposed to that, for example, of the European Commission where he works.

Let us first look at the facts of the case. In its decision, the Commission stated that the acquisition of the Belgian chemical company Eurodiol results in a dominant market position for BASF on the relevant markets for the BDO derivatives GBL, NMP and THF. On the basis of a modified concept of the failing firm defence vis-à-vis the Kali+Salz/MDK/Treuhand ([1]) ruling (hereinafter referred to as 'Kali+Salz'), the Commission came to the conclusion that the merger was consistent with the Common Market.

Eurodiol, like Pantochim which is also part of the Sisas Group, had been involved in composition proceedings under Belgian law since 16 September 2000. The observation period provided for under those proceedings – in the course of which the commercial court ordered a temporary deferment of payments, i.e. a temporary suspension of creditors' claims – ended on 15 June 2001. The Commission asserts in its ruling that, besides BASF, no other company had submitted a binding offer to purchase Eurodiol during that period despite intensive efforts on the part of the Belgian receivers and the Commission itself. Furthermore, it states with reference to Belgian law and the statement made by the relevant commercial court in Charleroi that Eurodiol (and Pantochim) would have inevitably been declared insolvent on expiry of the above-mentioned term without the takeover by BASF. In this respect, two of the three criteria established by the Commission in the Kali+Salz/MDK/Treuhand ruling for a 'failing firm defence merger' to be eligible for approval had been met: (1) The company acquired would be eliminated from the market within a short space of time failing acquisition by another company, and (2) there was no acquisition alternative that would be less harmful to competition.

By contrast, the requirements of the third criterion developed in the Kali+Salz ruling were not met in the BASF/Eurodiol/Pantochim case. In Kali+Salz, the Commission had found that the acquisition of the distressed company by the purchaser was not the cause of the latter's market dominance, as the market shares of the acquired company would – had it disappeared from the market – have gone to the acquiring company anyway even without the merger. The 'non-causality' of the merger inferred in this manner concerning the emergence or strengthening of market dominance could not be assumed even in view of the certain insolvency of Eurodiol. In contrast to the Kali+Salz case, other competitors in the form of Lyondell Chemical and ISP were active on the relevant market, in addition to BASF and the company acquired. It therefore had to be presumed that, following the insolvency of Eurodiol, at least part of the market shares held by Eurodiol would have been taken over by its competitors. Consequently, the acquisition of Eurodiol by BASF is, in the sense of the logic developed in the Kali+Salz case, absolutely 'causal' for the emergence or strengthening of market dominance.

Instead of basing its findings on causality, the Commission reached a decision in the BASF/Pantochim/Eurodiol ruling of an 'unavoidable loss of the plant systems associated with the takeover, in conjunction with capacity bottlenecks in the sector'. In consideration of a number of very

([1]) Commission decision IV/M.308 – Kali+Salz/MDK/Treuhand, OJ L 186, 21.7. 1994, p. 38.

specific peculiarities of Belgian bankruptcy law and the special characteristics of the production plant in Feluy (Belgium), in which Eurodiol and Pantochim produce various chemicals with high environmental risks, the Commission came to the conclusion that it can be ruled out in practical terms that the capacities, or even parts of them, could have been brought onto the market again by a company following a declaration of bankruptcy against Eurodiol. Based on this finding, the Commission examined the effects of the decline in capacities on the market conditions resulting from the definitive loss of the plant systems and compared this situation with the scenario after the merger. In this instance, the Commission concluded, with reference to the special market conditions prevailing on the relevant product markets, that the prices triggered by the anticipated loss of capacities would in all probability rise to a far greater extent in the case of bankruptcy than they would following the merger. Although it was recognised that BASF would attain market dominance by taking over Eurodiol's market shares and capacities, this fact was outweighed by the justified expectation that the market conditions would deteriorate even more to the detriment of consumers if the merger did not take place.

This brings us to an examination of the legal basis. Under Art 2 (3), a merger is prohibited if it (1) leads to creating or strengthening a dominant market position and (2) restrains competition. The Commission sees scope in this twofold requirement for its examination of the case. Although it is correct that market dominance is normally a reliable indication for the restraint of competition, this does not, in general terms, rule out that other factors can also be taken into account and be decisive. In this specific case, although the Commission did not deny the *possibility* that BASF could restrain competition, it did consider the *probability* of whether anti-competitive effects would really occur after the merger. The combination of the individual factors outlined above relating to the markets for BDO derivatives and the fact that BASF, in order to be able to exploit the Eurodiol plant systems in a cost-efficient manner, would had to substantially increase the previous use of capacities (which would hardly leave any leeway for price rises if this extra capacity is to be sold on the market) led to the conclusion, in the view of the Commission, that the merger would not obstruct competition to any significant extent.

The fundamental question of whether competition policy should include a 'failing firm defence' amongst its mechanisms is of a purely normative character. Amongst other things, it has been argued that the sole purpose of competition policy is to protect competition (and not particular companies). The disappearance from the market of an inefficient company (in this case Eurodiol) is seen as a 'normal part' of the 'discovery process of competition', which only fully develops its advantageous effects when it can proceed undisturbed and free from intervention from above. Seen from this angle, a decision that is justified (as in this case) by a failing firm defence merger being likely to produce better economic results for the consumer than the insolvency of the distressed company forced by the 'discovery process of competition' can be considered a 'presumption of knowledge'.

It can, however, be confidently argued against this position that the 'discovery process of competition' does not extend in the sense of Hayek to markets demarcated by cartel lawyers. Hayek saw the market system as a system of 'spontaneous order', in which the complexity of the individual correlated economic plans and data make it impossible to deduce specific forecasts of the precise course of future competition processes. Although it is true, seen against this background, that the possibility of being able to prove the 'efficiency' of a merger in scientific terms is disputed in principle, it is valid when these standards are applied consistently, also with regard to legitimising an interdiction based on the criterion of market dominance ([1]). Anyone wishing to adopt the Hayek position and who thinks ahead in a consistent, logical manner will thus have to concede that conclusive scientific proof for the correctness of a decision cannot be furnished in either approach.

If it is not possible for us to produce scientific 'proof' of the accuracy of our expectations, rational competition policy should best be realised in a 'piecemeal' approach in which the application of the law is adapted to new developments with the help of experience gained in previous cases. Seen in this light, the BASF/Pantochim/Eurodiol ruling can be regarded as a significant, though cautious further development of the failing firm defence merger concept. Resulting from the condition of the merger's 'non-causality' for creating market dominance, the tenets of the Kali+Salz decision led, in their final consequence, to the paradoxical situation that the concept of the failing firm defence can only be applied to cases where the acquiring party obtains a monopoly after the merger. (Otherwise, if there were several competi-

([1]) See Hoppmann, E.; Fusionskontrolle (Merger Control) 1972.

tors, it would have to be assumed that these would also gain market shares; the merger is then 'causal' for market dominance.) Seeing as the Commission – after fulfilment of the 'precondition' that the capacities of the acquired company would be definitively removed from the market in the absence of the merger – has instead drawn a comparison of the market situation following insolvency and after the merger in the case of BASF/Pantochim/Eurodiol, it will now be possible to apply the failing firm defence concept to more relevant case groups in future. This means that the failing firm defence concept will gain more practical relevance and be better able to respond to the real issues.

On the other hand, the decision to approve the BASF/Pantochim/Eurodiol merger certainly does not qualify as a blueprint for random mergers involving insolvent companies, since it was granted expressly under the special conditions prevailing in that individual case. The ruling furthermore clearly states that this case provided clear proof of fulfilment of the decision criteria, which the Commission set out in detail in its grounds for the decision. This applies, in particular, to the loss of capacities should the merger have been prohibited. By virtue of the very specific peculiarities of Belgian bankruptcy law – which provides, by statute, for an intensive search for a purchaser by the receivers over a relatively long period of time – and its own extensive investigations, the Commission was able to definitively rule out the availability of any alternative acquiring party to avert insolvency. It could also be ruled out that the capacities would have been brought back onto the market (by another company) following insolvency. Here again, it was the very special, individual characteristics of the chemical plants concerned in Feluy (Belgium) that forced this conclusion. The high degree of integration of the production processes locally, the huge repair costs required to restore the plant systems that had deteriorated as a result of the operators' insolvency, the specific commissioning costs following the temporary shutdown as well as the considerable environmental risks all made it virtually impossible to extract the capacities from the insolvency assets and return them to the market.

Finally, the Commission had obtained clear indications during its examination of the market that the removal of Eurodiol's capacities from the market could be expected to result in supply problems and substantial price increases over a longer period of time. The conclusion that the market situation would be more favourable for the consumer after the merger (despite the emergence of market dominance on the part of BASF) than in the case of Eurodiol being declared insolvent is therefore entirely confirmed by market investigations. This conclusion is justified in terms of worldwide undercapacities, which are compounded by very substantial market entry obstacles as a result of the relatively high capital expenditure required to construct and operate a new plant system. The failed market entry of Eurodiol, which had only come onto the market in 1998 with a new plant system for BDO and BDO derivatives, makes it eminently clear that specific peculiarities and market risks prevail in these markets, which the Commission took into account in its examination.

As a result, the BASF/Pantochim/Eurodiol ruling can, with due regard for the tenets of the decision, be considered a step in the direction of modernising the application of law. The special facts of the case, which the Commission investigated very carefully in this instance and paid particular attention to in its ruling, will hopefully also reassure critical minds, some of whom can already see the dark clouds of a realignment of merger control motivated by industrial policy looming on the horizon.

A methodology for analysing State aid linked to stranded costs

Brice ALLIBERT, Directorate-General Competition, unit G-2

1. The 'stranded costs' concept

At the time the European electricity market was not liberalised, recovery of all investments by electricity undertakings was achieved through adequate tariff fixation by the States. In these circumstances, many of these undertakings invested in relatively costly electricity production plants or long term take or pay contracts.

The decrease of electricity prices following the liberalisation of the sector may compromise the recovery of many of these investments or long term contract costs, and thus generate non recoverable costs. Such costs are generally known as 'stranded costs'.

Now, unlike other previous liberalisation processes, the liberalisation of the electricity sector does not take place coincidentally to a technological leap or a large increase in demand. On the contrary, the electricity market is more and more submitted to various external constraints that have a tendency to increase production costs, like environment protection or security of supply.

In such circumstances, certain undertakings may be tempted to pass the whole burden of their stranded costs on to their captive customers. The viability of other undertakings may be threatened. It may therefore be necessary to device some compensation mechanism for stranded costs.

This compensation mechanism must strike a delicate balance between, on the one hand, the necessity not to fragilise the electricity undertakings to a point where they would no longer be in a position to ensure the proper delivery of electricity which is vital to the economy of the Union, and, on the other hand, the necessity not to prevent new entrants to enter the market, which would hamper the liberalisation process and the benefit it brings to consumers.

It is the Commission's view that where such balanced compensation mechanisms constitute State aid, they can be viewed as compatible with the EC Treaty in application of its article 87(3)c, as they favour the transition of the electricity sector to a liberalised market and hence the economic development of the sector, while ensuring that the compensations are limited and proportionate, and therefore do not affect trade to an extent that is incompatible with the community interest.

2. Assessment of State aid linked to stranded costs by the Commission

On 25 July 2001, the Commission adopted a *Methodology for analysing State aid linked to stranded costs* that sets up the criteria it shall use to examine whether a stranded costs compensation mechanism that constitutes State aid can be authorised under the EC Treaty.

The basic principle of the methodology is that compensations should be limited in time and in extent. They should not exceed the costs actually borne by undertakings, directly caused by the liberalisation, and resulting in losses.

For example, no compensation should be paid for a plant that became less profitable following the opening of the market but even so remained profitable.

Compensations must be bounded *ex ante* and should also provide for an *ex post* adaptation mechanism that takes into account the real evolution of the market to liberalisation, and in particular the actual evolution of electricity market prices.

3. Individual stranded costs cases adopted on 26 July 2001

On 26 July 2001, the Commission authorised for the first time three individual stranded costs cases, in Austria, Spain and The Netherlands.

In *Austria*, the planned compensations relate to investments in three hydropower projects and a lignite-fired plant: The *Freudenau*, *Mittlere Salzach* and *Obere Drau* hydropower plants and the lignite-fired plant of *Voitsberg*.

Austria plans to pay compensations of up to 6,27 billion ATS (€ 456 million) for the three hydropower projects and of 1,82 billion ATS (€ 132 million) for the lignite-fired plant. The compensations will be paid yearly for the preceding business year. They are financed by contributions of the regional network operators and other customers who historically consumed the electricity produced in the plants which became stranded costs. The longest possible duration of the compensation system is until 31 December 2009.

In view of the recent ruling of the Court in the *PreussenElektra* case, the Commission could not determine whether the monies granted to the beneficiaries of the system constituted State resources or not. Indeed, the sums are transferred from the customers to the beneficiaries via a fund instituted by the State, but over which the State has little margin of control. This enables to find some analogy between the Austrian compensation mechanism's effects and the effects of the price fixing mechanism examined by the Court in the *PreusenElektra* case. The Commission could not at that stage of its reflection decide whether this analogy was sufficient to conclude that the compensation system at stake involved no State resources and was therefore no State aid in the meaning of article 87(1) of the EC Treaty.

However, the Commission concluded that in the hypothesis that the Austrian stranded costs compensation system would constitute State aid, the hydropower plants related compensations would comply with the *Methodology for analysing State aid linked to stranded costs* and might therefore be authorised under Article 87(3)(c) of the EC Treaty, whereas the notified compensations for the *Voitsberg* lignite plant might benefit from an authorisation as a compensation for a service of general economic interest as regards security of supply according to Article 86(2) EC-Treaty, in the light of Articles 3(2) and 8(4) of the above-mentioned electricity liberalisation Directive.

In *Spain*, the planned compensations (know as 'Costes de Transición a la Competencia' or CTCs) relate to past investments in costly electricity production plants on the one hand and a premium for the generation of electricity out of indigenous coal on the other hand.

CTCs have been put in place by the Spanish electrical sector law (Law 54/1997) that transposes directive 96/92/EC. The total amount of CTCs, as was originally foreseen, was e 11951 million. This amount has been since reduced by the Spanish law to e 10438 million. It is spread between a premium for the production of electricity out of indigenous coal (e 1774 million) and two allocations the sum of which amounts to e 8 664 million, known together as 'technological CTCs'.

Beneficiaries of technological CTCs are the electricity companies that were covered as of 31 December 1997 by the State tariff fixing mechanism ('Marco Legal Estable') that was in place before the liberalisation of the electricity sector in Spain. These undertakings had invested in electricity production assets in the framework of a non-liberalised electricity sector. Following the liberalisation of the sector, these investments have become non-economic, and have generated stranded costs.

The Spanish law provides for the compensation of these stranded costs. The compensation is linked to the evolution of the market : if the market price for electricity is over the 6 PTAs/kWh price target, the compensations are reduced accordingly.

The stranded costs compensations are financed through a levy on electricity consumption. The scheme ends on 31 December 2010.

On December 1998, the Spanish authorities had modified the law in order to enable the 'titulación' of part of the CTCs, that is: the possibility for beneficiaries of the scheme to sell the right to receive the revenues of the CTC levy to third parties. The beneficiaries would have been sure in that case to receive the totality of that part of the CTCs in any circumstance. This possibility, which has never been implemented by the Spanish Government, has been cancelled following the adoption of the 2 February 2001 Real Decreto-Ley 2/2001.

Like in the Austrian case, and for the same reasons, the Commission could not determine whether the CTCs constitute State aid.

However, it concluded that even if the CTCs included elements of State aid in the meaning of Article 87(1) of the EC Treaty, the aid would nevertheless be compatible with the latter.

Indeed, the technological CTCs are conform with the Commission's *Methodology for analysing State aid linked to stranded costs*. In particular, the Spanish authorities have provided the Commission with an evaluation of the difference between investment costs and foreseeable future revenues in the case of a 6 PTAs/kWh electricity market price for each of the concerned assets. The hypothesis made for these computations and the computation method have been validated by an independent expert.

As for the premium for the generation of electricity out of indigenous coal, the Commission has deemed that it did not comply with the requirements of its *Methodology for analysing State aid linked to stranded costs*, but that it might benefit from an authorisation as a compensation for a service of general economic interest as regards security of supply according to Article 86(2) EC-Treaty, in the light of Articles 3(2) and 8(4) of Directive 96/92/EC.

In *The Netherlands*, the planned compensations relate to long term city heating contracts and the coal gasification plant Demkolec. The stranded costs on city heating will be calculated annually by

a fuel price risk analysis. The stranded costs of the Demkolec project will be calculated by an auction of the plant. The duration of the compensation is 10 years and the budget is estimated by the Dutch authorities at around e 600 million in total.

To finance the stranded costs the Dutch authorities originally proposed a surcharge as a percentage of the costs for transport and system services charged on consumers of electricity. However, in June this year the Dutch authorities decided to withdraw this financing mechanism from the notification. The approval is therefore limited to the compensation for these stranded costs by the State and not on any related surcharge.

The Commission concluded that the Dutch system of stranded costs compensation includes elements of a State aid in the meaning of Article 87(1) and that these elements of State aid comply with its *Methodology for analysing State aid linked to stranded costs* and can therefore be authorised under Article 87 of EC Treaty.

European Competition Day in Stockholm, 11 June 2001

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

When taking up office, Commissioner Mario Monti undertook to improve the information policy with regard to consumers, in order to raise awareness of the benefits for them deriving from competition. One way to achieve this aim was to initiate the *European Competition Day*, conferences for a wider public to be hosted in and by the Member State holding the EU Presidency. So far, three competition days have been organised in collaboration with DG Competition and with the participation of Commissioner Mario Monti: in Lisbon, Paris and Stockholm. This last one in Stockholm was held on 11 June 2001 under the motto 'Choose to Win'.

In her opening statement Mrs Ulrica Messing, Minister responsible for competition in the Ministry of Industry, expressed Sweden's support for the modernisation of regulation 17, recalled the country's deregulation efforts and underlined that the consumer can only benefit from competition if he assumes an active critical role, compares quality and prices and refuses to accept bad value for money. Commissioner Monti then outlined in general, and with the help of specific examples from the new as well as to the 'old' economy (DVD marketing, parallel import of cars), how competition policy is working in the interest of consumers. The interventions were followed by a discussion moderated by Erik Blix, radio journalist and editor of a satirical magazine. This and the following discussions were conducted like a TV talk show which made the conference quite entertaining and contributed to the apparently good reception by the audience.

The second round was opened by the Head of the Swedish competition authority, Mrs Ann-Christin Nykvist and closed by the intervention of the Director General of DG Competition, Mr Alexander Schaub. It was devoted to practical examples how the internet offered tools to enhance competition (B2B, price comparison on the internet).

After lunch there followed a lively panel debate on the advantages of the parallel import of cars and of the opening of the markets for electricity and financial services, but also on the lack of competition in the market for construction materials, again animated by Mr Blix, opened by Statements of Mr Sven Norberg, Director in DG Competition, Mr Dan Andersson, a trade union representative very much in favour of competition, and MEP Marit Paulsen. This part was again quite entertaining and demonstrated that competition policy can be 'sold' in quite an attractive way, if linked to everyday products, services and problems.

The audience was composed to a large extent of non experts with regard to competition, like teachers and representatives of different interest groups, including consumer organisations and local administration. It constituted the ideal target group for the event. In addition, the anti-trust authorities of Denmark, Germany, France, Ireland, Italy, Portugal, Finland, Faeroe Islands, Estonia, Hungary, Malta, Romania and Slovakia were represented.

Three national TV channels reported the event as well as all major newspapers. The articles also conveyed the message about the effects of competition for the consumer. The event was extremely well attended, and the ideas behind competition policy were convincingly presented and well received by the audience. This Competition Day set a high standard for the organisation of such conferences in the future.

The Commission defines principles of competition for the packaging waste recovery markets

Michael GREMMINGER, Maija LAURILA and Gerald MIERSCH, Directorate-General Competition, unit D-3

I. Context

The Commission has received notifications of a number of comprehensive, nation-wide packaging waste recovery systems. It has recently taken decisions with respect to two of them, namely the system established by Eco-Emballages in France and the one of DSD in Germany. ([1])

By these decisions, the Commission has defined key principles of competition to be complied with by collective packaging waste recovery systems. In overall terms, the Commission seeks to act in the consumer interest. It believes high standards of environmental protection can be met while putting in place systems that deliver the services at the best value possible, within a competitive framework. The principles laid down in these cases should be kept in mind when assessing all such systems, although the national legislative and regulatory framework is naturally of special relevance to the appreciation by the Commission of each particular case.

In comprehensive systems, there are contractual relations between the system operator and producers/distributors of packaged goods, the collectors and the recycling companies. This multitude of contractual relations indeed makes the systems comprehensive and complex as a whole. This article aims to highlight the most important findings and policy messages.

II. Eco-Emballages

Introduction

By decision of 15 June 2001 ([2]), the European Commission has approved the contracts concluded by the French company Eco-Emballages SA concerning its system of selective collection and recovery of household packaging waste. In so doing, the Commission has, for the first time in a decision, defined principles of competition with which such collective systems must comply.

Background

In 1993, Eco-Emballages set up a complex system for the selective collection and recovery of household packaging waste in France. This system aims to meet the obligations imposed on firms by French Decree 92-377 (known as the 'Lalonde' Decree) on packaging and by Directive EC 94/62 on packaging and packaging waste.

The notification, received on 17 December 1993, comprised the following: Articles of Association for Eco-Emballages; a contract permitting use of the 'green dot' trademark (or logo) controlled by Pro Europe; a 'producer' contract (for producers putting packaged goods onto the market); a 'local authority' contract (for municipalities responsible for collecting household waste in their area); 'sectoral undertakings' contracts (for companies responsible for the reprocessing); an 'operational take-back contract' (for those responsible for organising the take-back under the sectoral undertaking contracts) as well as a research and development contract.

Eco-Emballages is by far the largest operator in this sector in France. The producers pay a financial contribution in return for having their legal obligations in the area of the recycling of packaging discharged. Eco-Emballages redistributes the revenues it collects from them to the local authorities, which are responsible, among other things, for collecting household waste in their local area. In 2000, it had contracts with about two-thirds of them. Its contributions are intended to compensate the local authorities for the extra cost of selectively collecting and sorting this type of waste. The local authorities sell the sorted materials to industrial firms which recover them. In France there is competition in this sector as Adelphe S.A. also offers its services on the same markets.

Relevant markets

The Commission has identified three relevant markets. The first market in which Eco-Emballages

([1]) Still pending are cases involving the ARA system from Austria and its Belgian counterpart FOST Plus.
([2]) OJ L 233, 31.08.2001, p. 37-48.

operates is that for services rendered to producers in the context of taking over their obligations to contribute to or organise the disposal of household packaging waste in France. This market could be called the 'market for collective systems for taking over the obligation to take back and recover household packaging' or the 'membership market'. Individual and collective systems could also be considered as belonging to the same market, which would then be the market in systems for taking back and recovering household waste. The second, affected market is that for the selective collection and sorting of all types of household packaging by local authorities: the 'selective collection market'. In this market, approved bodies give support to local authorities in return for collection and sorting services or, conversely, local authorities contribute to the operation of the Eco-Emballages system in return for financial compensation. The third, affected market is that for the recovery of materials by take-back firms and sectoral undertakings: the 'recovery market'. It was not necessary in the case in point to define the relevant service markets more precisely since the contracts do not give rise to competition problems.

Competition issues solved

Following a warning from the Commission in January 2000, Eco-Emballages amended some of the clauses of its contracts and thereby made it possible for the Commission to grant negative clearance to all the notified agreements. The most important changes and undertakings concerned their duration and scope and the granting of sub-licences for the use of the 'green dot'. Eco-Emballages agreed to amend its contracts and enter into commitments in such a way as to ensure that the contracts' duration and scope no longer restricted competition.

Producers may now leave the system after a year and at the end of every subsequent year. Local authorities may also immediately terminate their contract with the system, while Eco-Emballages must honour the contract length of six years unless there is default from the municipality side. Allowing contract termination in these limits was necessary in order not to tie contracting parties to one system for an unjustifiably long period of time. In this case the duration of contracts was determined, as regards producers, by offering to newer members the same termination possibilities as those available to members who joined in the first years of operations. As regards local authorities, according to Eco-Emballages they already in practice could have relied upon an established case-law allowing public bodies terminate their private-law contracts, and thus Eco-Emballages accepted to include this clause of unilateral right of termination in the contracts. Therefore economic analysis of objectively necessary contract length of exclusive agreements was not required in this case.

Producers may now conclude a contract for all or only some of their packaging and local authorities may conclude a contract for all or only some of the packaging waste materials they collect, i.e. for some of all of the categories of glass, paper/cartonboard, metals and plastic.

Eco-Emballages also accepted to offer the possibility of using the 'green dot' logo to anybody who legitimately needs to use this symbol to carry on business. Adelphe has in fact obtained from Eco-Emballages a sub-license to use the 'green dot' in its system, and other potential competing systems would also be entitled to a sub-license. Furthermore, Eco-Emballages agreed to grant such sub-licenses even to undertakings which wish to make individual arrangements for some or all of their packaging while calling on the services of a collective system for the rest either in France or in another country. This permits such a sub-licensee to use the same packaging bearing the 'green dot' whilst paying for it only to the extent that the services of the exemption system are also used. The recovery results of the other system or the self-management arrangement must nevertheless be comparable to those imposed on collective systems.

In order to guarantee the expected environmental benefits, the Commission has accepted that the firm should be able to ask its member producers who wish to use the 'green dot' logo on their packaging to meet all their obligations resulting from the applicable national regulation in the area of environmental protection. Likewise, it has accepted that the system requires municipalities, who wish to contract with the system, to organise a selective collection and the sorting of all the household waste in their territory.

III. Duales System Deutschland

Introduction

By decision of 17 September 2001 ([1]), the Commission has granted negative clearance for

([1]) Not yet published.

the notified statutes of DSD and guarantee agreements and exempted the service agreements. By way of complementing the above principles, the Commission makes clear, first, that it can only accept long-term exclusivity provisions in favour of the collectors in the service agreements concluded between DSD and its collectors, when the indispensability of such provisions is justified on the basis of convincing economic evidence. Secondly, the Commission underlines the importance it attaches to free and unimpeded access to the collection infrastructure for competitors of DSD. Together with the abuse decision adopted in this case on 20 April 2001 ([1]), which concerns the payment provision of the trademark agreement concluded between DSD and the companies obliged by the German Packaging Ordinance 82, this decision lays down the necessary conditions allowing the occurrence of competition in the area of collection and recovery of sales packaging waste in Germany.

Background

DSD is for the time being the only undertaking that operates a comprehensive packaging take-back system in Germany. According to its statutes, the system serves to meet the requirements laid down in the German Packaging Ordinance (GPO). DSD does not perform the task of collection itself but uses local collecting companies. DSD has concluded service agreements with those undertakings. Once the collected material has been collected and sorted out it is conveyed to a recycling plant either directly by the collector or handed over to so-called guarantee companies. These guarantee companies have given DSD – on the basis of guarantee agreements – an assurance that they will recycle the used packaging. DSD is financed by fees. Manufacturers and retailers, who have the legal obligation to take back sales packaging, conclude the trademark agreement. The contract entitles the undertaking to use the 'green dot' trademark on its packaging and guarantees to install a collection and recycling service in a way that the undertaking is exempted from its legal obligations.

Since the notification in September 1992, agreements have been changed and adapted on several occasions as a result of the investigation and intervention of DG COMP. DSD has also given several undertakings. The last changes of the notification occurred in September 1999, when DSD and the collectors finally agreed to terminate the service agreements by the end of 2003.

Relevant markets

The Commission has identified three relevant markets. The first market in which DSD operates is in its widest conceivable definition the market for organising the take-back and recovery of used sales packaging collected from private final consumers. The second relevant market is that for the collection and sorting of household packaging waste. In this market, DSD obtains the collection services from private and public collectors. The market is separate from traditional household and residual waste disposal and from collection from industry and large commercial enterprises. The third relevant market is that for recovery services and secondary raw materials. In this market, DSD organises the delivery of reusable materials covered by the system for recovery guarantee companies. The guarantee companies give DSD the assurance that the reusable materials prepared by the collectors will be recovered in accordance with the Packaging Ordinance.

As to the relevant geographic market, it was assumed that the objective supply and demand conditions in the first and second market covered by the DSD system still differ on a continuing basis from those in other parts of the common market. Consequently, for organising the take-back and recovery of used sales packaging collected from private final consumers and for the collection and sorting of household packaging waste, the relevant geographic market is that of Germany. As far as recovery services and secondary raw materials are concerned, this part of the waste-management sector is becoming increasingly internationalised. As it was not necessary to define the geographic market, the exact definition was left open.

Competition issues solved

The creation of DSD produced various anti-competitive effects. The two most important concerns raised by the Commission in the past have been the issue of free marketing of secondary material by collectors and the duration time of service agreements. Another important concern is the free access of DSD's competitors to the collection infrastructure of the DSD collectors.

Collected and sorted packaging material (paper, glass, metal, plastic) can be re-used as a secondary

([1]) OJ L 166, 21.06.2001, p. 1-24. See also the article in Competition Policy Newsletter 2/2001, page 27.

raw material for various new products. DSD entered into service and guarantee agreements which originally provided that the collector was not entitled to market the collected materials itself. The Commission objected to this restraint because it allowed DSD and the guarantee companies to establish themselves as a strong, or even dominant supplier of secondary raw material and prevented collectors from marketing materials in competition with each other. In the meantime DSD has abolished this constraint, except for plastics, where due to negative market prices and insufficient reprocessing capacities, the collector has to transfer the collected plastic waste to a guarantee company appointed by DSD.

The fact that for each administrative district only one collector is the sole partner of DSD and that these service agreements were originally concluded for a period of up to 15 years establishes exclusivity to which – taking into account the market position of DSD and the duration time of the service agreement – Article 81(1) applies, since the access to the relevant market by domestic and foreign collectors is obstructed. The parties originally sought to justify the overall 15-year exclusive contractual period until the end of the year 2007 by the investments necessary in new packaging-waste sorting plants. the Commission scrutinised whether such long-term exclusive agreements were indeed necessary. The results of the analysis undertaken by the Commission suggested rather that if the service agreements were to run until the end of 2003 collectors would have sufficient time to achieve an economically satisfactory return of their investment. The Commission informed the applicants of this finding, and the applicants then set a termination date of 31 December 2003 for the agreements, which has to be regarded as indispensable under the circumstances and therefore can be properly argued in the framework of Article 81(3). This will give those collectors, which were not selected by DSD in the first round of service contracts, the possibility to bid again for these service agreements much earlier and also a much better chance to 'survive' economically without holding currently a DSD service agreement.

As regards the service agreement, the Commission therefore granted an exemption until the end of the year 2003. After the year 2003 the service contracts have to be put out for tender according to the amended GPO.

The duration of the service agreements has a close connection to the access to the collection infrastructure. The relevant market for the collection and sorting of packaging waste at households is characterised by very specific supply-side conditions (network economies, disposal traditions of consumers, container instalment constraints), which makes the duplication of the existing collection infrastructure at the households in many cases economically not viable. Therefore the unrestricted access to and the unlimited sharing of the collection facilities of the DSD collectors is a precondition for the occurrence of competition on the down-stream market for organising the take-back and recovery of used sales packaging. This is one of our key policy lines developed in the decision. The collectors own these facilities and there is no provision in the notified service agreements preventing the collectors from offering these facilities to competitors of DSD.

Although DSD has already given commitments regarding the joint use of collection facilities by competitors, nevertheless, given the vital importance of unimpeded access to the collection infrastructure for competition on a market characterised by special supply conditions, the Commission considered it necessary to attach obligations to this Decision in order to ensure that competition on the relevant markets is not restricted. This secures that DSD cannot on the basis of the service agreements prevent its collectors from contracting with competitors of DSD.

IV. Competition policy conclusions

Article 6 of the EC Treaty requires that that environmental considerations must be integrated into all other Community policies.

These decisions show that competition in this sector can and must take place within a framework which maintains a high level of environmental protection. The scrutiny aims at enabling an existing or potential competitor to offer in these new and developing markets services which are more efficient, better suited to needs or simply better from the point of view of those requiring them. Companies with environmental obligations should have a real choice of alternative means of fulfilling their obligations resulting from national waste packaging regulations. The aim is to secure their freedom *not* to contract with the dominant system or to do so only with a partial amount of packaging. Taking into account the very strong market position of the already existing systems, it is of the utmost importance for the emergence of competition that there is unrestricted market access for alternative service providers.

The purpose is also to ensure that the development of new types of activities in packaging recovery is possible, and thus to remove obstacles from self-

management and other individual systems. The Commission does therefore not accept abusive market behaviour which would consolidate the dominant position of the existing operator, as demonstrated in, particular in the DSD negative decision under Article 82.

The consumers benefit directly from these decisions and policy conclusions since competition in packaging waste recovery markets is expected to reduce the price that the consumer ultimately pays for the products disposed of in the recovery systems.

Commission fines eight companies in graphite electrode cartel

Ingrid BREIT, Directorate-General Competition, unit E-1

On 18 July 2001 the Commission fined Germany's SGL Carbon AG, UCAR International of the United States and six other companies a total of € 218.8 million for fixing the prices and sharing the market for graphite electrodes. This decision is a further important step in the Commission's fight against hard-core cartels, the most damaging of all anti-competitive practices.

1. The cartel

Graphite electrodes are ceramic-moulded columns of graphite used primarily in the production of steel in electric arc furnaces, also referred to as 'mini-mills'. Electric arc furnace steel-making is essentially a recycling process whereby scrap steel is converted into new steel. The electric arc process currently accounts for some 35% of steel production in the Community. There are no product substitutes for graphite electrodes.

The EEA market for graphite electrodes in 1998 was worth some e 420 million. The two leading producers are SGL Carbon and UCAR which supply more than two thirds of demand in Europe. All the cartel participants together represent almost 90% of the worldwide and EEA market for graphite electrodes.

Following an extensive investigation which started in 1997 the Commission found that SGL Carbon AG (Germany), UCAR International Inc. (USA), Tokai Carbon Co. (Japan), Showa Denko K.K. (Japan), VAW Aluminium AG (Germany), SEC Corporation (Japan), Nippon Carbon Co. Ltd. (Japan) and The Carbide Graphite Group Inc. (USA) participated in a worldwide cartel through which they fixed prices and shared the market for graphite electrodes. Furthermore they set up a sophisticated machinery for monitoring and enforcing their agreements.

The cartel started in 1992 at the instigation of SGL and UCAR and continued until 1998, despite the fact that investigations had already been opened in the EU and in the United States.

Cartel meeting were held at several different levels: at chief executive level ('Top Guy' meetings), at sales managers level ('Working Level' meetings), European group meetings (without the Japanese producers) and national or regional meetings for particular markets. In order to disguise or conceal their contacts and meetings, the participants took elaborate precautions. Expenses for meetings were paid in cash with no reference in travel expense claims, documents were either not distributed at the meetings or destroyed afterwards, mobile telephones and home faxes were used and a system of code names for the companies and some individuals was devised to cover their real identities. SGL was referred to as 'BMW', UCAR as 'Pinot' and the Japanese group as 'Cold'.

The Commission characterised the companies' behaviour as a 'very serious' infringement of the EC competition rules and adopted a decision under Article 81(1) of the EC-Treaty and Article 53(1) of the EEA-Agreement imposing heavy fines. The leading players in the cartel SGL Carbon and UCAR International were fined € 80.2 million and € 50.4 million respectively. The other cartel participants Tokai Carbon, Showa Denko, VAW Aluminium, SEC, Nippon Carbon and Carbide Graphite were fined € 24.5 million, € 17.4 million, € 11.6 million, € 12.2 million, € 12.2 million and € 10.3 million respectively.

2. Calculation of fines and application of the 'Leniency Notice'

In fixing the amount of the fines, the Commission took account of the gravity and duration of the infringement and the existence or not of aggravating and mitigating circumstances. The role played by each undertaking was assessed on an individual basis. If appropriate, the Notice on the non-imposition or reduction of fines in cartel cases ('Leniency Notice') was applied.

In the present case, all the undertakings concerned 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 two companies taking into account their size and their overall resources.

Most of the cartel members committed an infringement of long duration (more than five years). Aggravating circumstances were taken into account for several of them (role of ringleader, continuation of the infringement after the Commission started its investigation and attempts to obstruct the Commission's investigation).

Mitigating circumstances were applied only for the Carbide Graphite Group (passive role, partial non-implementation of the agreements).

With regard to the Leniency Notice, this is the first time that the Commission has granted a substantial reduction of a fine (70%). Showa Denko benefited from this reduction, having been the first company to co-operate and provide decisive evidence of the cartel to the Commission.

UCAR also co-operated with the Commission at an earlier stage of the investigation. The Commission therefore granted a reduction of 40%. A significant reduction of the fine was also granted to SGL (30%), VAW (20%) and The Carbide Graphite Group (20%).

Tokai, SEC and Nippon were also granted a 10% reduction as they had not substantially contested the facts.

Décision Michelin: la Commission condamne l'entreprise Michelin pour un abus de position dominante portant sur des pratiques de rabais fidélisants

Christian ROQUES, Direction générale Concurrence, unité E-2

La Commission a adopté le 20 juin 2001 une décision relative à la procédure d'application de l'article 82 CE à l'encontre de l'entreprise Michelin pour avoir abusé de sa position dominante sur le marché français du pneumatique poids lourd de remplacement neuf et rechapé. Cette décision a été l'occasion de rappeler les principes développés par la Commission et la Cour de Justice par le passé et qui définissent étroitement la politique commerciale qu'une entreprise en position dominante peut suivre. Elle présente aussi l'intérêt de majorer le montant de base de l'amende imposée à l'entreprise pour la circonstance aggravante que représente la récidive, ce qui est une première depuis la publication des lignes directrices ([1]) pour le calcul des amendes.

I. Les Faits

Les circonstances

En mai 1996, la Commission a ouvert un dossier de procédure d'office à l'encontre de Michelin. La Direction Générale de la Concurrence disposait d'éléments lui permettant de soupçonner cette entreprise d'exploiter abusivement sa position dominante sur le marché français du pneumatique de remplacement pour véhicules poids lourd. Le Groupe Michelin, avec un chiffre d'affaires net de 13,763 milliards d'euros en 1999 (90,28 milliards de FRF) et une part de marché mondial (toutes catégories de pneumatiques confondues) supérieure à 18%, est en concurrence avec le groupe japonais Bridgestone et l'alliance Goodyear/ Sumitomo pour le leadership mondial dans le domaine du pneumatique. En France, le fabricant occupe une position nettement prépondérante (tous pneumatiques confondus).

La politique commerciale de Michelin à l'égard des «négociants-spécialistes» (revendeurs) se composait sur la période étudiée de trois éléments, les «Conditions générales de Prix France aux Revendeurs Professionnels», la «Convention pour le Rendement Optimum des Pneumatiques PL Michelin» («Convention PRO»), la «Convention de Coopération Professionnelle et d'Assistance Service» (dite «Club des amis Michelin»).

La décision constate que Michelin a mis en place ce système complexe de rabais quantitatifs, de primes et de conventions commerciales qui constitue un système de *fidélisation inéquitable* à l'égard des revendeurs, ayant pour effet de lier ces derniers et contribuant à la forclusion du marché français. Ces pratiques sont clairement interdites par l'article 82 du traité CE.

Les marchés de produit pertinent

Le pneumatique de remplacement ([2]) pour véhicules poids lourd englobe deux marchés de produits, à savoir le marché du *pneu neuf de remplacement* et le marché du *pneu rechapé*, le rechapage étant une technique de retraitement d'un pneu usagé (à chaud ou à froid) par l'adjonction d'une nouvelle bande de roulement qui allonge la durée de vie du pneu.

Tous les revendeurs et les manufacturiers de pneumatiques, en effet, s'accordaient pour définir le marché des pneumatiques pour poids lourd (ci-après PL) et autobus comme un marché distinct des autres catégories de pneus (destinées aux voitures de tourisme, aux camionnettes, aux tracteurs agricoles etc.…) pour des raisons essentiellement techniques, de même que le marché de «première monte» (Original Equipment Market) était perçu par ces mêmes acteurs comme distinct en raison notamment de la demande très particulière sur ce marché constituée par les fabricants automobiles et des conditions commerciales spécifiques qui s'y rapportent.

Par ailleurs, la Commission en 1981 et la Cour en 1983 dans leurs décision et arrêt Nederlandsche Banden-Industrie Michelin avaient défini comme pertinent le marché du pneu neuf de remplacement «dans la mesure où le marché des pneus neufs de remplacement n'était pas soumis à une concurrence suffisante des pneus rechapés».

([1]) Publiées au JO C 9, le 14 janvier 1998.

([2]) On parle de marché «au remplacement» par opposition au marché dit «de première monte» (pneus montés originellement sur les véhicules neufs).

Deux marchés de produits pertinents ont donc été considérés, le marché du pneumatique PL neuf de remplacement et le marché du pneumatique PL rechapé.

Le marché géographique du pneu rechapé

Michelin avait confirmé que le marché du rechapage est de dimension nationale: «*Michelin considère que le marché du rechapage est un marché national: c'est un marché de prestation de services et, donc, un marché de proximité*». Le marché du rechapage étant un marché de service, et les services ne pouvant être stockés, c'est par définition d'un marché de proximité qu'il s'agissait et donc au plus de dimension nationale, en l'occurrence, du marché français.

Le marché géographique du pneu neuf de remplacement

Ce qui comptait en l'espèce était de jauger la capacité réelle des revendeurs (qui sont la seule demande réelle à considérer sur ce marché), à s'approvisionner en dehors de leur territoire national, de même que les similitudes ou disparités qui peuvent être d'ailleurs rencontrées au niveau de la structure de l'offre. Or, lors de son étude, la Commission a notamment pris note que les grands manufacturiers organisent tous aujourd'hui la distribution et la commercialisation de leur production selon une logique nationale, de même qu'ils attestent que les revendeurs nationaux s'approvisionnent quasiment exclusivement auprès des filiales commerciales nationales, ce qui permettait à la Cour dans son arrêt Nederlansche Banden-Industrie Michelin de 1983 de conclure *au caractère national du marché*.

Pour les deux marchés de produits pertinents, le marché géographique considéré a donc été le marché français.

La position dominante de Michelin

Quatre séries de raisons ont conduit la Commission a considéré Michelin en position dominante sur les marchés définis plus haut.

a. Parts de marchés

Depuis l'arrêt Hoffmann-la-Roche/Commission ([1]), la Cour de Justice considère que des parts de marché extrêmement importantes constituent par elles-mêmes la preuve de l'existence d'une position dominante à condition de se maintenir sur une certaine durée. Dans ce même arrêt, la Cour estime que si par exemple une entreprise détient 80% de parts de marché, elle est supputée en position dominante. En 1991, dans l'arrêt Akzo Chemie BV / Commission ([2]), la Cour affirme qu'une part de marché de 50% constitue par elle-même, et sauf circonstances exceptionnelles, la preuve de l'existence d'une position dominante. Or toutes les analyses convergent pour montrer que la part de marché de Michelin sur les deux marchés pertinents a toujours été, et ce sur plus de 20 ans, toujours largement supérieure à ce seuil. Par ailleurs, aucun des concurrents de Michelin n'obtient plus d'un cinquième de ses parts de marché.

Michelin est en outre encore plus fort sur des marchés adjacents comme celui du marché de première monte qui bien entendu influence considérablement le marché du remplacement.

b. Michelin est un «Partenaire obligatoire»: le taux de demande spontanée (de la part du consommateur final) en produits Michelin est en effet considérable. La marque Michelin est donc incontournable pour un revendeur, et cela était attesté par nombre de déclarations faites par ces derniers.

c. Michelin avait su accroître ou au moins maintenir (selon les analyses) au cours de la dernière décennie son différentiel de prix avec ses concurrents alors même que le niveau des prix de Michelin étaient déjà très élevés et très largement supérieur à ceux de ses concurrents et ce au même moment où son avancée technologique se réduisait (fin du brevet de la technologie radiale).

d. Des arguments d'ordre commercial et technique: Michelin dispose de la première force de vente (avec 300 agents) largement supérieure à celle de ses concurrents, il dispose aussi du premier réseau commercial intégré «Euromaster» (environ 350 points de vente sur les 2000 que compte le marché français).

II. Le caractère abusif de la politique commerciale de Michelin

La décision constate que Michelin a mis en place un système complexe de rabais quantitatifs, de primes et de conventions commerciales qui constitue un système de *fidélisation inéquitable* à l'égard des revendeurs, ayant pour effet de lier ces

([1]) Arrêt du 13 février 1979.
([2]) Arrêt du 3 juillet 1991.

derniers et contribuant à la forclusion du marché français.

1. Les conditions générales de prix France aux revendeurs professionnels (1980-1997)

a. les rappels quantitatifs prenaient la forme d'une ristourne annuelle en pourcentage sur la totalité du chiffre d'affaires (PL, tourisme et camionnette) réalisé avec Michelin France. Pour y être éligible, il suffisait d'atteindre les seuils de chiffre d'affaires prévu par les grilles de rappel. La Cour, dans la première affaire «Nederlansche Banden-Industrie Michelin» comme dans une jurisprudence constante et récente, condamne la simple pratique d'un rabais quantitatif pour une entreprise en position dominante dès lors qu'il dépasse un délai raisonnable (ce qui est le cas en l'espèce, supérieur à l'année) au motif qu'il *n'est pas équivalent à une politique de concurrence normale par les prix*. En effet, le simple fait d'acheter une quantité supplémentaire infime de produits Michelin fait bénéficier le revendeur d'un rabais sur la totalité du chiffre d'affaires réalisé avec Michelin et est donc supérieur à la juste rétribution marginale de l'achat supplémentaire, ce qui produit à l'évidence un fort effet incitatif à l'achat et donc est fidélisant. La Cour insiste sur le fait qu'un rabais ne peut que correspondre aux économies d'échelle réalisées par l'entreprise grâce aux achats supplémentaires induits des consommateurs.

b. La prime de service (1980-1996): le montant de la prime était lié au nombre de points obtenus au regard d'une grille d'évaluation concernant en principe la qualité du service. Or, l'octroi des points n'était pas exempt de subjectivité et laissait une marge discrétionnaire d'appréciation à Michelin. En outre, certains points étaient conditionnés par la transmission d'informations stratégiques très précises sur le marché (de 1980 à 1992). Jusqu'en 1992, des points étaient octroyés si le revendeur respectait un pourcentage minimum d'approvisionnement en produits Michelin. Un point était octroyé si le revendeur s'engageait à faire systématiquement rechaper les carcasses Michelin chez Michelin. Cette prime a été supprimée en 1997.

c. La prime de progrès (1980-1996), comme la *Prime pour objectif atteint* qui l'a remplacée en 1997 et 1998, était particulièrement abusive dans la mesure où pour obtenir cette prime, le revendeur devait accepter de s'engager sur un montant minimum d'achats (dit la base) qui correspond soit à la réalisation de l'année précédente soit à la moyenne des 2 ou 3 dernières années (avec des modulations de coefficients). Cette prime *individualisée* correspondait exactement à ce que la Cour a condamné dans le premier arrêt Michelin-NBIM.

d. Les conventions commerciales (1980-1999) étaient un prolongement du système des rappels quantitatifs et de la prime de progrès avec des ristournes supplémentaires (plusieurs % du Chiffre d'affaires). Elles renforçaient le caractère abusif des autres primes avec en outre une clause de Chiffre d'affaires minimum de 24 millions de FF (entre 1991 et 1994) avec Michelin permettant à ce dernier de se garantir la coopération des revendeurs les plus importants.

2. La prime PRO («Convention pour le Rendement Optimum des Pneumatiques PL Michelin»)

Créée en 1993, cette prime était conditionnée à la signature d'une Convention Pro et au fait de disposer auparavant d'une prime de progrès (ou dès 1997 d'une prime d'objectif atteint). Elle comportait comme obligation de devoir présenter les carcasses Michelin au rechapage chez Michelin *exclusivement.* Pour chaque carcasse présentée, une prime unitaire était octroyée. Cette prime produisait donc manifestement un double effet très clair de ventes liées: premièrement, Michelin utilisait sa position dominante sur le marché du neuf pour conforter sa position sur le rechapé, deuxièmement, Michelin utilisait sa position dominante sur le marché du rechapé pour se renforcer sur le marché du neuf.

3. La «Convention de Coopération Professionnelle et d'Assistance Service» (dite «Club des amis Michelin») *(1990-1999)*

La Convention Club avait pour but essentiel de s'attirer les revendeurs les plus importants. Quoique l'obligation de parts de marché (dite «Température») ne soit pas écrite dans les conventions, elle était bien réelle et est mise en évidence par les documents recueillis lors des inspections chez Michelin

III. Le montant de l'amende

Le montant de l'amende tient compte tant de la gravité de l'infraction et de sa durée (neuf ans, de 1990 à 1998), que de certaines circonstances atté-

nuantes (cessation unilatérale de l'infraction) et aggravantes (récidive).

Eu égard à la gravité de l'infraction, une amende devait être infligée. Le niveau de l'amende proposée a été calculé conformément aux dispositions de l'article 15 du règlement n° 17 et tenait compte de la méthode exposée dans les lignes directrices de la Commission pour le calcul des amendes.

L'infraction constituait un abus de position dominante fondé sur des «rabais fidélisants accordés par une entreprise en position dominante afin d'exclure ses concurrents du marché», selon les termes des lignes directrices, étant donné que la politique commerciale de Michelin *barrait artificiellement* l'accès des concurrents au marché. Elle avait pour effet de faire gravement obstacle, dans une partie substantielle du marché commun et par des moyens différents de ceux qui gouvernent une concurrence normale, au maintien du degré de concurrence existant encore sur les marchés en cause. Cette infraction pouvait donc être qualifiée de **grave**; pour ce type d'infraction, les lignes directrices prévoient un montant de base envisageable de 1 million à 20 millions d'euros, avant examen de la durée et des circonstances atténuantes et aggravantes.

En fixant le montant de l'amende eu égard à la gravité de l'infraction, la décision a également pris en compte la capacité économique et financière de Michelin, puisque le montant de l'amende devait avoir un caractère suffisamment dissuasif pour éviter toute récidive ultérieure.

De fait, cette infraction constituait une récidive. En 1981, dans des circonstances analogues, la Commission avait condamné un comportement de Michelin aux Pays-Bas pratiquement identique à celui qu'elle condamne pour le marché français dans la présente affaire. Cet élément doit être considéré comme une circonstance aggravante.

Pour ce qui est de la durée de l'infraction, il a été constaté que l'abus devait être retenu sur une période de neuf ans, entre 1990 et 1998, période sur laquelle l'enquête de la Commission s'était focalisée. Selon les lignes directrices, il s'agissait donc d'une infraction de longue durée, pour laquelle on peut appliquer une majoration du montant de base pouvant atteindre 10 % par année d'infraction.

Toutefois, en janvier 1999, Michelin avait modifié sa politique commerciale et mis fin ainsi à l'infraction. L'entreprise avait donc procédé à ces changements avant l'envoi par la Commission de l'exposé des griefs; cet élément devait être retenu comme une circonstance atténuante.

Le montant de l'amende en raison de la gravité de l'infraction fut fixer à **8 millions d'euros**. Ce montant est conforme aux affaires précédentes concernant une infraction analogue British Airways ([1]), Irish Sugar ([2]).et Deutsche Post ([3]),. La majoration pour la durée de l'infraction a été de 90% (10% par année pour neuf années) soit **7,2 millions d'euros**, le «montant de base» total étant ainsi de **15,2 millions d'euros**. Cette majoration est parfaitement justifiée du fait de la durée extrêmement longue de l'infraction.

De même, la Commission se devait de condamner sévèrement la récidive et une majoration de 50% en raison des circonstances aggravantes fut appliquée, soit **7,6 millions d'euros**. Toutefois, il a été pris en considération le fait que Michelin a coopéré avec la Commission dans la dernière phase de la procédure. Par conséquent et compte tenu des précédents impliquant la considération de circonstances atténuantes pour cessation anticipée de l'infraction, (Fettcsa, Amino Acids et Nathan-Briolux), une minoration de 20% du montant de base a été appliquée, soit **3,04 millions d'euros**.

En définitive, le montant final de **19,76 millions d'euros** doit être considéré comme équilibré compte tenu des précédents analogues (British Airways, Irish Sugar, Deutsche Post) et des caractéristiques propres de l'infraction commise par Michelin, en particulier sa durée très longue et son caractère de récidive.

Conclusion: La décision Michelin offre un cadre clair aux entreprises possédant de fortes parts de marché pour identifier ce qui dans leurs conditions commerciales pourrait produire un effet anticoncurrentiel et éviter ainsi une lourde (mais justifiée) sanction pour abus de position dominante.

([1]) Publiée au JO le 14 juillet 1999
([2]) Publiée au JO le 14 mai 1997
([3]) United Parcel Service / Deutsche Post AG, Décision du 20.03.2001

Recent cases in the transport sector:

Commission fines Scandinavian Airlines System (SAS) and Maersk Air for market-sharing

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On 18 July 2001, the Commission decided to fine Scandinavian airlines SAS and Maersk Air € 39 375 000 and € 13 125 000 respectively for sharing markets on the routes to and from Denmark.

SAS is a consortium owned by SAS Sverige AB (3/7), SAS Danmark A/S (2/7) and SAS Norge ASA (2/7). Each of the three companies is 50% owned by the State and 50% by other investors. The turnover of SAS in 2000 was SEK 44 481 million (some e 4 917 million).

Maersk Air is, after SAS, the second airline in Denmark. It is owned by the A.P. Møller group, which is also active in shipping and oil and gas. The turnover of the Maersk Air group in 2000 was DKK 3 422 million (approximately € 458.6 million).

1. The notification, the complaint from Sun-Air and the June 2000 inspections

In March 1999, SAS and Maersk Air notified to the Commission a cooperation agreement, which entered into force on 28 March 1999. The two main areas of cooperation that the parties notified related to code-sharing and to frequent-flyer programmes (FFPs). The code-share made it possible for SAS to sell seats on flights operated by Maersk Air, using the SAS code and flight number. The FFP cooperation allowed members of the SAS's FFP (called 'EuroBonus') to earn and redeem points on the Maersk Air flights.

Sun-Air of Scandinavia, a small Danish airline, had submitted in November 1998 a complaint to the Commission against the cooperation between SAS and Maersk Air. Sun-Air wrote that 'there is a history of SAS working far more closely, coordinating far more business activities with its partner airlines than it has announced publicly', and asked the Commission to investigate the possible surreptitious cooperation in the SAS/Maersk Air case.

In the course of the preliminary enquiry that followed the notification and the complaint, it appeared that, coinciding with the entry into force of the cooperation agreement, Maersk Air had withdrawn from the Copenhagen-Stockholm route where it had until then been competing with SAS. It also appeared that, at the same moment, SAS had stopped flying on the Copenhagen-Venice route and Maersk Air had started operations on this route. Finally, it appeared from the preliminary enquiry that SAS had withdrawn from the Billund-Frankfurt route, leaving Maersk Air -its previous competitor on the route- as the only carrier. These entries and withdrawals were not notified as part of the agreement between SAS and Maersk Air.

Given the likelihood that these entries and withdrawals had not been unilaterally decided, the Commission carried out on-site inspections on 15 and 16 June 2000, in close cooperation with the national competition authorities and the enforcement authorities in Sweden and in Denmark.

2. The evidence obtained from the inspections

The documents obtained from the inspections confirmed that the agreement between SAS and Maersk Air was broader than what the parties had notified to the Commission.

First, SAS and Maersk Air negotiated *an overall non-compete clause* covering their future operations on the international routes from/to Denmark and on the Danish domestic routes. The parties agreed that Maersk Air would not operate new international routes from Copenhagen 'without specific request or approval by SAS'. The parties also agreed, as regards the routes out of Copenhagen, that the routes 'started by DM [Maersk Air] or taken over by DM from SAS cannot be taken over by SAS at a later date except by mutual agreement between SAS and DM'. Conversely, as regards the routes to/from Jutland, SAS and Maersk Air agreed that 'SAS will not operate on DM's routes out of Jutland'. The parties also agreed that 'the share-out of the domestic routes will be respected'.

Second, the parties agreed on *specific entries into and withdrawals from individual routes,* namely:

— *Copenhagen-Stockholm* (CPH-STO). SAS and Maersk Air agreed that 'Maersk Air will cease

flying CPH-STO and CPH-GVA [Geneva ([1])] on 28 March 1999.' Until Maersk Air's withdrawal on that date, the parties competed with each other on this route. Copenhagen-Stockholm is a major intra-Community route, with over one million passengers a year and some twenty daily flights in each direction. Until its withdrawal, Maersk Air had been code-sharing on the route with Finnair. Finnair was primarily prejudiced by the SAS/Maersk Air cooperation. Finnair first reduced frequencies, and then abandoned the route in May 2000. At present, SAS has a de facto monopoly on the route, with a token presence of TAP.

— *Copenhagen-Venice*. As compensation for withdrawing from the Copenhagen – Stockholm route and not launching other routes from Copenhagen, the parties agreed that Maersk Air would take up from SAS the Copenhagen-Venice route. SAS was the only airline operating the route until 28 March 1999, when it withdrew. On that date, Maersk started operating on the route. Since then, Maersk Air is the only airline operating on the Copenhagen – Venice route.

— *Billund-Frankfurt.* The parties had agreed that 'SAS will cease flying Billund-Frankfurt… as of 1 January 1999'. The parties competed with each other on this route until 3 January 1999, when SAS withdrew and left Maersk Air as the only airline on the route.

3. The legal assessment

3.1 The relevant markets

The SAS/Maersk Air cooperation affects, first, a large number of O&D markets ([2]) for the scheduled air transport of passengers to/from Copenhagen and to/from Billund. SAS and Maersk Air are the two main airlines operating to/from Denmark. Copenhagen and Billund are the two main airports in Denmark. Given that Maersk Air agreed with SAS that it would only launch routes from Copenhagen if SAS agreed to it, a large but undetermined number of routes to/from Copenhagen are affected by the agreement. Because SAS agreed that it would not operate on Maersk Air's routes out of Jutland, the agreement also affects such routes. Second, the cooperation also affects the markets for the scheduled air transport of time-sensitive passengers ([3]) between Copenhagen and Stockholm, between Copenhagen and Venice and between Copenhagen and Bornholm, as well as the market for the scheduled air transport of both time-sensitive and not time-sensitive passengers between Billund and Frankfurt.

3.2 Article 81 of the EC Treaty and Article 53 of the EEA Agreement

The legal assessment in this case is quite straightforward. By their very nature, the market-sharing agreements have the object of restricting competition and are therefore caught by Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. In addition, the arrangements between SAS and Maersk Air have the effect of significantly restricting competition. Actual competition was restricted on the Copenhagen – Stockholm and Billund – Frankfurt routes; potential competition was restricted on the Copenhagen – Venice route. The overall market-sharing agreement also restricted potential competition between the parties.

The market-sharing agreed between SAS and Maersk Air is a 'hard core' restriction of competition that does not meet the conditions to benefit from an individual exemption pursuant to Article 81(3) of the EC Treaty or Article 53(3) of the EEA Agreement.

4. The fines

4.1 Absence of immunity from fines

SAS and Maersk Air could not benefit from the immunity from fines foreseen by Article 12(5) of Regulation 3975/87 in respect of acts taking place after notification to the Commission, because they did not notify the overall market-sharing agreement or any kind of cooperation on the Copenhagen-Stockholm route. Also, while SAS and

([1]) Given that Regulation 3975/87 only applies to air transport between the EEA airports, the Decision does not relate to the market-sharing on the Copenhagen – Geneva route

([2]) In air transport cases, the Commission applies the so-called 'point of origin/point of destination' (O&D) pair approach. According to this approach, every combination of a point of origin and a point of destination should be considered as a separate market from the passenger's viewpoint. To establish whether there is competition on an O&D market, the Commission looks at the different transport possibilities in that market, that is, not only at the direct flights, but also, to the extent that they are substitutable to the direct flights, at other alternatives, including indirect flights linking the O&D pair and other means of transport like road, train or sea.

([3]) For 'time-sensitive' passengers, time is of the essence, either as regards the need to ensure a minimum travel time or the need to travel at a precise time of the day and not at any other given moment, or both. Also, these passengers may need to book a flight at short notice or require flexibility. Time-sensitive passengers are willing to pay a premium to have their requirements satisfied. On the contrary, for non-time sensitive passengers, savings on the price of the trip have priority over time constraints.

Maersk Air notified the Commission that they were cooperating on the Copenhagen-Venice and Billund-Frankfurt routes as regards code-sharing and FFPs, the actual cooperation on these routes exceeded the limits of the notification, because the parties presented the SAS withdrawals as unilateral decisions and concealed that these withdrawals had been agreed as part of a package.

4.2 The amount of the fines

The basic amount is determined according to the gravity and duration of the infringement.

As regards the *gravity*, the Commission considered that the market-sharing agreement between SAS and Maersk Air is a very serious infringement of Community competition law. To reach this conclusion, the Commission took account of:

(i) *The nature of the infringement.* The infringements consisted of market-sharing practices, which are by their nature very serious violations of Article 81 of the EC Treaty. The parties knew that their behaviour infringed competition law and took action to avoid that the Commission became aware of the full extent of their agreements.

(ii) *The size of the relevant geographic market.* The withdrawals that took place in the Copenhagen – Stockholm, Copenhagen – Venice and Billund – Frankfurt routes are only the most visible consequences of the market-sharing. On many other routes to and from Denmark (routes to/from the other Member States, to/from the EEA countries and to/from the rest of the world), the agreement prevented competition that could otherwise have taken place. The affected geographic market therefore extends over the EEA and beyond.

(iii) *The actual impact of the infringement.* The competition restrictions that prejudiced passengers resulted in additional revenue to the parties. The parties themselves estimated that the circumstance that Maersk Air would be "steering clear" of Stockholm and Oslo would provide a substantial annual additional revenue to SAS, to which the parties attributed a value in concrete money terms in order to compensate Maersk Air at an equivalent level. To establish the fine, the Commission also considered that the overall market-sharing between SAS and Maersk Air did not only affect two routes but a large number of routes to and from Denmark as well.

The Commission gave more weight to the infringements committed by SAS than to the infringements committed by Maersk Air. SAS is the major airline in Scandinavia, while Maersk Air is much smaller. In addition, the agreement in effect extended the SAS market power by incorporating the routes on which the parties code-shared to the SAS network ([1]).

Taking these factors into account, as well as the need to set the fines at a level that ensures that they have a sufficiently deterrent effect, the starting point for the fines was set at € 35 million for SAS and at € 14 million for Maersk Air.

As regards the *duration*, the infringements started on 5 September 1998 (which is the date when the parties' agreement was recorded) and terminated on 15 February 2001, when – according to a exchange of letters between the parties – the two companies regained their freedom to compete. The duration was therefore of two years, five months and ten days. For infringements of medium duration (between one and five years), the Commission applies an increase of up to 50% of the amount determined for gravity. In the present case, the Commission increased the starting point of the fine by 25%. The basic amounts were therefore set at € 43.75 million for SAS and at € 17.50 million for Maersk Air.

The Commission decided that in the present case there were no aggravating or attenuating circumstances.

Application of the Leniency Notice ([2])

The Commission applied section D.2 of the Leniency Notice, taking into account the different degrees of cooperation of SAS and Maersk Air.

Maersk Air could benefit from the application of the first indent of Section D.2 of the Leniency Notice ('active' cooperation). At the end of the on-site inspections, Maersk Air offered to the Commission services to hold a meeting with a former employee who had played a key role in the SAS/Maersk Air negotiations. During the meeting, Maersk Air handed over to the Commission representatives the 'private files' that that person had kept at home. These files helped the Commission establish the evolution of the negotiations and the precise scope of the agreement.

Both companies could benefit from the application of the second indent of Section D.2 of the Leniency Notice ('passive' cooperation of compa-

([1]) SAS put its code on Maersk Air's routes, but Maersk Air did not put its code on the SAS routes.
([2]) Commission Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207,18.7.1996, p.4.

nies not contesting the statement of objections), because neither SAS nor Maersk Air contested the facts contained in the statement of objections.

Taking the above into account, the Commission reduced Maersk Air's fine by a percentage of 25%, and SAS's fine by 10%.

Commission approves British Midland International joining STAR alliance

Oliver STEHMANN, Directorate-General Competition, unit D-2

On 1 March 2000 the airlines British Midland International (*bmi*), Lufthansa and SAS (hereinafter 'The Parties') notified to the European Commission a co-operation agreement in accordance with Regulation 3975/87 for a decision applying Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement. On 12 June 2001, the European Commission informed the Parties that they were granted a six year exemption for their Tripartite Joint Venture Agreement ('TPJVA'). Granting such an exemption became possible after the Parties had made a number of undertakings which addressed the Commission's competition concerns. It followed a detailed investigation during which the Commission services had consulted a large number of European airlines. Remedies proposed by the Parties were put to a thorough 'market test' in order to find out whether the proposed remedies, in the form of slots to be made available by the Parties, would actually be taken up by (potential) competitors.

In what follows, the effect of the TPJVA and the Parties' undertakings are analysed.

1. The Tripartite Joint Venture Agreement

Under the TPJVA, the Parties agree to co-ordinate their respective current and future scheduled passenger air transport services within the EEA to and from London Heathrow Airport and Manchester International Airport. Services that do not depart from or arrive at these airports fall outside the scope of the TPJVA. Under the agreement, the Parties decide jointly on the capacity, the fare structure and the flight schedules on these routes. They share profits and losses for services covered by the TPJVA.

For services not covered by the TPJVA, the Parties co-ordinate their activities pursuant to separate bilateral alliance agreements concluded between *bmi* and SAS, and *bmi* and Lufthansa respectively. The Bilateral Agreements cover code sharing, the co-ordination of schedules and the establishment of through-check-in facilities in order to achieve the efficient and seamless transfer of passengers. However, they do not provide for any profit sharing and provide for only a limited degree of fare structure co-operation.

2. The relevant market

In the passenger transport market, customers demand a transport service between a point-of-origin and a point-of-destination under certain conditions as timing and quality of service. This transport service can be carried out by different transport modes (air, rail, road or sea) or a combination thereof. With regard to air transport, it can be offered by direct flights or indirect ones, i.e. flights which include a stop-over. To establish the relevant market in air transport, in a number of decisions and supported by case law, the Commission has developed the so called point-of-origin / point-of-destination (O&D) pair approach. ([1]) According to this approach, every combination of a point-of-origin and point-of-destination should be considered to be a separate market from the customer's point of view. In order to establish whether there is competition on an O&D market, a bundle of routes is looked at, comprising:

— The direct flights between the two airports concerned;

— The direct flights between the airports whose respective catchment areas significantly overlap with the catchment areas of the airports concerned at each end;

— The indirect flights between the airports concerned to the extent that these indirect flights are substitutable to the direct flights. Substitutability of direct routes with indirect routes depends on a number of factors such as the flight time or the frequencies (and schedules) of routes.

— Other available transport means (car and/or train) to the extent that these are substitutable to direct or indirect flights in terms of journey time and frequencies, etc.

The Commission further distinguishes 'time-sensitive' and 'non-time-sensitive' customers. The former wish to reach their destination in the

([1]) Compare: Commissioin Decision of 11 August 1999(KLM-Alitalia).

shortest possible time, they are not flexible in terms of time of departure/arrival and they require that the airline offers the possibility to change their reservation at short notice. Non-time sensitive customers instead are more price-sensitive and accept longer journey times.

3. The Commission's analysis under Article 81

The TPJVA provides that Lufthansa is granted the exclusive right to operate flights on almost all routes between London and Manchester on the one hand and German airports on the other hand. Similarly, SAS is granted the exclusive right for the traffic between London/Manchester and Scandinavian countries. *bmi* is therefore not allowed to compete with Lufthansa and SAS on the respective routes to and from London/Manchester. This restriction was found to be problematic for the London-Frankfurt market. By way of contrast, prior to the conclusion of the agreement, there existed no overlap between *bmi* and Lufthansa with regard to traffic to other German airports. With regard to *bmi* and SAS, the latter had long co-operated before entering into the TPJVA, and there was no overlap between the two parties on the routes between London and Scandinavian countries.

An overlap between Lufthansa and *bmi* existed for the London-Frankfurt route on which prior to the agreement the latter operated on its own right between Heathrow and Frankfurt main airport. As a result of the agreement, in the summer season 2000 *bmi* withdrew and therefore it does not any longer compete with Lufthansa on this route. The Commission concluded that *bmi*'s withdrawal from the London-Frankfurt route represents an appreciable restriction of competition on both the market for non-time-sensitive (leisure) passengers and for time-sensitive (business) customers.

As this agreement affects passenger traffic between Member States, it has an impact on trade between Member States. The effect on trade between Member States is appreciable. With 2.1 million O&D passengers in 1999, the London-Frankfurt route is one of the busiest in Europe. It was therefore concluded that the TPJVA is caught by Article 81(1) ([1]).

In its analysis under Article 81 (3), the Commission came to the conclusion that in terms of efficiency gains and competition, the overall effect of the agreement is positive. It leads to a re-organisation and expansion of the parties´ existing networks. The agreement allows Lufthansa and SAS to compete for domestic UK traffic as well as for traffic between the UK and Ireland and they will be able to carry passengers from any point in the STAR network to regional destinations in the UK. It furthermore leads to an increase in network competition. As a result of the agreement, *bmi* was able to start providing new services between London and Barcelona, Lisbon, Madrid, Milan and Rome. On some of these routes, as London-Barcelona/Madrid, before *bmi*'s entry there was only one alliance operating. The agreement therefore fosters competition between these incumbents and the STAR alliance on such routes.

Furthermore, given that *bmi* has a significant number of slots at Heathrow, the agreement also allows the STAR alliance to develop Heathrow as a second hub. For the time being, BA has 37% of slots at Heathrow while *bmi* and Lufthansa have 14% and 13%, respectively. BD's joining of the STAR alliance will therefore foster competition between the STAR alliance and the Oneworld alliance of BA.

These pro-competitive effects will generate benefits to the consumer. Customers will benefit from a wider choice of air transport services to more destinations, better connections and convenient scheduling and seamless travel. However, in spite of these positive elements, the Commission was concerned that the agreement would lead to the elimination of competition on the market for time-sensitive customers on the route London-Frankfurt.

Generally speaking, there exist five different airports in London (Heathrow, Gatwick, Stansted, Luton and London City). Before entering into the agreement Lufthansa, *bmi* and British Airways operated from London-Heathrow and Gatwick into Frankfurt. In addition, low cost carriers Ryanair and Buzz operate from London-Stansted. In the case of non-time sensitive customers it was assumed that the five airports are substitutable. Thus, in this case the Parties face competition from British Airways as well as the low cost carriers Ryanair and Buzz. It was therefore concluded that the agreement between *bmi* and Lufthansa is unlikely to eliminate competition in respect of a substantial part of the market for scheduled air services for non-time-sensitive passengers.

([1]) With regard to the Bilateral Agreements, it was concluded that they do not restrict competition between the Parties. These agreements apply on routes where there had been no overlap before.

The case is different with regard to *point-to-point time-sensitive* passengers. The low cost carriers Ryanair and Buzz, operating from London Stansted, were not considered to be effective competitors on this market. Following the withdrawal of *bmi*, only Lufthansa and British Airways remained on the market for time-sensitive customers between Frankfurt and London. As transfer passengers generally have the choice to fly from different hubs, the analysis concentrated on point-to-point passengers.

Following the agreement with *bmi*, Lufthansa had become dominant on the market for point-to-point time-sensitive customers. In terms of frequencies Lufthansa had a market share of about 63% on this market. More important, BA was not able to increase its frequencies due to a shortage of slots at Frankfurt airport. Lufthansa alone has 64% of all slots at its Frankfurt hub. If the STAR alliance is taken together, the share rises to 72% in Frankfurt. With regard to slots at peak times, Lufthansa's position in Frankfurt is even stronger. In spite of several requests made, BA was unable to obtain further slots in Frankfurt in order to increase its frequencies on the London-Frankfurt market. By way of contrast, due to its co-operation with *bmi*, Lufthansa's position in Heathrow is considerably stronger. As a result, the only remaining competitor to Lufthansa in the market for point-to-point time sensitive customers on the market London-Frankfurt, i.e. British Airways, was severely handicapped. In particular due to the shortage of slots in Frankfurt and Lufthansa's strong position on this airport, there existed the risk that Lufthansa could eliminate competition on this market.

4. Remedies

With a view to obtaining an Article 81(3) exemption pursuant to Article 5(3) of Council Regulation (EEC) 3975/87, the Parties submitted commitments to address the Commission's competition concerns. In particular they offered to make available four pair of slots at Frankfurt airport to a new entrant. The Parties furthermore offered that the entrant could participate in their Frequent-Flyer Programme and that they would enter into an interline agreement. The four pair of slots at Frankfurt airport would allow the entrant to operate four daily frequencies. As *bmi* had already returned one pair of slots to the slot pool, the number of slots offered exceeded the slots available from the withdrawal of *bmi*. In the event that the entrant would request some, but not all of the four pairs of slots, the Parties undertook to make the remaining number of slots available to any airline currently operating services on Frankfurt-London. This would allow British Airways to increase its frequencies on this route and compete on an equal footing with Lufthansa. In the light of Lufthansa's position at Frankfurt airport, it was offered that *bmi*'s Frankfurt slots, which are not taken up by competitors would be given back to the slot pool. This would avoid that Lufthansa could further strengthen its position at the Frankfurt airport as a result of the co-operation agreement ([1]).

5. Conclusions

By proceeding in this way, the Commission was able to secure the overall pro-competitive effect of the co-operation agreement while at the same time preventing an elimination of competition on an important market on the route Frankfurt-London. The Commission carried out a market test to be assured that the slots made available by the Parties would actually be taken up by competitors. In the meantime, a request for these slots has been made by BA. On the basis of these commitments from the Parties, the Commission decided not to raise serious doubts with regard to the TPJVA and thereby granting an exemption pursuant to Article 5(3) of Regulation 3975/87 for a period of six years.

([1]) The full details of the remedies package have been published in the Official Journal C 83, 14.03.2001, p. 6.

Commission does not oppose the continuing operation of P&O Stena Line's cross-Channel ferry services

Maria JASPERS, Directorate-General Competition, unit D-2

Introduction

The Commission has not raised serious doubts against P&O Stena Line's application for renewal of an exemption granted in 1999. The joint venture, operating passenger and freight services between Dover and Calais/Zeebrugge, is therefore deemed exempted under Council Regulation 4056/86 ([1]) until 7 March 2007.

Background

In 1996, P&O and Stena Line decided to merge their respective ferry operations on the Short French Sea and Belgian Straits by creating a full-function joint venture operating under the name of P&O Stena Line. Following the procedure established in Council Regulation 4056/86 (the maritime transport equivalent to Regulation No 17), the Commission granted the joint venture a three-year exemption under Article 81(3) of the EC Treaty. ([2]) The French and the UK authorities approved the joint venture under their respective national merger control rules. The Commission exemption came to an end on 9 March 2001.

In December 2000, the parties applied for a renewal of the Article 81(3) exemption until 2020. This gave the Commission the opportunity to re-assess the impact of the joint venture on the cross-Channel ferry market.

Legal framework

Notifications made under Council Reg. 4056/86 are treated under the so-called objections procedure set out in Article 12 of that Regulation. Under this procedure, the Commission publishes a summary of the application and invites interested third parties to submit comments within a 30-day period. Unless the Commission notifies the applicants within 90 days from the date of such publication that there are serious doubts as to the applicability of Article 81(3), the notified agreement is deemed exempted for a maximum of six years. The Regulation provides a possibility for the Commission to review its position during the six-year period if it appears that the conditions for applying Article 81(3) are no longer satisfied. ([3])

When, as in this case, an application is made for a renewal of an exemption, the Commission follows the same objections procedure. The notice summarising the parties' application was therefore published on 8 March 2001 and a press release was issued the same day. ([4]) The test to be applied under a renewal application is whether the situation in the market has changed to such degree that the conditions required for the grant of an exemption are no longer fulfilled. ([5])

A deemed exemption arises by passage of time and there is no formal decision addressed to the notifying parties. In the light of this, the following sections summarise the reasoning behind the Commission internal position not to raise serious doubts in this case.

Assessment under Article 81 of the EC Treaty

The investigation revealed no facts or changes in the market structure which would cause the market definition as defined in the 1999 decision [the Anglo/Continental freight market and the Short Sea tourist market ([6])] to be re-defined. As regards the Anglo/Continental freight market, the investigation concluded that since 1999, the market has not changed in such way that a different assessment than that in the 1999 decision would be justified.

([1]) Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport.
([2]) OJ L 163, 29.6.1999, p.61 It should be noted that this original notification was made on 31 October 1996, i.e. prior to the entry into force of the amendments to the EC Merger Regulation concerning concentrative joint ventures introduced by Council Regulation (EC) 1310/97 of 30 June 1997, [1997] OJ L180/1.
([3]) Article 12(3).
([4]) OJ C 76, 8.3.2001, p. 2 and IP/01/333 of 8 March 2001.
([5]) Case 43/86 *ANCIDES* [1987] ECR 3131, paragraph 25.
([6]) OJ L 163, 29.6.1999, p. 63.

As regards the tourist market, the investigation concluded that the joint venture had achieved the efficiencies and benefits expected in the previous exemption. The consumers could be expected to continue to benefit from such efficiencies, notably in terms of improved frequency of departure, reduced waiting time on the quayside and higher quality of onboard services and other facilities, if there is sufficient competition on the market.

The 1999 decision addressed the concern that the creation of the P&O Stena Line joint venture could lead to a duopolistic market structure conducive to parallel behaviour of the joint venture and Eurotunnel, the main operators on the market. After re-assessing the elements typically examined in an oligopoly test (degree of concentration, stability of market shares, price transparency, cost structures and capacity constraints), the investigation showed that such duopolistic behaviour was even less likely under current market conditions. In particular, it was noted that Eurotunnel's market share had increased far ahead of P&O Stena Line's which had reduced the symmetry between the two market leaders. Eurotunnel and P&O Stena Line continued to have different cost structures which makes parallel behaviour less likely. Furthermore, the current market is no more transparent than in 1999 and the total capacity on the market is no lower than it was immediately after the creation of P&O Stena Line. The investigation also noted that there had been a new entrant on the market and that the third and fourth biggest operators have introduced new vessels on their routes. Following these developments, the investigation concluded that the market structure is no less, and indeed in some respects more competitive than the market structure that was assessed in the 1999 decision.

In determining whether the continuing operation of the P&O Stena Line joint venture would risk eliminating competition on the market, the investigation also took into account letters from consumers and questions from Members of the European Parliament concerning price rises and changes in ticket distribution, which the Commission had received independently from the examination of P&O Stena Line's application. The investigation found that the price increases on the market are explicable for other reasons than the operation of the joint venture. The price developments rather seem to reflect adjustments in the market to more normal market conditions, following the abolition of duty-free concessions and the absorption of the new capacity introduced around the opening of the Tunnel. As a result of such adjustments, operators have also adopted airline styled yield management systems, where the ticket price is set according to the current demand, resulting in higher prices during peak-periods. The price increases are therefore not in themselves evidence of a change in the market conditions such that renewal of the exemption could be refused.

Concluding remarks

The investigation concluded that there had been no such changes in the market that the conditions required for the grant of an exemption were no longer fulfilled. Consequently, there was no element which would justify the Commission raising serious doubts against the continuing operation of the joint venture. Following the mechanism in Council Regulation 4056/86, the joint venture agreement was deemed exempted for six years, irrespective of the parties' request for a 20-year exemption. It should be noted that the investigation only assessed whether the continuing operation of the P&O Stena Line joint venture fulfilled the exemption criteria in Article 81(3) EC. The aim of the investigation was not to examine the general price level or competitiveness on the market as such, except for what is necessary in order to assess whether the continuing operation of the joint venture would eliminate competition on the market.

Other developments in the transport sector

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Extension of Block Exemptions in the Air Transport Sector

On 29 June 2001 the Commission adopted Regulation 1324/2001 extending two block exemptions in the air transport sector. ([1]) The new Regulation amends the existing air transport block exemption Regulation, Commission Regulation 1617/93 ([2]). The two remaining air transport block exemptions concern consultations on slot allocation at airports and consultations on passenger tariffs for the purposes of interlining.

The block exemption for consultations on airport slots has been extended to 30 June 2004. This exemption allows airlines to take part in slot allocation conferences as foreseen in Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports ([3]). The Commission took the view that such conferences are necessary for the proper functioning of the slot allocation system and as such continue to qualify for exemption under Article 81(3) of the Treaty. The exemption will need to be reviewed, however, if the European Parliament and the Council adopt a Regulation amending Council Regulation (EEC) 95/93. A proposal for an amending Regulation was adopted by the Commission on 20 June 2001 ([4]).

The block exemption on consultations on passenger tariffs for interlining has been extended to 30 June 2002. This block exemption allows airlines to take part in the International Air Transport Association (IATA) tariff conferences which set interlining fares for routes within the EEA. The Commission is continuing to investigate whether these tariff conferences still meet the conditions for exemption under Article 81(3). While the conferences secure a benefit in the form of multilateral interlining, it is possible that this benefit could be secured by less restrictive means. DG COMP issued a consultation paper on this issue on 8 February 2001 ([5]) and has received a large number of responses. In the light of these responses and of the results of further investigations, DG COMP may propose to reduce the scope of the block exemption once it expires in June 2002 or to replace it with an individual exemption.

IATA Cargo Tariff Conferences

In a statement of objections sent to the International Air Transport Association IATA) in May 2001, the European Commission took a preliminary view that the IATA cargo tariff consultations restricted competition and were no longer indispensable to provide customers with efficient interlining services within the EEA.

Following this statement of objections, IATA has made a proposal for settlement to the Commission. This proposal is currently under review and the Commission believes this case could be settled in the next few weeks.

Commission clears two liner shipping consortia

In October and December 2000 the Commission received two notifications of agreements envisaging the formation of consortia of liner shipping companies in the sense of Regulation 823/2000 ([6]).

The former consists of several such companies wanting to join forces to operate on the transatlantic trades whilst the latter's objective is to cooperate in trades from Europe to the Caribbean.

([1]) OJ L 177, 30.6.2001.
([2]) OJ L 155, 26.6.1993.
([3]) OJ L 14, 22.1.1993.
([4]) COM (2001) 335.
([5]) IP/01/181, 8.22001.
([6]) Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20/4/2000, p. 24, hereinafter referred to as 'Regulation'.
If not otherwise indicated Articles quoted refer to the regulation mentioned above.

Legal background

Regulation 823/2000 replaced Regulation 870/95 ([1]) as regards the application of Article 81(3) EC to liner shipping consortia. The Regulation grants a block exemption to such consortia.

The conditions and obligations that a consortium must respect in order to benefit from the block exemption are set out in Articles 5 to 9. Above all, they seek to ensure that consortia are operating in trades where they remain subject to effective competition in order to guarantee that transport users retain a fair share of the benefits resulting from these agreements.

According to Article 7(1) of the Regulation the exemption provided for these consortia shall also apply to consortia whose market share on any market upon which it operates exceeds the limits laid down in Article 6 ([2]) but does not, however, exceed 50 % on any market. Such consortia can, on condition that the agreements are notified and that the Commission does not oppose such exemption within a period of six months form the notification, benefit from the block exemption.

Grand Alliance – Americana Consortium

In October 2000 an agreement was notified by the members of the 'Grand Alliance' (Hapag-Lloyd AG of Germany, Nippon Yusen Kaisha of Japan, Orient Overseas Container Line of Hong Kong, and P&O Nedlloyd) on the one side and Lykes Lines Ltd. and Mexican Lines Ltd., two companies belonging – via Americana Ships- to the Canadian Pacific group's shipping interests, on the other.

The consortium operates weekly liner shipping services between ports in North Europe and ports in North America. More than 20 ships are employed altogether. ([3])

The market in which the service operates is that of containerised liner shipping between ports in North Europe and ports in the USA as well as Mexico. Mexico could have been viewed as a distinct market but recent developments such as improved rail and other transport links indicate substitutability. Mexico could therefore not be seen as forming a distinct geographic market in the case in question.

Europe to Caribbean Consortium

In December 2000 the Commission received a notification of a bundle of agreements referring to a joint North Europe/Caribbean service as well as a joint Mediterranean/Caribbean service. All these agreements are tailored to form the above mentioned consortium.

Parties to the agreement(s) are CMA-CGM SA and Marfret of France as well as A.P. Møller Maersk Sealand and Nordana Line of Denmark.

The consortium operates two weekly services between ports in Europe to and from ports in the Caribbean (French Antilles as well as other locations).

The North Europe/Caribbean service will essentially rely on ships equipped with the so-called CONAIR or Blown-Air system ([4]). The system, as well as traditional reefer ships ([5]), is phased out and replaced more and more by container ships carrying (individually temperature-controlled) reefer containers. ([6])

The product market in which the service operates is that of containerised liner shipping. As regards bananas, the market includes bulk services (with reefer ships), since bananas are still mainly transported in bulk, and (temperature-controlled) containers. These two different modes of transportation still seem to constitute – as regards bananas -one product market, at least for the foreseeable future.

There are two distinct geographic markets in which the consortium is active: the North Europe/Caribbean market on the one side and the Mediterranean/Caribbean market on the other side. As regards the Caribbean, it should be noted that this market developed over the last few years. Whilst before the

([1]) Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation (EEC) No 479/92, OJ L 89, 21/04/1995 p. 7.

([2]) Market share in excess of 30% within or 35% outside a conference.

([3]) See also *American Shipper, 03/2000,* Transatlantic reshuffle, pp. 8, as well as *09/2000*, Alliances introduce Atlantic services, pp. 6.

([4]) This is an active refrigeration system for the carriage of temperature-controlled cargo. The refrigeration plant on the vessel, powered by the ship's generator, produces a stream of cold air which is fed to outlets in the ship's hold ('portholes'). A connection is made between two of the vessel's portholes and two similar openings in the container.
Each port terminal has a dedicated stack which replicates the vessel's equipment. This system is specific to the fruit trade and demands portside installations in order to maintain a certain temperature inside the containers.

([5]) See already in 1997 *Lloyds List,* Boxships pose threat to reefer fleet, as well as *American Shipper*, Reefer boxes, ships co-exist. Both articles point in the same direction.

([6]) CMA has however invested around 10 Million USD into the upgrading of its CONAIR-equipped ships; see *Richardson*, Compagnie Generale Maritime makes its move in the Europe-West Indies run.

arrival of shipping lines such as Maersk, the trade from the French Antilles to France was operated – more or less exclusively – by French companies, this has changed in the meantime. The French Antilles might therefore have been seen as a distinct market (from the rest of the Caribbean) in the past but this does not seem to be justified any longer.

Outcome of the analysis and conclusion

Both consortia in question have a market share between 30 and 40 % in their respective markets. In both cases, the analysis made concluded that the consortium agreements fulfilled all conditions laid down by the Regulation.

In the analysis particular emphasis was given to the question of the (actual and potential) competition the consortia face. Both are exposed to a considerable degree of competition.

The Commission did therefore not oppose the notified agreements, which are consequently deemed exempt ([1]).

([1]) In case of non-opposition the consortium agreement benefits from the block exemption for the lifetime of the regulation, i.e. up to 25 April 2005.

Merger control: main developments between 1 May and 31 August 2001

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Recent cases – Introductory remark

The number of cases notified to the Commission levelled off slightly between 1 May and 31 August 2001. 124 cases were notified during the period, compared to 127 in the first four month period of 2001 and 135 from 1 May to 31 August 2000. The Commission took 117 final decisions, 5 of which followed in depth investigations (1 prohibition, 3 clearances and 1 conditional clearance) and 5 of which were conditional clearances at the end of an initial investigation ('Phase 1'). The Commission cleared 105 cases in Phase 1. 47 decisions (45%) of the first-phase clearance decisions were taken in accordance to the simplified procedures introduced in September 2000. In addition, the Commission took two referral decisions pursuant to Article 9 of the Merger Regulation and opened in depth investigations in 10 cases. As of medio September 11 transactions were subject to in depth investigations, however, the Swedish banks Skandinaviska Enskilda Banken (SEB) and FöreningsSparbanken (FSB) announced that they had cancel their merger agreement. This case will be described in next number of the Competition Newsletter.

Decisions following as additional four month investigation (Decisions pursuant to Article 8, Merger Regulation)

MAN/Auwärter ([1])

Following a thorough investigation, the European Commission on 20 June 2001 granted regulatory approval to the proposed takeover of Auwärter, the German company which makes the Neoplan buses and coaches, by the MAN group. The Commission concluded that, despite the acquisition, effective competition between MAN/Auwärter and Daimler Chrysler's EvoBus, the two main players in the German city bus market, will prevail.

The Commission examined carefully the acquisition by MAN Nutzfahrzeuge AG, a truck and bus producer located in Munich, Germany, of Gottlob Auwärter GmbH, another German firm based in Stuttgart which sells buses and coaches under the Neoplan brand name.

The Commission concluded that the German bus market sector will remain competitive even after the acquisition, as the DaimlerChrysler group will continue to be the leading bus manufacturer. DaimlerChrysler group owns EvoBus, which produces buses and coaches under the Mercedes-Benz and Setra brand names.

Auwärter is a non-integrated bus manufacturer which sources engines and chassis from other companies. The company is a relatively small player in the bus market, which is, in Germany, already largely dominated by MAN and EvoBus.

The main impact of the merger will be on the city-bus market in Germany. MAN/Auwärter and EvoBus will each supply just under half of that market, leading the Commission to investigate in detail whether the merger would pose the danger of joint market dominance in Germany by means of tacit coordination between the two groups. Such coordination is in theory possible, despite the fact that Europe-wide invitations to tender are required for city buses.

Following a close examination of the case, however, the Commission concluded to the absence of any such risk. First of all, the Commission found that any tacit division of the market between EvoBus and MAN/Auwärter was not likely as there would be no viable coordination mechanism. Secondly, significant disparities between EvoBus and MAN/Auwärter, such as different cost structures, will make it likely that the companies will compete rather than collude.

In conclusion the Commission believes that there is at present effective competition on the German market; the disappearance of Auwärter as an independent supplier as a result of the merger will not alter this.

([1]) M.2201.

De Beers/LVMH ([1])

In July, following an in-depth investigation under the Merger regulation, the Commission authorised the creation of a joint venture between De Beers and LVMH. This joint venture company, Rapids World, will be active in the retail of diamond jewellery to be sold under the De Beers brand. However, while clearing the joint venture itself, the Commission at the same time sent a statement of objections to De Beers on its Supplier of Choice agreements, which have also been notified for regulatory approval, warning that the agreements violate EU competition law as they currently stand.

Both the retail joint venture and the Supplier of Choice notification are part of De Beers' new strategy in which it is seeking to replace its traditional monopolistic approach based on the control of supply with a strategy based on demand driven actions. De Beers now aims to focus more on adding value through marketing and branding initiatives and a strengthening of its control of the supply chain to the diamonds already under its dominion. A third strand of this strategy will be the launch of what is to be called the 'Forevermark', a hallmark which De Beers intends to represent the integrity of diamonds and of those who deal in them.

Rapids World

The Commission begun an in-depth investigation into the Rapids World joint venture plans on April 18 due to concerns that De Beers might strengthen its dominant position in the mining and selling of rough diamonds.

The Commission's extensive and detailed investigation into the competitive effects of this deal has highlighted the extent of De Beers' dominance in the global market for the supply of rough diamonds. But it did not unearth a causal link between the combination of LVMH and De Beers at the retail level, and a possible strengthening of De Beers' position in the upstream markets.

De Beers is the self-confessed 'custodian' of the diamond industry controlling around two-thirds of the world's supply of rough diamonds. De Beers's control over the world's production of rough diamonds, together with the strategic use of its stockpile of rough diamonds enables De Beers to determine the quantity, the quality, and to a large extent the price of the rough diamonds that they release onto the market every year. The remainder of the market is highly fragmented and the incentives of some of the other rough diamond producers to compete with De Beers is limited by the fact that they sell significant proportions of their output under contract to De Beers.

Despite this dominance upstream, the Commission's investigation did not establish that the creation of the joint venture would have led to a significant structural change on the upstream rough diamond market. While the joint venture may create a greater awareness of the Forevermark and enhance the perceived value of diamonds channelled through the De Beers's fully-owned subsidiary Diamond Trading Company (DTC), this contribution will be limited by the fact that Rapids World is not yet operational and will have to build up its market position from scratch.

The strength of De Beers's position upstream, combined with the millions of dollars which De Beers plans to spend on marketing makes it highly likely that De Beers would be able to establish the Forevermark (and thereby enhance De Beers' position) even in the absence of the proposed joint venture.

As a result, the Commission decided to clear the operation without conditions.

Supplier of Choice

As stated above, the Commission has issued a statement of objections to De Beers setting out its view that the Supplier of Choice agreements, as notified in May of this year, do not conform with European competition law and cannot benefit from exemption under Article 81(3) in their present form.

The 'Supplier of Choice' agreements between the DTC and its customers, the 'Sightholders' are designed to formalise what has so far been an informal commercial relationship between De Beers and its customers for the purchasing and selling of rough diamonds. The agreements set out the criteria according to which its Sightholders will be selected.

A Statement of Objections is a preliminary step in antitrust proceedings which does not prejudge the Commission's final decision.

Hutchison/ RCPM/ ECT ([2])

On 3 July, the Commission approved the acquisition by Hutchison Netherlands BV (Hutchison)

([1]) M.2333.
([2]) JV.55.

and Rotterdam Municipal Port Management (RMPM) of the Rotterdam container terminal operator Europe Combined Terminals BV (ECT), subject to commitments. As initially notified, the acquisition would have led to the creation of a dominant position on the market for the provision, in Northern Europe, of stevedoring services for transhipment traffic carried by deep-sea container vessels. However, the parties have offered undertakings which will enable significant competition to emerge on the relevant market.

Hutchison belongs to the Hutchison Whampoa Group (Hong Kong), the direct and indirect subsidiaries of which supply stevedoring services wordwide. In Europe, Hutchinson controls the container terminals at the deep-sea ports of Felixstowe and Thamesport. RMPM is responsible for the development and management of the port of Rotterdam in the Netherlands. ECT is the leading container terminal operator in the Port of Rotterdam, itself the largest port in continental Europe.

The Commission's in-depth investigation focused on the provision of stevedoring services in respect of the Northern European transhipment market. The investigation confirmed that the concentration would lead to the creation of a dominant position in that market.

The acquisition combines the number one operator on the continent (ECT) and the number one operator in the UK (Hutchison). Following the operation, Hutchison/ECT will have a market share of approximately 50 percent, over twice as big as its nearest two competitors taken individually, namely HHLA (18.2%) and Eurogate (17.3%). The parties' strong market position is also reflected in their high share of port calls by the main shipping lines on the important Northern Europe Far East and Transatlantic trades. Furthermore, the parties' Felixstowe and Rotterdam terminals have several natural advantages which make them particularly suited for serving larger vessels. The increasing use of ever larger vessels on the major trades to and from Europe, accounting for a very high proportion of overall transhipment traffic, would therefore further strengthen Hutchison/ECT's market position.

In the course of the investigation the parties submitted commitments, which will result in the emergence of independent competition in the Port of Rotterdam, one of the main transhipment ports in Northern Europe for deep-sea container vessels. Subject to the parties' full compliance with the submitted undertakings, the Commission has concluded that the acquisition will not lead to a dominant position on the relevant market.

In 1999, a similar transaction by which Hutchison Port Holdings Ltd and RMPM acquired ECT was notified to the Commission under the EC Merger Regulation. That transaction was later abandoned by the parties after the Commission's in-depth investigation had shown that the operation would have created a dominant position.

Later the same year, the present operation was notified to the Commission as a co-operation agreement, with the aim of obtaining exemption under the competition rules applicable to restrictive agreements. The Commission's investigation showed that the transaction constituted a concentration and the Commission prepared to take action against the parties for failure to notify the transaction under the EC Merger Regulation and for implementing the operation without authorisation. The parties thereupon notified the present operation in January 2001.

The Commission has decided not to impose fines for their failure to notify : the fact that the parties have not attempted to conceal the operation and even notified it as a co-operation agreement, as well as the co-operative attitude of the companies throughout the Commission's investigation, have been important elements in reaching that decision. The Commission has also had due regard to the particularly complex factual and legal analysis required to determine that the operation notified by the parties is a concentration.

Conditional clearances after Phase 1 (pursuant to Articles 6(1)(b) and 6(2))

Pernod Ricard/Diageo/ Seagram [1]

In May, the Commission approved the acquisition by Pernod Ricard SA of France and British-based Diageo Plc of the world-wide spirits and wine business of the Seagram Company Ltd Canada from France's Vivendi Universal SA. According to a Framework Agreement agreed between the acquiring parties, most important brands and assets of Seagram will be divided between Pernod Ricard and Diageo while a number of other brands and assets will be sold to third parties within a defined time period. The Commission's clearance is conditional on the fulfilment of the said agreement, the sale of the 'Four Roses' Bourbon

[1] M.2268.

whiskey brand to a third party and on the separation of the distribution of the 'Captain Morgan' rum brand in Iceland from the distribution of other Diageo brands there.

The Seagram Spirits & Wines Group is the owner of a number of leading spirits brands, for example, 'Chivas Regal', 'Glenlivet' and 'Bourbon Four Roses' whiskies, 'Captain Morgan' rum and 'Martell' cognac. Seagram's spirits division is part of the Seagram company which also includes the Universal film unit and which was bought by Vivendi in December 2000.

Both Pernod Ricard and Diageo also produce and distribute spirits world-wide. The main spirits brands of Pernod Ricard include 'Clan Cambell' Scotch whisky, 'Bisquit' brandy and 'Ricard', the leading flavoured spirit in France. Diageo was created in 1997 through the merger between *Grand Metropolitan plc and Guinness plc*. Diageo owns a number of leading spirits brands such as 'Johnnie Walker' Scotch whisky, 'Smirnoff' vodka, 'Baileys' liqueur and Gordon's Gin.

The operation arises from a joint bid by Pernod Ricard and Diageo for the world-wide spirits and wine business of the Seagram Company Ltd. The commercial rational of the transaction is to enable each of the notifying parties to acquire and retain certain parts of Seagram for integration into their respective businesses. The remaining parts of Seagram will be sold to third parties within a fixed time period. The parties' intentions as to the destination of each brand are set out in the Framework Agreement.

The Commission's investigation confirmed that the spirit market can be segmented into individual spirit categories such as whiskey, rum, gin, vodka, tequila, and flavoured spirits. In the case of whiskey and brandy these categories may be further subdivided (Scotch whisky, Cognac/ Armagnac for example). In past cases concerning spirits and alcoholic beverages, and in particular in *Guinness/Grand Metropolitan*, the Commission considered the relevant geographical markets to be essentially national in scope due to differences in consumption patterns, logistic and distribution networks, marketing strategies, taxation, excise duties, legislation, etc. This market definition was confirmed by the Commission's inquiry in the present case.

The six-week examination of the transaction identified competition concerns in two areas. First, the Commission found that, in Iceland, the addition of the locally dominant rum brand "Captain Morgan" to the already strong position held by Diageo might give rise to competition problems. Secondly, it was considered that the acquisition by either Diageo or Pernod Ricard of 'Four Roses' Bourbon whiskey could give rise to competition concerns in a number of national markets.

To address these potential concerns, the parties undertook that the distribution of the 'Captain Morgan' rum brand in Iceland would be separated from the distribution of other Diageo brands and that the 'Four Roses' Bourbon whiskey brand would be sold to third parties. The parties also pledged to fulfil the Framework Agreement. They also undertake to put in place specific safeguards and firewall measures and procedures to avoid any potential competition concerns during the allocation of the assets and their management during the transition period. An independent Trustee will be appointed to monitor the allocation of the Seagram brands and the operation of the firewalls. The Commission concludes that the commitments given by the parties are sufficient to remove the competition concerns identified by the Commission during its investigation.

The Commission examined the impact of the joint acquisition only in the European Economic Area, which is made up of the 15 European Union states plus Norway, Iceland and Liechtenstein. The review has been carried out in close co-operation with the EFTA Surveillance Authority. The case is also being examined by the US Federal Trade Commission.

YLE/TDF/Digita/JV ([1])

The Commission on 26 June approved an operation by which Télédiffusion de France (TDF), a France Télécom subsidiary providing wireless solutions for broadcasters and telecom operators, acquires a controlling stake in Digita, the national supplier of distribution and transmission services to radio and TV broadcasters in Finland. The regulatory clearance is conditional on the sale by TDF of Telemast, Digita's main competitor in Finland on the markets for the distribution and transmission of radio programmes.

According to a deal notified to the Commission, TDF will acquire a controlling stake in Digita, which is currently solely controlled by Finland's national public broadcaster YLE.

TDF, through its subsidiary Telemast, is already active in the distribution and terrestrial transmission of radio programmes by low power frequen-

([1]) M.2300.

cies in Finland, therefore currently competing with Digita.

The Commission's investigation showed that the proposed operation would result in the elimination of TDF/Telemast as an actual competitor to Digita on the markets concerned where TDF/Telemast was found to be the only really serious alternative to Digita, in a market where barriers to entry were found to be high.

Equally, the Commission found that by creating a vertical link between TDF/Telemast and Digita, the operation raised serious doubts concerning the creation of a dominant position on the Finnish market for the supply of radio transmission and distribution equipment. TDF/Telemast is an important supplier of this type of equipment in Finland and Digita an important purchaser.

Although the geographic market for the supply of such equipment may be world-wide for larger radio stations, the Commission's market investigation found that local presence was nevertheless required by local radio stations, for effective after sales repair and maintenance services and linguistic reasons.

To resolve the serious doubts identified in the horizontally and vertically affected markets, TDF offered to divest Telemast, a remedy which neatly removed the Commission's concerns.

During its review, the Commission received a complaint claiming that the acquisition of a controlling stake by TDF in Digita, would strengthen YLE's dominant position on the market for the acquisition of broadcasting programmes as well as its television and radio audience to the detriment of its commercial competitors. It was alleged this would result in increased prices being charged by Digita due to the fact that whilst YLE is a 'not for profit' organisation, TDF is a 'profit making' enterprise with an added incentive to recoup its investment by leveraging Digita's 'natural monopoly'. It was also alleged that such price increases would be discriminatory since whereas YLE could partially re-coup any increases through its investment in Digita there is no such possibility for the commercial broadcasters.

The Commission has decided to reject this complaint since it was not possible to establish that the proposed transaction would automatically lead to, or facilitate, price increases and price discrimination. It should be noted that as a de facto monopolist Digita already has the ability to increase prices the proposed transaction does not alter this - nor would the severing of the vertical link between YLE and Digita improve the situation in this regard. By contrast, by substantially reducing the vertical link between YLE and Digita, the proposed transaction does in fact reduce the incidence of price discrimination in favour of YLE.

Nestlé/Ralston Purina ([1])

On 27 July, Swiss-based Nestlé made significant concessions in order to obtain a clearance for the acquisition of the American petfood company Ralston Purina. The conditions concerns Spain, Italy and Greece. In Spain, Nestlé will grant an exclusive licence for a substantial period covering its Friskies branded pet food products, and divest the production site of Castellbisbal near Barcelona. Alternatively, it will divest Ralston Purina's 50% stake in the Spanish joint venture, Gallina Blanca Purina. In Italy and in Greece, the new entity will grant exclusive licences for Purina's branded pet food products, mainly sold under the 'Chow' family. Furthermore in each country, the divestiture will include related assets, such as goodwill and marketing assets. The licensee will have an option to have the relevant pet food products supplied by the new entity for the duration of the license period. The Commission's clearance is conditional on the fulfilment of the said undertakings.

The concentration consists in the acquisition by Nestlé of sole control of Ralston Purina. Nestlé is traditionally involved in the production, marketing and sale of a large variety of food products, including pet food. In April 1998, it expanded its petfood activities via the acquisition of Spillers Pet Food business from Dalgety Plc, which was then approved by the Commission.

The principal activities of Ralston Purina are the manufacture and sale of pet foods. Ralston Purina is primarily active in the United States and Canada. In Europe, Ralston Purina is active through subsidiaries, except for Spain, where it operates through Gallina Blanca Purina S. A., Barcelona, a joint venture company owned on a 50 : 50 basis with the Spanish company Agrolimen S. A.

The Commission's investigation confirmed that the petfood market can be segmented into cat and dog pet food and, within each of them, in dry and wet food and that markets are still national, due to appreciable differences across Member States in purchasing patterns of customers, prices, market structures, access to distribution networks, marketing strategies, etc.

([1]) M.2337

The six-week examination of the transaction identified competition concerns in three national markets. First, the Commission found that, in Spain, post-transaction, Nestlé would have held a dominant position and would have eliminated its most prominent competitor in the markets for dry dog food, dry cat food and snacks and treats for cats. It was also found that the acquisition would have created competition concerns with regard to the markets for dry cat food in Italy and in Greece.

To address these concerns, the parties undertook to remove the overlap in Spain by either selling Ralston Purina's 50% shareholding in Gallina Blanca Purina, or to divest Nestlé's Spanish production plant and to grant exclusive licenses for the 'Friskies' family brand for three years. The scope of the latter option ensures the viability of the divestment, as it secures the transfer of a complete business and reduces the risk for the buyer. The same approach has been adopted in Italy and in Greece, where the three-year exclusive license will cover the entire 'Chow' family brand. Moreover, all intellectual property rights related to the divested businesses are included in the divestitures. In each of the three countries, the parties also undertake not to reintroduce or promote the licensed brands for nearly five years after the expiry of the licensing period. This will give the future purchaser in each country sufficient time to re-brand the acquired products in the course of the overall period, and to position itself as a competitive force in the market.

Given the particular features of the markets involved in this case, the Commission concluded that the remedy, including re-branding, offers a viable solution and is in the interest of consumers, by avoiding a situation where the ownership of the involved pet food brands would be permanently split in different parts of the Community. It therefore concluded that the commitments given by the parties are appropriate to remove the competition concerns identified during the investigation.

The Commission examined the impact of the acquisition in the European Union only, since pet food products are excluded from the application of the EEA-Agreement. The case is also being examined by the US Federal Trade Commission.

Industri Kapital/Perstorp [1]

Subject to the divestiture the Commission approved the proposed acquisition by Industri Kapital Group of the chemical operations of Swedish company Perstorp AB. The divestiture concerns Industri Kapital's phenolic resins operation in Meerbeeck (Germany) and Perstorp's resins and merchant formaldehyde businesses in Perstorp (Sweden). Without those commitments, the transaction would have given rise to competition concerns in the markets for gas compound formaldehyde and two types of formaldehyde based resins.

The Industri Kapital Group manages and controls a number of private equity funds, among them the Industri Kapital 2000 Fund, which in their turn control numerous undertakings. Among the undertakings controlled is Dynea Oy, which is active in specialty chemicals. Swedish-based Perstorp AB is the parent company of a group of companies with activities in the chemical and the flooring sectors.

Dynea Oy and Perstorp AB are both active in the EEA and world-wide. They produce specialty chemicals, in particular resins and formaldehyde. Resins are used for bonding as adhesives in various kinds of wood panel applications, in paper lamination and impregnation, insulation bonding, in foundry processes and a number of other applications. Formaldehyde, a gas compound, is used in the production of resins.

The Commission's investigation focused on the markets of formaldehyde based resins (in particular V-100 particle board resins and insulation bonding resins), formaldehyde, formaldehyde technology and catalysts. The operation as notified would have led to the creation of a dominant position in the market for V-100 particle board resins in Germany, as well as in the market for insulation bonding resins in Norway, Sweden and Denmark. The operation would have also created a dominant position on the formaldehyde market in Denmark.

In order to address the Commission's concerns, Industri Kapital offered to divest Perstorp's resins business together with its merchant formaldehyde business in Perstorp, in Sweden. As a result of this divestiture, the operation will not lead to the creation of a dominant position on the markets for insulation bonding resins and formaldehyde on the Nordic area. Further, Industri Kapital undertakes to divest its phenolic resins operation in Meerbeck, which will remove the competition concerns on the market for V-100 particle board resins in Germany.

A similar transaction, whereby Industri Kapital proposed to acquire the whole of Perstorp, had

[1] M.2396.

been notified to the Commission last year. At that time, the Commission decided to open an in-depth investigation, since the operation gave rise to competition concerns in a number of markets. Industri Kapital submitted commitments addressing those competition concerns. However, Industri Kapital, for commercial reasons, withdrew the notification before the Commission adopted a final decision.

Allianz/Dresdner [1]

Following remedies offered by the parties concerned, the Commission on 19 July gave the go-ahead for the Allianz insurance group to take over Dresdner Bank. The Commission's investigations focused on the consequences of the creation of a strong 'bancassurance' group and the impact of the planned takeover on the relationship between the new Allianz/Dresdner group and the Münchener Rück/Ergo group, a major competitor.

Allianz AG is the largest life and non-life insurance company in Germany. Dresdner Bank AG is Germany's third-largest universal commercial bank. Both companies are also actively involved in asset management. The merger will create Germany's largest 'bancassurance' group.

Although the activities of the two companies present very small overlaps, the Commission carefully examined the possible consequences of the merger given the strong distribution networks of both companies. It also looked at the new group's position on the new growth market for personal pension schemes the so-called Riester pension.

The Commission's examination led it to conclude that, while Allianz would improve its competitive position as a result of the 'bancassurance' alliance with Dresdner, there was no risk of a dominant position being created or strengthened.

However, in the course of its review the Commission noted a large number of structural and economic links between the new Allianz/Dresdner group and the Münchener Rück/Ergo group, a major competitor, which would be considerably strengthened by the merger. In view of the strong position on the market of the Münchener Rück/Ergo group, which, together with the Bayerischen Hypo- und Vereinsbank AG (HVB), has also developed into a major 'bancassurance' group, the Commission had serious misgivings on this score.

Allianz and Münchener Rück had declared their intention to reduce their mutual holdings to around 20% as part of the planned merger. In order to remove the Commission's concerns, Allianz and Dresdner gave a legally binding assurance that they would reduce their joint holdings in Münchener Rück to 20.5% by the end of 2003 and would not in the meantime exercise more than 20.5% of their voting rights at Münchener Rück's annual general meetings. Presently, Allianz and Dresdner hold 24,9 % and 7.4%, respectively, in Münchener Rück.

Accordingly, the Commission reached the conclusion that the planned merger will neither create nor strengthen a dominant position that would significantly restrict competition within the Community. It therefore considers the notified operation to be compatible with the common market.

Article 9 referral decisions

Govia/Connex South Central [2]

On 20 July, the Commission agreed to a request from the UK authorities to refer to them the examination of the acquisition by the Newcastle-based Go-Ahead Group and Paris-based Keolis SA of joint control of London-based Connex South Central Ltd (South Central).

Go-Ahead provides passenger transport services in the UK, including train services in the Thameslink and Thames Trains franchise areas in the south-east of England.

Keolis provides passenger transport services in France and other EU member states.

Keolis and Go-Ahead have joined control of Thameslink through their joint subsidiary Govia.

South Central, currently owned by Connex UK, is a train operating company providing passenger rail services in the South Central franchise area of the UK. The UK train regulator, the Strategic Rail Authority, has agreed that the existing South Central franchise may be assigned to the parties, who are also bidding for the right to continue as franchisees after the current franchise expires.

The UK authorities made their request on the grounds that the operation affects competition on specific railway routes, particularly in the London-Gatwick-Brighton area where it would create overlap between South Central and the parties' existing train operating company Thameslink. They also argue that the routes in question are local in scope in relation to the overall UK rail network,

[1] M.2431.
[2] M.2446.

and that the operation has no impact in Member States other than the UK.

The Commission considered that, given the particular circumstances of the case, the conditions laid down in the merger regulation are fulfilled, and that it was therefore required to refer the case to the UK authorities.

Shell/Dea [1]

The Commission on 23 August referred to the German Competition Authority the examination of the impact in the downstream market for oil products of a proposed joint venture between Deutsche and RWE-DEA. At the same time, the Commission also took the view that the deal's effect in the petrochemicals sector required further review and started an in-depth investigation.

Dutch-British Royal Dutch/Shell (Shell) is one of the world's biggest oil groups active in exploration, production and sale of oil and natural gas, the production and sale of refined products chemicals, power generation and the production of energy from renewable resources. In Germany, Shell is active through its wholly-owned subsidiary Deutsche Shell GmbH.

DEA Mineralöl is a 100-percent subsidiary of RWE AG, the parent of a group of so-called multi-utility companies ranging from energy, water distribution and treatment and environmental services, as well as mining, petroleum and chemicals.

Under the terms of the agreement notified to the Commission on 10 July 2001, Shell and DEA intend to combine their downstream oil and petrochemicals business in a joint venture. The joint venture will not include the parent companies' upstream activities in the oil or natural gas sectors. The agreement also foresees that Shell will take sole control of DEA from 01 July 2004 at the latest.

On 03 August, the German Competition Authority (Bundeskartellamt) asked the European Commission to refer part of the examination in application of Article 9 of the Merger Regulation 4064/89. Article 9 allows for such referrals if a merger threatens to create or strengthen a dominant position as a result of which effective competition would be significantly impeded on a distinct market within a Member State.

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 and petrochemicals business of BP and E.ON (Veba and Aral brands), a separate German deal which was also notified to the Commission on 27 July 2001.

As a preliminary conclusion, the Bundeskartellamt found that the transaction risks creating a situation where the new entity, together with a combined BP/Veba/Aral and the other oil majors will hold a collective dominant position in particular on the market for motor fuels retailing in Germany.

The Commission's findings in its first-phase investigation support the preliminary analysis made by the German Competition Authority.

The Commission believes that the Bundeskartellamt is best placed to assess the competitive impact of the case on the oil products markets in Germany, as this will require the investigation of local sub-markets and supply relations. In addition, the Bundeskartellamt has only recently concluded an investigation into alleged abusive pricing practices of the major oil companies in Germany which gives it considerable expertise of the sector. The German authority has four months to take a final decision.

The Commission's first-phase investigation also highlighted concerns regarding the deal's impact in the petrochemicals sector which it will now assess further.

The combination of the respective petrochemicals activities of Shell and DEA, on the one hand, and of BP and E.ON, on the other hand, raises fears of a creation of a collective dominant position in particular on the market for the supply of ethylene on the ethylene 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 merged entities will control the biggest part of the market and of the underlying infrastructure, consisting of steam cracking equipment, the core 'ARG' pipeline network and its extensions as well as connected sea terminals. The transactions will also eliminate the only downstream non-integrated ethylene producers from the market.

The Commission also has a total of four months to reach a final decision on these aspects of the transaction.

[1] M.2389.

State aid:
Main developments between 1 June and 30 September 2001

Extension of the validity of the Multisectoral Framework on regional aid for large investment projects and of the Code on aid to the synthetic fibres industry

Adolfo BARBERA del ROSAL, Directorate-General Competition, unit H-2

The current Multisectoral Framework on regional aid for large investment projects was adopted in 1997 and entered into force on 1 September 1998 for an initial trial period of three years. Before the end of the trial period, the Commission must carry out a thorough review of the utility and scope of the Framework, which must inter alia consider the question of whether it should be renewed, revised or abolished.

The Commission services held a first multilateral meeting with representatives of Member States on 12 July 2001 to discuss the preliminary review of the utility and scope of the Framework as well as to explore options for the future.

In the meantime it becomes necessary to extend the current Framework until 31 December 2001, to allow for the above consultations with the Member States.

The Code on aid to the synthetic fibres industry came into force on 1 April 1996 with a period of validity of three years. Its validity was extended until 31 August 2001, to enable the Commission to assess in the context of the review of the Multisectoral Framework whether or not a sectoral framework for the synthetic fibres industry remains appropriate any longer. Since the validity of the Multisectoral Framework must be extended to allow an adequate consultation procedure with the Member States, the Commission considers that the validity of the Code on aid to the synthetic fibres industry should be extended over the same period, i.e. until 31 December 2001. This will enable the Commission to assess in the context of the review of the multisectoral framework whether or not a sectoral framework for the synthetic fibres industry remains appropriate any longer.

The Member States were informed by the Commission's services at the multilateral meeting held on 7 June 2001 that the Commission intended to extend the validity of the Multisectoral Framework on regional aid for large investment projects and of the Code on aid to the synthetic fibres industry until 31 December 2001 in order to allow consultations with the Member States about the future of the Frameworks.

At its meeting on 3rd July 2001, the Commission accordingly decided to extend the validity of the Multisectoral Framework on regional aid for large investment projects and the Code on aid to the synthetic fibres industry until 31 December 2001.

At the same meeting the Commission decided to propose, in the form of an appropriate measure within the meaning of Article 88(1) of the EC Treaty, that the Member States comply with the rules of the Multisectoral Framework on regional aid for large investment projects and of the Code on aid to the synthetic fibres industry resulting from this extension, and in particular the notification requirements laid down therein.

Ninth Survey on State Aid in the EU

Richard JOELS, Directorate-General Competition, unit G-3

In July the Commission approved the Ninth Survey on State Aid in the EU (COM (2001) 403). As in previous years its coverage has been extended and further information is presented on the agriculture, fisheries and services sectors. Greater emphasis is put on the analysis of recent trends and on *ad hoc* aid, regional aid and aid to services.

Results of the Survey

Overall results presented in Table 1 show that during the current reporting period from 1997 to 1999 the Member States of the EU spent an average of € 90 billion a year in aid in the manufacturing, agriculture, fisheries, coal mining, transport and service sectors. This is a decrease of 12% on the period from 1995 to 1997.

The manufacturing sector received an average of € 28 billion a year over the period, a decrease of some 23% when compared with the previous reporting period from 1995 to 1997. The gradual decrease observed in the Sixth, Seventh and Eighth Survey has therefore been maintained.

However as can be seen from Table 2, this overall figure conceals wide variations in aid levels and trends between countries.

Aid levels in relation to value added are highest in Greece and Italy and lowest in the United Kingdom and Portugal. The difference in aid levels is very significant with Greece granting seven times more aid than the UK.

Manufacturing aid in Germany, Italy and France accounted for 73% of the EU total as compared to 76% in the previous reporting period, whereas the share of aid granted to the manufacturing sector in the Cohesion countries – Portugal, Spain, Greece and Ireland – increased marginally from 9% to 10%.

There are also significant disparities between Member States in terms of aid objectives and forms. Regional aid is still predominant, although its share in manufacturing aid at the EU level has dropped from 59% in the previous reporting period to 56% of manufacturing aid in the current period. At Member State level, however, the share of regional aid ranges from 2% in Denmark to 93% in Greece. The amount of aid awarded to the manufacturing sector for one-off *ad hoc* measures to assist individual firms has decreased quite dramatically and accounted, in 1999, for 1.7% of all manufacturing aid, as compared to 5% in the previous year.

The share of aid to the manufacturing sector that was granted for horizontal objectives (excluding aid for rescue and restructuring) has increased from 27% to 34%. With the exception of France and the UK, this trend is followed by all Member States. At the same time the share of aid granted to particular sectors has fallen from 9% to 7%. At the EU level, there seems to be a shift away from resources allocated to *ad hoc*, regional and sectoral aid towards horizontal objectives.

Conclusions drawn by the Commission

According to the conclusions of the Stockholm Council, Member States should demonstrate a downward trend in the level of State aid in relation to GDP by 2003. Since the overall amount of aid granted in the EU is still high and because there are still significant disparities in the trends of aid award between Member States, the strict and rigorous control of this policy instrument is an ongoing concern to the Commission.

In this context the following actions are underway:

— **Increasing transparency:** a State aid Register and Scoreboard have been developed and can now be consulted on the internet (see below). The former provides improved access to information on the Commission's State aid policy, whilst the latter is an important tool to assess trends in State aid policy in the EU. The envisaged development of these tools shall enhance the transparency of State aid policies in the EU.

— **Modernising State aid control rules:** the frameworks for R&D and employment aid are under revision. The multi-sectoral framework is also being reviewed. Together with the recently adopted group exemption Regulations for SMEs and for training aid, these new rules should help modernise the current legal framework for State aid control.

— **Increased monitoring of State aid decisions:** a significant effort is being made to reinforce the monitoring of Commission decisions, notably aid recovery decisions.

— **Enforcing State aid control in the Candidate Countries:** work on the implementation of the Community's strict State aid control provisions in the context of the Europe Agreements continues.

The Survey may be consulted on the Internet at:

http://europa.eu.int/eur-lex/en/com/ cnc/2001/ com2001_0403en01.pdf.

Table 1

Annual amounts of overall national aid in the Member States 1995-1997 and 1997-1999

€ billion

	1995-1997	1997–1999
Overall national aid	102	90
of which:		
– Manufacturing sector	35.8	27.6
– Agriculture	15.2	14.0
– Fisheries	0.3	0.3
– Coal mining	8.2	7.6
– Transport	35.4	32.0
of which rail transport	33.7	31.5
– Services	5.0	5.4
– Employment	0.8	0.9
– Training	1.7	2.2

Table 2

State aid to the manufacturing sector in the Community Annual average 1995-1997 and 1997-1999

	In per cent of value added		In euro per person employed		In million euro	
	1995-1997	1997-1999	1995-1997	1997-1999	1995-1997	1997-1999
Austria	1.4	1.3	685	696	473	478
Belgium	2.1	1.7	1 237	1 003	826	657
Denmark	2.6	2.6	1 429	1 453	642	655
Germany	3.4	2.4	1 592	1 211	13 144	9 808
– Old Länder	*:*	*:*	*431*	*437*	*2 914*	*2 913*
– New Länder	*:*	*:*	*6 854*	*4 820*	*10 230*	*6 896*
Greece	5.5	4.3	1 093	876	677	537
Spain	2.5	1.7	841	567	2 117	1 548
Finland	1.7	1.6	937	968	394	424
France	1.9	2.0	1 090	1 235	4 141	4 651
Ireland	1.3	2.0	1 075	1 683	263	477
Italy	5.0	2.7	2 025	1 108	10 350	5 694
Luxembourg	2.3	2.1	1 464	1 380	48	45
Netherlands	1.1	1.0	561	530	595	571
Portugal	0.9	0.9	185	193	183	192
Sweden	0.9	1.0	490	557	364	418
United Kingdom	0.7	0.6	357	322	1 558	1 408
EU 15	2.6	1.9	1 193	916	35 775	27 563

Averages in constant 1998 prices.

Two new transparency instruments: the State Aid Register and the State Aid Scoreboard

Richard JOELS, Directorate-General Competition, unit G-3

1. State Aid Register

Last March, the European Commission published the State aid Register. This new public transparency instrument, which is being developed under the aegis of all Commission services responsible for State aid control, provides summary information on Commission State aid decisions shortly after they are taken.

Further details on State aid cases are made available by way of links to the Official Journal and press releases. The Register is available on the DG Competition's internet site at: http://europa.eu.int/comm/competition/state_aid/register/.

Contents

The Register is divided into two parts:

Part I

This part presents, in tabular form, aggregated information on all cases under preliminary examination that were registered in the Commission after the 1st of January 2000. Data is broken down by the Directorate-General responsible for handling the cases and by Member State.

It comprises three tables: the first presents data on the cases under examination from the beginning of 2000 to date, the second table presents aggregated data on all cases registered in the most recent month and the third table contains the number of cases withdrawn since January 2000.

Part II

The second part allows users to carry out simple searches for detailed information on all Commission State aid decisions pertaining to cases registered after the 1st January 2000.

The search facility incorporated in the Register allows users to access information by:

— case number

— aid instrument (grant, soft loan, guarantee, tax deferral, etc.)

— case type (individual application or aid scheme)

— decision type (opening of formal proceedings, final decisions, etc.)

— Member State (and region/province)

— primary objective (regional aid, aid for training, R&D aid, etc.)

— sector/activity (agriculture, energy, steel, etc.).

By providing links to press releases and Commission decisions, the Register brings together under one roof, the substantial amount of information on the Commission's State aid decisions that is already available by way of the Internet.

Future developments

Given the importance of this new transparency tool, the Commission is currently envisaging the following possible developments:

— incorporating direct access to the most recent Commission Decisions, adding information on aid volumes approved by the Commission and including cases falling under the exemption regulations ([1])

— developing the search facilities further, notably allowing for multi-criteria queries

— promoting the internationalisation of this instrument, namely including State aid cases form EFTA and Candidate Countries.

2. State Aid Scoreboard

Last July the European Commission unveiled the new State aid Scoreboard. Following publication of the State aid Register earlier in the year, the Scoreboard was the second of two new transparency instruments that have been developed by the Commission in the area of State aid policy.

([1]) Council Regulation 68/2001 on State aid to training and Council Regulation 70/2001 on State aid to small and medium-sized enterprises.

The Scoreboard is a source of information on the State aid situation in the EU and on the State aid control activities of the Commission. It also contains links to official sources of information on Member States' activities in this field.

The Scoreboard is available on the Internet site of DG Competition at:
http://europa.eu.int/comm/competition/state_aid/scoreboard/.

Contents

The Scoreboard is currently divided into five main parts:

Part I

This part presents an overview of State aid volumes in the European Union over the last ten years, including a breakdown by economic sector and by Member State. It also includes an analysis of State aid to the manufacturing sector according to the objective pursued (regional, sector-specific or horizontal).

Part II

This introduces a forum for Member States to present their own State aid policies and indicates Internet links to official publications and other documents concerning their vision of the future thrust of National State aid policies.

Part III

This part focuses on the Member States' compliance with State aid rules. It presents data on the evolution at EU level and a Member State breakdown according to the following indicators:

— relation between notified and non-notified cases

— the ratio of cases decided without opening the formal investigation procedure and those decided after investigation

— the ratio of positive and conditional decisions and, negative decisions.

Part IV

This part concentrates on State aid objectives. Particular attention is devoted to the analysis of aid granted for horizontal objectives. A detailed scrutiny of State aid for rescuing and restructuring companies is also presented.

Part V

In this part, the broader context of State aid policy in the Internal Market is presented. It offers an analysis of the dispersion of State aid within Member Countries and of the relation between National State aid and other government expenditure. A comparison is established between the evolution of the manufacturing sector in Member States in relation to aid given to this sector. This part also comprises an assessment of the evolution of competitive conditions in Member States as compared with variations in State aid.

Future developments

The objective of the Scoreboard is threefold. Firstly it should provide further the understanding of the Community's State aid system and raise awareness of the need for strict State aid control. It should also contribute to the availability of information on the Commission's decisional processes whilst providing information on how Member States implement Commission decisions.

Last but not least, it must provide all Member States with a means to facilitate the exchange of information and experience on their respective State aid policies. In this way the Scoreboard will provide a vehicle for improving the process peer review and the analysis of the effectiveness and efficiency of State aid measures with respect to other government measures that do not distort competition.

As time passes it will be developed gradually in response to the needs of the various user constituencies.

La Commission a adopté une communication relative à l'assurance-crédit à l'exportation à court terme modifiant celle qu'elle avait adressée aux États membres en 1997

Valentina SUPERTI, Direction Générale Concurrence, Unité A-3

Le 25 juillet, la Commission, au titre de l'article 88, paragraphe 1 du traité CE, a adopté une nouvelle communication aux Etats membres modifiant celle qu'elle leur avait adressée en 1997 «concernant l'application des articles 92 et 93 du traité à l'assurance-crédit à l'exportation à court terme». Ces communications ont notamment pour objet l'assurance des risques liés aux crédits à l'exportation à court terme finançant des transactions à l'intérieur de la Communauté et avec certains pays tiers. La couverture de ces risques, qui sont dénommés «risques cessibles», ne peut pas bénéficier d'aides d'État. Les principales modifications apportées à la communication de 1997 concernent la prolongation de sa durée d'application jusqu'au 31 décembre 2004 et l'extension de la définition des «risques cessibles» de manière à y inclure les risques politiques à l'intérieur de l'Union européenne et dans les pays membres de l'OCDE actuellement énumérés dans son annexe.

State aid: Cases

Espagne: la Commission décide que six régimes d'aides fiscales des provinces basques et un régime de la Navarre sont incompatibles avec le marché commun et que les aides déjà versées doivent être remboursées

José Luis CALVO de CELIS, Direction Générale Concurrence, unité G-1

1. Régimes d'aides fiscales sous la forme d'un crédit d'impôt

La Commission européenne a décidé le 11 juillet de clore la procédure formelle d'examen qu'elle avait ouverte en juillet 1999 à l'encontre de trois régimes d'aides fiscales des provinces basques. En l'occurrence, il s'agit de trois régimes d'aides fiscales sous la forme d'un crédit d'impôt de 45% du montant des investissements dont bénéficiaient les contribuables de l'Álava, la Guipúzcoa et la Vizcaya qui réalisent programmes d'investissement dépassant les 15 mio d'€ (ESP 2,5 mrds). Ces régimes ont été en vigueur pendant la période 1995-2000 dans le cas de l'Alava et 1997-2000 dans les autres provinces.

En ce qui concerne le caractère d'aide d'État du crédit d'impôt en cause, la Commission a été d'avis que celui-ci comporte une spécificité matérielle au sens qu'il favorise certaines entreprises. En effet, les seules entreprises qui réalisent des investissements dépassant le seuil de ESP 2,5 Mrds peuvent bénéficier du crédit d'impôt de 45% en cause. Toutes les autres entreprises, même lorsqu'elles investissent mais sans dépasser le seuil cité de 2,5 milliards de ESP, sont exclues du bénéfice des aides. En outre, la Commission a rejeté que, comme le prétendaient certains commentaires présentés par des tiers, le crédit en cause serait justifié par la nature et l'économie du système. A cet égard, la Commission a mis en relief la question de savoir si les mesures fiscales en question répondent aux objectifs inhérents au système fiscal lui-même ou, si, par contre, elles visent d'autres objectifs, même légitimes, mais extérieurs audit système fiscal. Dans le cas d'espèce, il apparaît que le crédit d'impôt de 45% ne saurait répondre aux objectifs internes du système fiscal espagnol qui, outre l'objectif principal inhérent à tout système fiscal de collecter des recettes destinées à financer les dépenses de l'État, il s'inspire notamment des principes d'égalité et de progressivité. En conclusion, la Commission a considéré que le crédit d'impôt susvisé est une aide d'État au sens de l'article 87.1 car il confère un avantage, est accordé par l'État au moyen de ressources d'État, affecte les échanges entre les États membres, et fausse la concurrence en favorisant certaines entreprises.

Ensuite, la Commission a estimé que ces aides devraient être considérées comme illégales car elles n'ont pas été notifiées aux termes de l'article 88.3 CE. A cet égard, la Commission a considéré que, contrairement aux commentaires des tiers, le crédit fiscal en cause n'était pas revêtu du caractère d'aide existante car il comportait des modifications substantielles par rapport aux crédits fiscaux existants avant 1995. Il était donc une aide nouvelle. Quant à l'argument présenté par des tiers selon lequel la considération comme aide illégale comporterait une violation de la confiance légitime et de la sécurité juridique découlant de la décision de la Commission 93/337/CEE à l'égard d'autres aides fiscales, la Commission l'a rejeté. En effet, la Commission a, dans ladite décision, considéré que les mesures fiscales en cause étaient recouvertes du caractère d'aides d'État et qu'elles étaient ainsi soumises aux règles communautaires en matière d'aides d'État (règles régionales ou des PME, de cumul, et sectoriels). Or, si, comme le prétendent les commentaires susvisés, le crédit d'impôt de 45% était une mesure semblable au régime visé par la décision citée de 1993, il aurait dû, d'une part, être notifié du fait d'être une aide d'État nouvelle et, d'autre part, se conformer notamment aux règles régionales ou des PME, de cumul, et sectoriels. Dans ces conditions, les bénéficiaires ne pouvaient se prévaloir d'une quelconque confiance légitime ou sécurité juridique en matière d'aides d'État à l'égard du crédit d'impôt de 45%.

Quant à l'appréciation de la compatibilité du régime en cause, la Commission a d'abord considéré que le crédit d'impôt semble être revêtu du caractère d'aide à l'investissement dans la mesure où il satisfait aux critères, d'autre part: d'avoir comme assiette des dépenses d'investissement et, d'autre part, d'être versé jusqu'à concurrence de 45% de

l'investissement. Ensuite, elle a examiné si cette aide à l'investissement satisfaisait aux règles communautaires en la matière et notamment aux règles concernant les aides à finalité régionale. A cet égard, la Commission a notamment observé que le crédit en cause, d'une part, peut avoir comme assiette d'autres dépenses d'investissement qui ne rentrent pas dans l'assiette type des aides à finalité régionale et, d'autre part, il a une intensité de 45% qui dépasse largement le plafond régional (0%, 25% et 20% selon les périodes et les zones) des régions concernées. C'est pourquoi, la Commission a considéré que le régime d'aides fiscales en cause ne peut être considéré comme compatible avec le marché commun aux termes des dérogations régionales de l'article 87.3.a) CE et de l'article 87.3.c) CE dans la mesure où il ne se conforme pas aux règles en matière d'aides d'État à finalité régionale. Au demeurant, la Commission a constaté également que le régime en cause ne se conforme pas non plus aux réglementations communautaires concernant les PME, les secteurs sensibles, les entreprises en difficulté et les grands projets. A l'issue de cette analyse, la Commission a conclu que le crédit fiscal en cause est incompatible avec le marché car il ne peut bénéficier d'aucune des dérogations établies à l'article 87 CE.

2. Régimes d'aides fiscales sous la forme de vacances fiscales en faveur de certaines entreprises nouvellement créées

La Commission européenne a décidé le 11.07.01 de clore la procédure d'examen formelle, à l'encontre de quatre régimes de «vacances fiscales», trois dans les provinces basques et un régime dans la communauté autonome de la Navarre, qu'elle avait ouvert en juillet 1999. En l'occurrence, il s'agit de «vacances fiscales», en faveur de certaines entreprises nouvellement créées, pendant quatre exercices fiscaux consécutifs et consistant en la réduction de la base imposable de 99, 75, 50 et 25 pour cent (pendant la 1re, 2e, 3e et 4e année respectivement) dans le cas des provinces basques et en l'allégement de 50% du montant de l'impôt dans le cas de la Navarre. En outre, les entreprises bénéficiaires doivent notamment créer au moins 10 emplois, avoir un capital libéré dépassant ESP 20 mio (120 202 €) et investir ESP 80 mio. Ces régimes ont été en vigueur pendant la période 1996-2000.

En ce qui concerne le caractère d'aide d'État du crédit d'impôt en cause, la Commission a été d'avis que celui-ci comporte une spécificité matérielle au sens qu'il favorise certaines entreprises. En effet, les seules entreprises qui réalisent des investissements dépassant le seuil d'ESP 80 mio (ESP 100 mio dans le cas de la Navarre), ayant un capital libéré dépassant les ESP 20 mio et qui créent au moins 10 emplois, peuvent bénéficier des «vacances fiscales». Or selon le cinquième rapport sur l'entreprise en Europe ([1]), en 1995, le nombre, dans l'UE, d'entreprises dont l'effectif était en dessous de 10 salariés ou n'avaient pas de salariés s'élevait à 16,767 mio, soit 92,89% du total. Dans le cas d'Espagne, ce pourcentage était encore plus élevé, soit environ 95,00. Il est vraisemblable que ces pourcentages seront encore plus élevés dans le cas des nouvelles entreprises car habituellement une entreprise démarre avec un effectif qui est augmenté au fur et à mesure que l'entreprise se consolide et atteint sa vitesse de croisière. Tel est le cas en Espagne, en 1995, où ce pourcentage était encore plus élevé, soit environ 98,00. En conséquence, il apparaît que l'une des conditions établies pour pouvoir bénéficier des aides comporte, à elle seule, l'exclusion de la plus grande majorité des nouvelles entreprises du bénéfice de l'aide. En outre, la Commission a rejeté le fait que, comme le prétendaient certains commentaires présentés par des tiers, le crédit en cause serait justifié par la nature et l'économie du système. A cet égard, les autorités espagnoles ont signalé que la conformité des mesures en cause à la logique interne du système fiscal découlerait de leur caractère objectif et horizontal. Or, le caractère objectif et horizontal de la mesure ne prouve pas la conformité avec la logique interne du système fiscal. En effet, ce caractère ne suffit pas à justifier que la mesure en cause réponde à l'objectif principal inhérent à tout système fiscal de collecter des recettes destinées à financer les dépenses de l'État ni non plus aux principes d'égalité et de progressivité inhérents au système fiscal espagnol. De surcroît, la Commission a constaté que, tel que signalé par les autorités espagnoles, la réduction de la base imposable en cause vise un objectif de politique économique qui n'est pas inhérent au système fiscal. En conclusion, la Commission a considéré que les «vacances fiscales» susvisées sont des aides d'État au sens de l'article 87.1 car elles confèrent un avantage, sont accordées par l'État au moyen de ressources d'État, affectent les échanges entre les États membres, et faussent la concurrence en favorisant certaines entreprises.

Ensuite, la Commission a estimé que ces aides devraient être considérées comme illégales car

([1]) Enterprises in Europe, Fifth Report, EUROSTAT.

elles n'avaient pas été notifiées aux termes de l'article 88.3 CE.

Quant à l'appréciation de la compatibilité du régime en cause, la Commission a considéré que, en allégeant partiellement les entreprises bénéficiaires de l'impôt sur les bénéfices, ces aides ont le caractère d'aides au fonctionnement. En effet, l'impôt des sociétés est une charge fiscale dont les entreprises qui y sont assujetties doivent s'acquitter nécessairement et périodiquement dans le cadre de leur gestion courante. En outre, la Commission a estimé que, en dépit notamment d'un montant initial d'investissement et d'un nombre d'emplois créés qui dépassent certains seuils, les aides fiscales en cause ne présentent pas le caractère d'aide à l'investissement ou d'aide à l'emploi. En effet, ces aides fiscales n'ont pas pour assiette ni le montant de l'investissement ni le nombre d'emplois ni les coûts salariaux y afférents mais la base imposable. En outre, elles ne sont pas versées jusqu'à concurrence d'un plafond exprimé en pourcentage du montant de l'investissement ou du nombre d'emplois ou des coûts salariaux y afférents mais jusqu'à concurrence d'un plafond exprimé en pourcentage de la base imposable.

La Commission a ensuite examiné le respect par ces aides des différentes règles communautaires en matière d'aides au fonctionnement. A cet égard, la Commission a rappelé que les aides au fonctionnement sont, en principe, interdites. Exceptionnellement, elles peuvent cependant être octroyées, aux termes des lignes directrices des aides d'État à finalité régionale, et ce sous certaines conditions, soit dans des régions bénéficiant de la dérogation de l'article 87.3.a) CE (régions dans lesquelles le niveau de vie est anormalement bas ou dans lesquelles sévit un grave sous-emploi), soit dans les régions 87.3.c) CE à faible densité de population ou à caractère ultrapériphérique. Comme ni les provinces basques ni la Navarre ne satisfont à ces conditions, la Commission a considéré que le régime d'aides fiscales au fonctionnement en cause ne peut pas être considéré comme compatible avec le marché commun aux termes des dérogations régionales de l'article 87.3.a) CE et de l'article 87.3.c) CE dans la mesure où il ne se conforme pas aux règles en matière d'aides d'État à finalité régionale. Au demeurant, la Commission a constaté notamment que le régime en cause ne se conforme pas non plus aux réglementations communautaires en matière de PME, secteurs sensibles, entreprises en difficulté et grands projets. A l'issue de cette analyse, la Commission a conclu que les «vacances fiscales» en cause sont incompatibles avec le marché commun car elles ne peuvent bénéficier d'aucune des dérogations établies à l'article 87 CE.

3. Remboursement des aides incompatibles déjà versées

Pour ce qui est des aides incompatibles déjà versées aussi bien dans le cadre des régimes concernant le crédit fiscal que les «vacances fiscales», la Commission a décidé, aux termes de l'article 14.1 du règlement n°659/1999, que les autorités espagnoles doivent prendre toutes les mesures nécessaires pour récupérer les aides déjà versées afin de rétablir la situation économique dans laquelle se trouveraient les entreprises bénéficiaires sans l'octroi illégal des aides, les bénéficiaires ne pouvant se prévaloir d'une quelconque violation des principes généraux du droit communautaire comme la confiance légitime ou la sécurité juridique.

Germany – Commission investigates new aid to Neue Erba Lautex GmbH and takes Germany to Court for non-execution of negative decision on aid to 'old' Erba Lautex

Eva VALLE, Directorate General Competition, unit H-2

On 25 July 2001, the Commission adopted two closely linked decisions concerning the bankrupt Erba Lautex GmbH and its legal successor Neue Erba Lautex GmbH (hereafter NEL). The Commission initiated the formal investigation procedure in respect of new aid of some € 7.83 million (DEM 15.32 million) in parallel to a judicial procedure against Germany for not executing a negative decision on aid to the now bankrupt Erba Lautex GmbH.

The Commission investigates new aid which consists of some € 4.76 million (DEM 9.32 million) granted to NEL as alleged rescue aid and a capital increase of € 3.07 million (DEM 6 million) in favour of the bankrupt Erba Lautex GmbH. The Commission considers that these two legal entities form a single economic unit, therefore both together constitute the aid beneficiary. Germany did not notify the aid prior to its award, therefore the aid is unlawful. Moreover, the Commission has serious doubts on the compatibility of the aid and notes that it should not have been paid out until the incompatible aid in favour of the bankrupt Erba Lautex GmbH was recovered.

The Commission also decided to take Germany to the European Court of Justice (hereafter ECJ) for non-execution of the negative decision it adopted in July 1999 on aid of some € 61.63 million (DEM 120 million) to the now bankrupt Erba Lautex GmbH, demanding recovery of the aid with interests generated since the date of its award. The Commission notified its decision to Germany in October 1999. Germany did not apply for annulment of the decision at the ECJ, hence the decision became firm. In November 1999 Erba Lautex GmbH filed for bankruptcy.

In December 1999, the administrator in bankruptcy of Erba Lautex GmbH created Neue Erba Lautex GmbH (hereafter NEL) as a legal successor to the bankrupt company. The bankrupt Erba Lautex GmbH holding all shares of NEL, allocates part of its workforce to work at NEL and rents is assets to NEL. Both legal entities form a single economic unit located in Sachsen (Germany).

The Commission can not conclude that Germany registered all the incompatible aid within the estate of bankruptcy. Consequently the Commission considers that Germany has not executed its decision which ordered all incompatible aid to be recovered. Furthermore, twenty months after the negative decision Germany has not recovered any incompatible aid and activities are continued, hence distortions of competition persist due to the non-recovery of the aid. Moreover, Germany did not use all means available under national law to recover the incompatible aid and to put an end to distortions of competition. Hence, Germany did not act as a diligent creditor because it did not use all its rights as from the very moment when the Commission decision was notified to it. Instead Germany created further distortions granting new aid to the same company.

Spain — The Commission authorizes a State aid package worth € 152 million in favour of General Electric for its new polycarbonate plant in Cartagena

Adolfo BARBERA del ROSAL, Directorate-General Competition, unit H-2

General Electric's new plant will cost € 630. Production of polycarbonate resins will start on 2002. This will be the second plant that the American corporation establishes in Cartagena, an area which is eligible for regional aid under the EC rules.

A total of 225 direct jobs will be created as a result of the investment. An additional number of 306 indirect jobs will also be created through suppliers and customers located in the same or in adjacent assisted areas.

Because of the size of the public assistance, the Commission has examined this aid package under the basis of the Multisectoral Framework for Large Investment Projects, in force since 1st September 1998.

When assessing the aid, the Commission has taken into consideration the important market share (above 30%) of General Electric in the policarbonate market both at world and EU level. In its decision authorising the aid, the Commission takes the view that the aid intensity of 17.91% proposed by the Spanish authorities — which is less than half the maximum aid intensity allowed for the Cartagena area (40%) — is within the maximum aid intensity allowable under the Multisectoral Framework rules. Consequently, the Commission has declared the proposed aid compatible with the common market.

United Kingdom – Commission decides to close the Article 88(2) procedure in respect of Regional Venture Capital Funds in England

Madeleine INFELDT, Directorate-General Competition, unit G-2

On 6 June 2001 the Commission decided to close, with a positive decision, the procedure laid down in Article 88(2) EC with regard to the Regional Venture Capital Funds proposed by the UK authorities.

The Regional Venture Capital Funds are intended to fill a gap in the provision of risk capital to small and medium-sized enterprises. The gap is said to exist for investments in the range of GBP 100 000–500 000, since the return on such relatively small investments is insufficient compared to the high administrative costs. At least one regional fund will be set up in each of the English regions in the form of a Limited Partnership. The Government will provide a total of GBP 50 million to the scheme over 3 years and private investors are expected to contribute up to five times that amount. The Government's return on investments will be subordinated to that of the private investors to an extent determined through a public tender. The regional funds will only make equity-based investments. Each tranche of investment is strictly limited to GBP 250 000, and the investment per enterprise is normally limited to GBP 500 000. There is no particular sectoral focus.

The procedure had been opened on 18 October 2000, since the Commission found that the scheme potentially involved state aid at three levels (to the fund, the private co-investors and the SMEs) and the notification did not contain an explicit commitment to link the equity investments to investments that were eligible for aid under the state aid rules in force at that time. It could therefore not be excluded that the aid granted constituted operating aid. Such aid can only be allowed in regions qualifying for an exemption under Article 87(3)(a) EC and if the aid is progressively reduced and limited in time. As all of these conditions did not seem to be fulfilled, the Commission had doubts as to the compatibility of the scheme with the common market. Based on the information submitted by the UK authorities, the Commission also had doubts as regards the presence of an equity gap.

During the procedure the Commission received comments from interested parties, who confirmed the presence of an equity gap in the range of investments targeted by the regional funds. Interested parties stated that even though there are venture capital funds on the market which target the lower range, they are not sufficient to cover demand. They also confirmed that the problem was a reality for medium-sized and small enterprises alike. In general, interested parties did not find that the scheme involved state aid, and to the extent that it did constitute aid to the SMEs, that aid would be compatible, as it would not be possible for a company to grow without making some 'eligible' investments.

The Commission has expressed a general policy in favour of promoting risk capital in the Community. The key challenge is to provide the conditions under which the large reserves of private capital which exist in Europe will be used for such investment. In addition, however, the Commission has recognised a role for public funding of risk capital measures limited to addressing identifiable market failures. Public interventions in the risk capital market inevitably raise the question of compatibility with the state aid rules, and the Commission therefore adopted a Communication on State aid and risk capital ([1])in May 2001.

The assessment of the scheme under the new Communication confirmed that there was state aid to the private co-investors in each regional fund, due to the subordination of the Government's return on investments made. The presence of aid to the SMEs in which the regional funds invest could not be excluded in cases where a regional fund does not invest in a particular SME *pari passu* with other fully private investors.

The Communication sets out a number of criteria against which the compatibility of risk capital schemes involving state aid are assessed. In this case each tranche of investment made by a regional fund is limited to an amount below € 500 000, and there is a limit to the total funding any one enterprise can receive from the fund. According to the Communication, the market failure is therefore assumed and any SME may benefit from investments, irrespective of its stage of development. Furthermore, the investment

([1]) OJ C 235, 21.8.2001, p. 3 and CPN 2/2001, p. 1.

decisions taken by the fund managers are profit driven. The fact that the private investors and the terms of their investment have been determined through an EU-wide public tender ensures that any distortion of competition between investors and investment funds is minimised. This was the first decision the Commission took with reference to the new Communication.

Germany – Commission approves rescue aid of about Euro 2 billion for Bankgesellschaft Berlin AG (BGB)

Stefan MOSER, Directorate-General Competition, unit H-3

On 25 July 2001, the Commission approved the Federal Government's application in respect of rescue aid of about € 2 billion to be granted by the Land of Berlin to Bankgesellschaft Berlin AG (BGB) with a view to enabling it to restore in the short term its pre-crisis solvency ratio. The aid had become necessary following substantial losses by BGB above all in the real estate sector, which caused its equity capital to fall below the statutory solvency ratio; otherwise, the Federal Banking Supervisory Office (BAKred) would have imposed restrictive measures on the bank.

BGB is a listed company active internationally whose main shareholders are the Land of Berlin (56.6%), Norddeutsche Landesbank (20%) and the Parion insurance group (7.5%). It came into existence in 1994 as a result of the merger of several credit institutions owned at the time by the Land of Berlin and is the tenth-largest credit institution in Germany with a balance-sheet total of around € 200 billion and a workforce of some 17 000. The BGB group includes among others the Landesbank Berlin, the Berlin-Hannoversche Hypothekenbank AG (BerlinHyp), Berliner Sparkasse and Berliner Bank. The banking crisis led in June 2001 to the fall of the coalition government of the Land of Berlin.

At the end of June 2001, the Federal Government formally notified the Commission of the rescue aid. It comprises two components: a declaration of intent of the Land of Berlin given in May 2001 to provide BGB with the necessary funds and an injection of the capital required to reach the bank's pre-crisis solvency ratio, to be decided on by the general assembly of shareholders at the end of August 2001 and replacing the declaration of intent.

The declaration of intent represents a commitment vis-à-vis the BAKred and ranks, therefore, as a State guarantee. The fruitless search for other investors indicates that the measures taken by the Land of Berlin do not correspond to those of a market-economy investor and therefore constitute State aid.

Particularly in view of the urgent nature of the decision, the Commission, in assessing the compatibility of the aid measures with the Common Market, has relied crucially on the position adopted by the BAKred vis-à-vis the Commission, in which it is clearly stated that there is no alternative to a capital injection of that size to keep BGB in business until the restructuring plan has been approved by the Commission. As regards the amount of the capital injection, it is stated that the pre-crisis solvency ratio must be restored in order to rectify the loss of confidence in the markets and to guarantee BGB's survival. On account of the clear position taken by the BAKred, the Commission has approved the amount needed to restore the pre-crisis solvency ratio. The amount was provisionally put at about € 2 billion. In the banking sector, capital injections are admissible as rescue aid in exceptional cases.

Approval of the rescue aid is based on the Federal Government's undertaking to present to the Commission within six months a complete restructuring plan for BGB. The approval is, in principle, valid only for that six-month period. Provided that the Federal Government does present a comprehensive restructuring plan within six months, this period will be extended until the Commission's definitive decision in the matter.

Once it has received the restructuring plan, the Commission will examine it closely and, if necessary, initiate the formal investigation procedure. The Commission will establish the amount of aid necessary to restore long-term viability and will decide which compensatory measures are necessary to offset as far as possible the distortion of competition caused by the State aid. In the case of a (partly) negative decision, the Commission may require BGB to repay to the Land authorities (some of) the capital originally approved as a rescue aid.

Germany – Further developments on State guarantees for German public banks – The German Government accepted the 'appropriate measures' proposed by the Commission

Karl SOUKUP and Stefan MOSER, Directorate-General Competition, unit H-3

The German Government accepted on 18 July 2001 the formal recommendation adopted by the European Commission on 8 May 2001, proposing so-called 'appropriate measures' in order to render the system of State guarantees for public law credit institutions (*Anstaltslast* and *Gewährträgerhaftung*) compatible with the State aid rules of the EC Treaty. This acceptance was based on an understanding reached on 17 July 2001 between Commissioner for Competition Mario Monti and German State-Secretary for Finance Caio Koch-Weser, leading a delegation of three *Länder* Finance Ministers and the President of the German savings banks' and giro association.

Anstaltslast could be translated as 'maintenance obligation', which means that the public owners (e.g. Federal State, *Länder*, municipalities) of the institution are responsible for securing its economic basis and function for the entire duration of its existence. ***Gewährträgerhaftung*** could be translated as 'guarantee obligation'. It stipulates that the guarantor will meet all liabilities of the bank which cannot be satisfied from its assets, giving creditors a direct claim against the guarantor. The guarantees allow the public banks, which are strong competitors on the European financial markets, significantly cheaper funding. Both guarantees are neither limited in time nor in amount. Also, the credit institutions do not have to pay any remuneration for them. The German credit institutions in public legal form, which benefit from these guarantees, comprise the 12 *Landesbanken,* around 550 savings banks of widely varying size as well as 11 special purpose credit institutions, which taken together make up for about one third of the German banking market and have ca. 320 000 employees.

The German Government confirms by its acceptance that the existing aid system of guarantees which constitutes incompatible State aid within the meaning of the Treaty (the measures are based on State resources and favour certain groups of undertakings, they distort competition and affect trade within the Community without fulfilling the conditions of the given compatibility clauses) will be changed. Its acceptance creates an obligation for the German government to bring the system of guarantees in line with the State aid rules of the Treaty.

While the understanding of 17 July 2001 refers only to *Landesbanken* and savings banks, the acceptance of appropriate measures covers also the special credit institutions. Possibly remaining problems with the special credit institutions will be identified and resolved in the months following the understanding.

The understanding of 17 July 2001 provides for a 4-year transitional period, which lasts from 19 July 2001 to 18 July 2005. During this period the two existing guarantees may remain in place. After that, on the basis of the so-called 'platform-model', one guarantee (*Anstaltslast*) will be replaced by a normal commercial owner relationship governed by market economy principles, implying no obligation of the State to support the bank any more. The other guarantee (*Gewährträgerhaftung*) will be abolished.

However, Gewährträgerhaftung can be maintained (grandfathered) also after 18 July 2005 to protect creditors along the following lines:

— For liabilities existing at 18 July 2001, *Gewährträgerhaftung* can be maintained without any limits until they mature.

— For liabilities created between 19 July 2001 and 18 July 2005, *Gewährträgerhaftung* will only be maintained for those maturing before the end of 2015. Otherwise, for those maturing after 2015, *Gewährträgerhaftung* will not be grandfathered.

According to the Commission decision of 8 May 2001, the German authorities have to submit to the Commission by 30 September 2001 the concrete measures they intend to take in order to make the guarantee system compatible with the rules of the Treaty. In the understanding, the German authorities engaged themselves to submit by the end of 2001 the necessary legal measures to the relevant federal or *Länder* legislative bodies and to adopt them by the end of 2002. In case of non-compliance with the deadline for adoption by the Federal State or a *Land*, the State aid elements contained in the guarantees will be treated as new aid from beginning of 2003 for banks falling under the legislation of the respective *Land* or the Federal State. Consequently, the State aid element could

be recovered from these banks with effect from 2003.

The contents of the understanding will form the basis of a Commission decision amending the recommendation of 8 May 2001. This decision will be taken before the end of March 2002.

The understanding contributes to the creation of a future level playing field between private sector and public sector banks. The transitional arrangements taken together will allow the financial institutions concerned to restructure adequately their activities and organisation in view of the changed legal and economic environment.

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Documentation

European Commission
Directorate General Competition
Administration, budget and information
Cellule Information

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 and articles by the Commissioner 1 June 2001 – 30 September 2001

Defining the boundaries: competition policy in high tech sectors – Mario MONTI – UBS Warburg Conference Europe 20/20 – Barcelona – 11.09.2001

The Future for Competition Policy in the European Union (Extracts): Merger control: Issues highlighted in the context of the GE/Honeywell Merger; Antitrust and financial services: clearing and settlement arrangements – Mario MONTI – Merchant Taylor's Hall – 09.07.2001

International co-operation and technical assistance: a view from the EU – Mario MONTI – UNCTAD 3rd IGE Session – Geneva – 04.07.2001

Enforcement of competition policy - case for the accession negotiations and for developing a real competition culture – Mario MONTI – 7th Annual Competition Conference between Candidate countries and the European Commission – Ljubljana – 17.06.2001

Content, Competition and Consumers: Innovation and Choice – Mario MONTI – European Competition Day – Stockholm – 11.06.2001

Effective Private Enforcement of EC Antitrust Law – Mario MONTI – Sixth EU Competition Law and Policy Workshop – Florence – 01.06.2001

Speeches and articles, Directorate-General Competition staff, 1 June 2001 – 30 September 2001

European competition policy for the recycling markets – Jean-François PONS – Pro Europe International Congress – 'Recycling as Part of Daily Life in Europe' – Madrid – 20.09.2001

European Competition Policy in the New Economy – Jean-François PONS – International Competition Policy Conference 2001 – Regulatory Policy Institute – Oxford – 26.06.2001

Jurisdiction and cooperation issues in the investigation of international cartels – Georgios KIRIAZIS – 20.06.2001

Community Publications on Competition

Except if otherwise indicated, these publications are available through the Office for Official Publications of the European Communities or its sales offices.

Use Catalogue number to order.

Many publications are also available on DG Competition web site:

http://europa.eu.int/comm/competition/publications

LEGISLATION

Competition law in the European Communities-Volume IA-Rules applicable to undertakings
Situation at 30 june 1994; this publication contains the text of all legislative acts relevant to Articles 85, 86 and 90.
Catalogue No: CM-29-93-A01-xx-C (xx=language code: ES, DA, DE, EL, EN, FR, IT, NL, PT).

Competition law in the European Communities-Addendum to Volume IA-Rules applicable to undertakings
Situation at 1 March 1995.
Catalogue No: CM-88-95-436-xx-C (xx=language code: ES, DA, DE, EL, EN, FR, IT, NL, PT).

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Situation at 30 June 1998; this publication contains the text of all legislative acts relevant to Articles 42, 77, 90, 92 to 94.
Catalogue No: PD-15-98-875-xx-C (xx=language code: ES, DA, DE; EL, EN, FR, IT, NL, PT, SV, FI)

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Catalogue No: CV-15-98-899-xx-C (xx=language code: ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

Brochure concerning the competition rules applicable to undertakings as contained in the EEA agreement and their implementation by the EC Commission and the EFTA surveillance authority
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Final report of the multimodal group – Presented to Commissioner Van Miert by Sir Bryan Carsberg, Chairman of the Group (Ed. 1997)
Catalogue No: CV-11-98-803-EN-C

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December 1995 (M. Cave, P. Crowther, L. Hancher).
Catalogue No: CM-94-96-582-EN-C

Community Competition Policy in the Telecommunications Sector (Vol. I: July 1995; Vol. II: March 1997)-volume II B a compedium prepared by DG IV-C-1; it contains Directives under art 90, Decisions under Regulation 17 and under the Merger Regulation as well as relevant Judgements of the Court of Justice

Copies available through DG COMP-C-1 (tel. +322-2968623, 2968622, fax +322-2969819).

Brochure explicative sur les modalités d'application du Règlement (CE) N° 1475/95 de la Commission concernant certaines catégories d' accords de distribution et de service de vente et d'après vente de véhicules automobiles – Copies available through DG COMP-F-2 (tel. +322-2951880, 2950479, fax. +322-2969800) EN, FR, DE

COMPETITION DECISIONS

Recueil des décisions de la Commission en matière d'aides d'Etat -Article 93, paragraphe 2 (Décisions finales négatives)- 1964-1995
Catalogue No: CM-96-96-465-xx-C [xx=FR, NL, DE et IT (1964-1995); EN et DA (73-95); EL (81-95); (ES et PT (86-95); FI et SV (95)]

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Catalogue No: CM-76-92-996-xx-C (xx=DE, FR, IT, NL)

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XXVII Report on Competition Policy 1997
Catalogue No: CM-12-98-506-xx-C (xx= ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

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Catalogue No: CM-90-95-283-xx-C (xx= ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

Fifth survey on State aid in the European Union in the manufacturing and certain other sectors
Catalogue No: CV-06-97-901-xx-C (xx= ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)

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Catalogue No: CV-18-98-704-xx-C

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Catalogue No: CB-CO-99-153-xx-C (xx= ES, DA, DE, EL, EN, FR, IT, NL, PT, SV, FI)

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Buyer power and its impact on competition in the food retail distribution sector of the European Union
Cat. No: CV-25-99-649-EN-C

The application of articles 85 & 86 of the EC Treaty by national courts in the Member States
Cat. No: CV-06-97-812-xx-C (xx= FR, DE, EN, NL, IT, ES, PT)

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Cat. No: CM-98-96-897-xx-C (xx= DE, NL, GR, SV)

Study of exchange of confidential information agreements and treaties between the US and Member States of EU in areas of securities, criminal, tax and customs (Ed.1996)
Cat. No: CM-98-96-865-EN-C

Survey of the Member State National Laws governing vertical distribution agreements (Ed. 1996)
Cat. No: CM-95-96-996-EN-C

Services de télécommunication en Europe: statistiques en bref, Commerce, services et transports, 1/1996
Cat. No: CA-NP-96-001-xx-C (xx=EN, FR, DE)

Report by the group of experts on competition policy in the new trade order [COM(96)284 fin.]
Cat. No: CM-92-95-853-EN-C

New industrial economics and experiences from European merger control: New lessons about collective dominance *?* (Ed. 1995)
Cat. No: CM-89-95-737-EN-C

Proceedings of the European Competition Forum (coédition with J. Wiley) -Ed. 1996
Cat. No: CV-88-95-985-EN-C

Competition Aspects of Interconnection Agreements in the Telecommunications Sector (Ed. 1995)
Cat. No: CM-90-95-801-EN-C

Proceedings of the 2nd EU/Japan Seminar on competition (Ed. 1995)
Cat. No: CV-87-95-321- EN-C.

Bierlieferungsverträge in den neuen EU-Mitgliedstaaten Österreich, Schweden und Finnland – Ed. 1996
Cat. No: CV-01-96-074-DE-C DE

Surveys of the Member States' powers to investigate and sanction violations of national competition laws (Ed. 1995)
Cat. No: CM-90- 95-089-EN-C

Statistiques audiovisuelles: rapport 1995
Cat. No: CA-99-56-948-EN-C

Information exchanges among firms and their impact on competition (Ed. 1995)
Cat. No: CV-89-95-026-EN-C

Impact of EC funded R&D programmes on human resource development and long term competitiveness (Ed. 1995)
Cat. No: CG-NA-15-920-EN-C

Competition policy in the new trade order: strengthening international cooperation and rules (Ed. 1995)
Cat. No: CM-91-95-124-EN-C

Forum consultatif de la comptabilité: subventions publiques (Ed. 1995)
Cat. No: C 184 94 735 FR C

Les investissements dans les industries du charbon et de l'acier de la Communauté: Rapport sur l'enquête 1993 (Ed. 1995)
Cat. No: CM 83 94 2963 A C

Study on the impact of liberalization of inward cross border mail on the provision of the universal postal service and the options for progressive liberalization (Ed. 1995) Final report,
Cat. No: CV-89-95-018-EN-C

Meeting universal service obligations in a competitive telecommunications sector (Ed. 1994)
Cat. No: CV-83-94-757-EN-C

Competition and integration: Community merger control policy (Ed. 1994)
Cat. No: CM-AR-94-057-EN-C

Growth, competitiveness, employment: The challenges and ways forward into the 21st century: White paper (Ed. 1994)
Cat. No: CM-82-94-529-xx-C (xx=ES, DA, DE, GR, EN, FR, IT, NL, PT)

Growth, competitiveness, employment: The challenges and ways forward into the 21st century: White paper (Ed. 1993) – Volume 2 Part C
Cat. No: CM-NF-93-0629 A C

The geographical dimension of competition in the European single market (Ed. 1993)
Cat. No: CV-78-93-136-EN-C

International transport by air, 1993
Cat. No: CA-28-96-001-xx-C xx=EN, FR, DE

Les investissements dans les industries du charbon et de l'acier de la Communauté: Enquête 1992 (Ed. 1993) – 9 languages
Cat. No: CM 76 93 6733 A C

EG Wettbewerbsrecht und Zulieferbeziehungen der Automobilindustrie (Ed. 1992)
Cat. No: CV-73-92-788-DE-C

Green Paper on the development of the single market for postal services, 9 languages
Cat. No: CD-NA-14- 858-EN-C

Press releases
1 June 2001 – 30 September 2001

All texts are available from the Commission's press release database RAPID at: http://europa.eu.int/rapid/start/ Enter reference (e.g. IP/01/760) 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/01/1292 – Date: 2001-09-20 EU-US hold high-level meeting on anti-trust policy

IP/01/1279 – Date: 2001-09-18 The Commission defines the conditions for packaging waste disposal systems to be compatible with the European competition law in the DSD case

IP/01/1247 – Date: 2001-09-07 Commission refers oil products part of BP/E.ON deal to Germany, deepens probe into petrochemicals markets

IP/01/1232 – Date: 2001-08-30 Commission initiates additional proceedings against Microsoft

IP/01/1226 – Date: 2001-08-24 Tariff rebalancing: Commission sends new warning to Spain

IP/01/1212 – Date: 2001-08-20 Commission closes inquiry into CD prices after changes to business practices

IP/01/1198 – Date: 2001-08-10 Commission clears certain provisions of the Visa international payment card system

IP/01/1170 – Date: 2001-08-02 Commission insists on effective access to European pipelines for Norwegian gas

IP/01/1165 – Date: 2001-08-01 Commission clears global network for the authentication of electronic signatures and other e-commerce transactions

IP/01/1155 – Date: 2001-07-31 Commission clears the creation of the Covisint Automotive Internet Marketplace

IP/01/1159 – Date: 2001-07-31 Commission action results in reduced conversion charges for Euro-zone currencies

IP/01/1068 – Date: 2001-07-25 Commission condemns Deutsche Post AG for intercepting, surcharging and delaying incoming international mail

IP/01/1057 – Date: 2001-07-24 Italy implements Commission decision on the provision of new postal services in Italy

IP/01/1051 – Date: 2001-07-23 Car price differentials in the European Union remain high, in particular in the high volume segments

IP/01/1043 – Date: 2001-07-20 Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League

IP/01/1035 – Date: 2001-07-19 Commission re-opens proceedings concerning the German system of fixed book prices because of its effects on cross-border Internet bookselling

IP/01/1011 – Date: 2001-07-18 Commission launches debate on draft new leniency rules in cartel probes

IP/01/1010 – Date: 2001-07-18 Commission fines eight companies in graphite electrode cartel

IP/01/1009 – Date: 2001-07-18 Commission fines SAS and Maersk Air for market-sharing agreement

IP/01/1007 – Date: 2001-07-17 Press statement after the meeting of Commissioner Monti and State Secretary Koch-Weser on 17.7.2001

IP/01/941 – Date: 2001-07-03 Commission imposes interim measures on IMS HEALTH in Germany

IP/01/873 – Date: 2001-06-20 Commission fines Michelin for abusive commercial behaviour

IP/01/858 – Date: 2001-06-19 Commission and Candidate Countries met in Ljubljana on 18-19 June to discuss competition policy

IP/01/850 – Date: 2001-06-15 The Commission defines the principles of competition for the packaging-waste disposal market

IP/01/844 – Date: 2001-06-15 Commission and Candidate Countries to discuss Competition Policy issues in Ljubljana

IP/01/830 – Date: 2001-06-13 Commission objects to GFU joint gas sales in Norway

IP/01/815 – Date: 2001-06-11 Third « European Competition Day » takes place in Stockholm

IP/01/806 – Date: 2001-06-07 Commission does not oppose the continuation of the P&O Stena Line cross-Channel ferry service

IP/01/791 – Date: 2001-06-06 Commission opens antitrust proceedings against La Poste (Belgium)

STATE AID

IP/01/1287 – Date: 2001-09-19 Commission decides that the 1994 capital injection in favour of Enichem is compatible with the Common Market

IP/01/1286 – Date: 2001-09-19 Spain: Commission clears EURO 152 million State aid package for General Electric's new polycarbonate plant in Cartagena; opens investigation against alleged new aid to porcelain manufacturer GEA

IP/01/1285 – Date: 2001-09-19 Commission orders recovery of aid from Hiltex

IP/01/1082 – Date: 2001-07-25 Go-ahead for Spanish aid to the Trasmediterranea shipping company

IP/01/1081 – Date: 2001-07-25 The Commission authorises the United Kingdom to grant nearly 34 million to its coal industry

IP/01/1080 – Date: 2001-07-25 Expiry of the ECSC Treaty : the Commission proposes a new system of State aid to the coal industry

IP/01/1078 – Date: 2001-07-25 Commission proposes temporary defensive mechanism for shipbuilding against unfair Korean practices

IP/01/1079 – Date: 2001-07-25 Commission gives green light to 'stranded costs' compensation by Spain, Austria and The Netherlands

IP/01/1077 – Date: 2001-07-25 Commission adopts document on 'Methodology for analysing state aid linked to stranded costs' in the electricity sector

IP/01/1076 Date: 2001-07-25 Commission investigates new aid to Neue Erba Lautex GmbH and takes Germany to Court for non-execution of negative decision on aid to 'old' Erba Lautex

IP/01/1075 – Date: 2001-07-25 Commission investigates restructuring and privatisation of mixed shipyard KSG in the Netherlands

IP/01/1074 – Date: 2001-07-25 Commission decides not to raise objections to investment aid to ATM Rousset, France.

IP/01/1073 – Date: 2001-07-25 Commission declares State aid for the construction of French cruise ship incompatible with the EC Treaty

IP/01/1072 – Date: 2001-07-25 Commission approves rescue aid of some euro 2 billion for Bankgesellschaft Berlin

IP/01/1071 – Date: 2001-07-25 Commission launches investigation into planned aid to DaimlerChrysler and Mitsubishi for a new engine plant in Kölleda (Thüringen)

IP/01/1070 – Date: 2001-07-25 Commission raises no objection to a proposed aid in favour of Glunz AG

IP/01/1033 – Date: 2001-07-19 State aid movement in the right direction

IP/01/1032 – Date: 2001-07-19 Commission unveiled EU Scoreboard on State aid

IP/01/1024 – Date: 2001-07-18 The Commission sends Italy a reasoned opinion for failure to comply with the judgment ordering it to recover aid granted in 1992 to professional road transport operators

IP/01/1018 – Date: 2001-07-18 Italian ports: the Commission approves social measures worth EURO 566 million for dock workers

IP/01/1017 – Date: 2001-07-18 Commission confirms its authorisation for State aid to Alitalia in 1997

IP/01/1016 – Date: 2001-07-18 Commission reduces planned aid to Volkswagen for new factory in Dresden (Germany)

IP/01/1015 – Date: 2001-07-18 Commission approves State aid awarded to Zentrum Mikroelektronik Dresden AG

IP/01/1014 – Date: 2001-07-18 Commission approves investment aid for a polypropylene plant in Greece

IP/01/1013 – Date: 2001-07-18 Commission approves German research project on Extreme Ultraviolet Lithography

IP/01/1012 – Date: 2001-07-18 Commission approves euro 27.6 million (DM 53.9 m) aid to Kartogroup Deutschland GmbH (Kartogroup).

IP/01/982 – Date: 2001-07-11 Commission launches large scale state aid investigation into business taxation schemes

IP/01/981 – Date: 2001-07-11 Commission decides that six tax aid schemes in the Basque Provinces and one scheme in Navarre are incompatible with the common market.

IP/01/979 – Date: 2001-07-11 Commission opens formal investigation of Dutch aid to tugging operations

IP/01/935 – Date: 2001-07-03 Dutch aid scheme for the reduction of CO-2 emissions in the field of transport approved by the Commission

IP/01/934 – Date: 2001-07-03 Commission wants Dutch tax relief to Schiphol Group to end by 2002

IP/01/933 – Date: 2001-07-03 Commission decides that State aid in favour of Kronoply GmbH is compatible with the EC Treaty

IP/01/932 – Date: 2001-07-03 Commission approves most of the aid for Babcock Wilcox Española S.A.

IP/01/878 – Date: 2001-06-20 Commission clears Austrian environmental premium for inland waterway

IP/01/877 – Date: 2001-06-20 Kommission genehmigt Beihilfen Italiens zugunsten des Schifffahrtsunternehmens 'Tirrenia di Navigazione'

IP/01/871 – Date: 2001-06-20 The Commission examines aid granted to Klausner Nordic Timber GmbH & Co. KG

IP/01/869 – Date: 2001-06-20 Commission investigates restructuring aid to Minas de Rio Tinto SAL

IP/01/868 – Date: 2001-06-20 Commission initiates formal investigation of presumed aid for Terra Mítica theme park (Benidorm, Spain)

IP/01/867 – Date: 2001-06-20 European Commission investigates State aid awarded to Chemische Werke Piesteritz GmbH

IP/01/788 – Date: 2001-06-06 Commission opens inquiry into Spanish aid planned for Ford's Valencia plant.

IP/01/790 – Date: 2001-06-06 Commission to investigate a Walloon measure to assist the Beaulieu group in the Verlipack case

IP/01/789 – Date: 2001-06-06 Commission to scrutinise Bahía de Bizcaia aid project in Spain

IP/01/787 – Date: 2001-06-06 Commission investigates aid in asset sale of Gröditzer to Georgsmariënhütte

IP/01/786 – Date: 2001-06-06 Commission declares State aid to Technische Glaswerke Ilmenau GmbH incompatible with the EC Treaty

IP/01/785 – Date: 2001-06-06 Commission approves Regional Venture Capital Funds for England

IP/01/784 – Date: 2001-06-06 Commission takes a negative decision on state aid to IVECO

MERGER CASES

IP/01/1335 – Date: 2001-09-28 Commission clears acquisition of Klöckner by Balli

IP/01/1333 – Date: 2001-09-27 Commission clears modified iced tea, coffee joint venture between Coca-Cola and Nestlé

IP/01/1320 – Date: 2001-09-26 Commission clears acquisition of joint control over Hidroeléctrica del Cantábrico by Grupo Villar Mir and EnBW subject to conditions

IP/01/1307 – Date: 2001-09-24 Commission clears acquisition of sole control over Galileo by Cendant (both US based)

IP/01/1299 – Date: 2001-09-20 Commission gives conditional approval to the acquisition of joint control of Olivetti and Telecom Italia by Pirelli and Edizione

IP/01/1290 – Date: 2001-09-19 Commission takes note of merger withdrawal by Swedish banks (SEB/FSB)

IP/01/1278 – Date: 2001-09-18 Commission clears acquisition of SSM Coal by Rheinbraun

IP/01/1277 – Date: 2001-09-18 Commission clears purchase of Yorkshire Power Group by CE Electric

IP/01/1274 – Date: 2001-09-17 Commission clears Italian venture between JCDecaux, Rizzoli Corriere della Sera and Publitransport in the field of outdoor advertising

IP/01/1273 – Date: 2001-09-17 Commission clears joint-venture between Hitachi and LG Electronics

IP/01/1261 – Date: 2001-09-12 Commission clears the acquisition of Thyssen Schien Technik GmbH by Voest-Alpine Stahl

IP/01/1241 – Date: 2001-09-05 Commission clears Italian car rental joint venture between Fidis (Fiat) and Sei (Enel)

IP/01/1239 – Date: 2001-09-05 Commission clears acquisition of Tempus by Havas Advertising

IP/01/1235 – Date: 2001-09-03 Commission clears Angelini and Phoenix acquisition of Italian pharmaceuticals wholesaler Grossfarma

IP/01/1229 – Date: 2001-08-28 Commission authorises Fiat's acquisition of Montedison through Italenergia

IP/01/1224 – Date: 2001-08-24 Commission clears Bertelsmann joint venture with Arnoldo Mondadori

IP/01/1225 – Date: 2001-08-24 Commission clears Dalkia acquisition of sole control of Clemessy

IP/01/1222 – Date: 2001-08-24 Commission refers oil products part of Shell/DEA deal to Germany, deepens probe into petrochemicals markets

IP/01/1223 – Date: 2001-08-24 Commission launches detailed investigation into the takeover of St. Louis Sucre by Südzucker

IP/01/1221 – Date: 2001-08-23 Commission authorises the creation of a joint venture by HHLA and Hapag-Lloyd to run the new Altenwerder container terminal Altenwerder at the Port of Hamburg.

IP/01/1201 – Date: 2001-08-10 Commission clears acquisition of Du Pont Pharmaceuticals by Bristol-Myers Squibb

IP/01/1200 – Date: 2001-08-10 Commission clears acquisition of sole control by Fabricom over GTI

IP/01/1199 – Date: 2001-08-10 Commission clears acquisition of sole control by Fabricom over Sulzer

IP/01/1197 – Date: 2001-08-09 Commission clears acquisition of Nutricia by Friesland Coberco in the dairy sector

IP/01/1194 – Date: 2001-08-07 Commission approves automotive components joint venture of Siemens and Yazaki

IP/01/1187 – Date: 2001-08-06 Commission clears joint venture between Hollandse Beton Groep N.V. and Ballast Nedam N.V. in the dredging sector

IP/01/1181 – Date: 2001-08-03 Commission clears joint control of RWE and Bundesland Kärnten in Kärntner Energieholding Beteiligungs GmbH

IP/01/1179 – Date: 2001-08-03 Commission gives go-ahead for Preussag to acquire entire capital of TUI Belgium

IP/01/1141 – Date: 2001-07-30 Commission clears the proposed acquisition by Interseroh AG of Hansa Recycling GmbH

IP/01/1123 – Date: 2001-07-27 Commission clears the retail joint venture Coop Nord

IP/01/1122 – Date: 2001-07-27 Commission authorises Joint Venture between Accenture and Lagardere.

IP/01/1069 – Date: 2001-07-25 Commission clears venture between De Beers and LVMH but warns De Beers on Supplier of Choice agreements

IP/01/1067 – Date: 2001-07-25 Commission clears acquisition of joint control by Saab Ericsson Space (Sweden) and Stork (The Netherlands) of Fokker Space (The Netherlands).

IP/01/1053 – Date: 2001-07-23 Commission opens detailed inquiry into takeover of German paper manufacturer Haindl by UPM-Kymmene and Norske Skog

IP/01/1050 – Date: 2001-07-23 European Commission requests notification of the Montedison case

IP/01/1048 – Date: 2001-07-20 Commission refers acquisition of Connex South Central by The Go-Ahead Group and Keolis to the United Kingdom authorities

IP/01/1041 – Date: 2001-07-19 Commission initiates detailed probe into merger between steel producers Usinor and Arbed/Aceralia

IP/01/1040 – Date: 2001-07-19 Commission clears acquisition of Dresdner Bank by Allianz AG

IP/01/1034 – Date: 2001-07-19 Commission clears acquisition of Norwegian company Moelv by Finnforest

IP/01/1002 – Date: 2001-07-17 Commission clears acquisition by CVC of a division of Amstelland

IP/01/994 – Date: 2001-07-13 Commission clears joint acquisition by Heinek of Bayerische Brauholding's beer activities

IP/01/993 – Date: 2001-07-12 Commission opens in-depth probe into Swedish bank merger between SE Banken and FöreningsSparbanken

IP/01/984 – Date: 2001-07-11 Commission clears BASF's takeover of Eurodiol and Pantochim

IP/01/974 – Date: 2001-07-09 Commission clears acquisition by Alcatel of full control of Alcatel Space

IP/01/973 – Date: 2001-07-09 Commission clears Italian pharmaceuticals wholesale venture between Angelini and Phoenix

IP/01/966 – Date: 2001-07-06 Commission clears acquisition by OM Group (US) of Degussa's chemicals and catalysts unit

IP/01/965 – Date: 2001-07-06 Commission opens in-depth probe into Tetra Laval's proposed acquisition of French company Sidel

IP/01/953 – Date: 2001-07-04 Commission clears purchase of Hansol's stake in Singapore's Pan Asia Paper by Norske Skog and Abitibi.

IP/01/952 – Date: 2001-07-04 Commission clears joint venture between Hitachi and STMicroelectronics to license and develop RISC microprocessor cores

IP/01/940 – Date: 2001-07-03 Commission clears acquisition of ECT by Hutchison and the Rotterdam port authority, subject to commitments

IP/01/939 – Date: 2001-07-03 The Commission prohibits GE's acquisition of Honeywell

IP/01/938 – Date: 2001-07-03 Commission initiates detailed investigation into merger between Brazilian iron ore producers

IP/01/936 – Date: 2001-07-03 Commission approves joint venture between Creditanstalt and RaiffeisenZentralbank

IP/01/928 – Date: 2001-07-02 Commission clears IBM Italia joint venture with Fiat

IP/01/926 – Date: 2001-07-02 Commission clears Flextronics buy of Alcatel's mobile phones plant at Laval, France

IP/01/912 – Date: 2001-06-28 Commission clears acquisition of Swedish phone directories firm ENIRO by SEAT

IP/01/911 – Date: 2001-06-28 Commission clears joint acquisition of Renault's CAT

IP/01/908 – Date: 2001-06-27 The Commission changes its policy on 'ancillary restraints'

IP/01/907 – Date: 2001-06-27 Commission clears acquisition of Sapa by Elkem

IP/01/906 – Date: 2001-06-27 Commission clears with undertakings Télédiffusion de France's acquisition of a controlling stake in Finland's Digita

IP/01/904 – Date: 2001-06-27 Commission clears acquisition of control of Fiat Hitachi Excavators by CNH Global

IP/01/890 – Date: 2001-06-22 Commission initiates detailed probe into CVC's acquisition of Austrian fibre company LENZING

IP/01/886 – Date: 2001-06-22 Commission clears acquisition of True North by Interpublic in the marketing communications sector

IP/01/874 – Date: 2001-06-20 Commission clears MAN's takeover of Auwärter (Neoplan)

IP/01/870 – Date: 2001-06-20 Commission clears acquisition of Informix Software by IBM, both American

IP/01/848 – Date: 2001-06-15 Commission clears Speedy Tomato Italian Internet portal joint venture with Olivetti

IP/01/847 – Date: 2001-06-15 Commission clears takeover of Artesia by Dexia

IP/01/841 – Date: 2001-06-14 Commission authorises merger between BHP and Billiton

IP/01/839 – Date: 2001-06-14 Commission clears joint venture by Skanska and Posten

IP/01/838 – Date: 2001-06-14 Commission authorises joint venture between Schneider and Thomson Multimedia

IP/01/831 – Date: 2001-06-13 Commission approves partnership between bmi british midland, Lufthansa and SAS

IP/01/823 – Date: 2001-06-12 Commission approves Continental's takeover of Daimler Chrysler subsidiary Temic

IP/01/810 – Date: 2001-06-08 Commission clears acquisition by Sodexho of a number of Albert Abela companies

IP/01/804 – Date: 2001-06-07 Commission clears acquisition of Sanitec by BC Funds in the bathroom products sector

IP/01/803 – Date: 2001-06-07 T-Online, TUI and Neckermann withdraw online project

IP/01/798 – Date: 2001-06-06 Commission gives green light to NEC's space joint venture with Toshiba

IP/01/774 – Date: 2001-06-05 Commission clears acquisition by Lufthansa Service Holding of sole control of Onex Food Services

IP/01/773 – Date: 2001-06-05 Commission opens in-depth probe into the acquisition of joint control of Hidrocantábrico by Grupo Villar Mir and EnBW

Court of Justice/Court of First Instance
New cases before the Court

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 21 September 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 – 1er juin 2001 au 21 septembre 2001

Aff. T-53/01 R
Poste Italiane SpA / Commission des Communautés européennes
Concurrence

Aff. C-198/01
Consorzio Industrie Fiammiferi (CIF)
et
Autorità Garante della Concorrenza e del Mercato
Préjudicielle – Tribunale amministrativo regionale del Lazio – Concurrence – Entente imposée ou favorisée par la réglementation nationale et ayant des effets préjudiciables au commerce communautaire – Législation nationale imposant la détermination par le Ministère compétent du prix de vente d'une marchandise et l'existence d'un consortium entre les producteurs de ladite marchandise – Champ d'application de l'art. 85 du traité CE (devenu art. 81 CE)

Aff. C-207/01
Altair Chimica SpA
et
ENEL Distribuzione SpA
Préjudicielle – Corte d'appello di Firenze – Interprétation des art. 85 et 86 du traité CE (devenus art. 81 et 82 CE), de l'art. 89 du traité CE (devenu, après modification, art. 85 CE), et de la directive 92/12/CEE du Conseil, du 25 février 1992, relative au régime général, à la détention, à la circulation et aux contrôles des produits soumis à accise – Contrat de fourniture d'électricité – Majoration des prix afin de couvrir des charges non inhérentes à la fourniture d'électricité

Aff. T-133/01
ZEMAG GmbH (en liquidation)/Commission
Annulation de la décision C(2201)1028 de la Commission, du 28 mars 2001, concernant les aides accordées par les autorités allemandes dans le cadre de la restructuration et privatisation du groupe de huit entreprises filiales de Lintra, en ce qu'elle constate l'incompatibilité avec le marché commun de ces aides en raison du non-respect des conditions liées à l'autorisation précédemment accordée par la Commission

Aff. T-136/01 AJ
Udo Platte/Commission
Demande d'assistance judiciaire présentée antérieurement à l'introduction d'un recours en carence contre la Commission concernant une prétendue violation des règles de concurrence par «Mazda Motors (Deutschland) GmbH» denoncée par le requérant

Aff. T-151/01
Der Grüne Punkt – Duales System Deutschland AG/Commission
Annulation de la décision C(2001)1106-DE de la Commission, du 20 avril 2001, relative à une procédure d'application de l'article 82 du traité CE (Affaire COMP D3/34493 DSD) déclarant incompatible avec le marché commun l'exigence de la requérante du versement d'une redevance pour la totalité des emballages de vente commercialisés en Allemagne avec le logo «Point vert» («Der Grüne Punkt»)

Aff. T-157/01
Danske Busvognmænd/Commission
Annulation de la décision SG(2001)D/287297 de la Commission, du 28 mars 2001(aide n. NN 127/2000) déclarant compatible avec le marché commun l'aide accordée par les autorités danoises à la société Combus A/S sous forme d'apports de capital effectués dans le cadre de la privatisation de celle-ci

Aff. T-166/01
Lucchini SpA/Commission
Annulation de la décision 2001/466/CECA (notifiée sous le numéro C(2000)4368) de la Commission, du 21 décembre 2000, déclarant incompatible avec le marché commun l'aide d'État que l'Italie envisage de mettre à exécution en faveur des entreprises sidérurgiques Lucchini SpA et Siderpotenza SpA

Aff. T-167/01
Schmitz-Gotha Fahrzeugwerke GmbH/Commission
Annulation de la décision C(2001)1028 de la Commission, du 28 mars 2001, constatant l'incompatibilité avec le marché commun des aides accordées par les autorités allemandes dans le cadre de la restructuration et privatisation du groupe de huit entreprises filiales de Lintra, en raison du non-respect des conditions liées à l'autorisation précédemment accordée par la Commission, dans la mesure où cette décision oblige la requérante, en tant qu'acqueresse de certains actifs d'une des filiales de Lintra, à rembourser le montant de l'aide accordée à celle-ci

Aff. T-168/01
Glaxo Wellcome plc/Commission
Annulation de la décision C(2001)1202 final de la Commission, du 8 mai 2001, relative à une procédure d'application de l'article 81 du traité CE (IV/36.957/F3 Glaxo Wellcome, IV/36.997/F3 Aseprofar et Fedifar, IV/37.121/F3 Spain Pharma, IV/37.138/F3 BAI, IV/37.380/F3 EAEPC) - Prix imposés par la requérante aux grossistes pour la vente de ses médicaments en dehors du système espagnol de prix fixés par les services de santé

Aff. T-6/99
ESF Elbe-Stahlwerke Feralpi GmbH/Commission des Communautés européennes
CA
Traité CECA – Aides d'État – Aides à l'investissement – Aides au fonctionnement – Champ d'application du traité CECA – Principe de protection de la confiance légitime

Aff. T-187/99
Agrana Zucker und Stärke AG/Commission des Communautés européennes
Aide d'État

Aff. C-276/99
République fédérale d'Allemagne/Commission des Communautés européennes
Annulation de la décision K(1999)1123 final dans une procédure au titre de l'art. 88 CA concernant une aide d'Etat de l'Allemagne en faveur de Neue Maxhütte Stahlwerke AG – Modalités de la répétition d'une aide incompatible avec le marché commun – Obligation d'étendre les poursuites judiciaires au montant total de l'aide à rembourser, à l'exclusion d'une poursuite «pour le principe» – Obligation de combattre une décision de sursis du juge national en attendant une décision du juge communautaire

Aff. T-111/01
Saxonia Edelmetalle GmbH/Commission
Annulation de la décision K(2001)1028 de la Commission, du 28 mars 2001, concernant les aides accordées par les autorités allemandes dans le cadre de la restructuration et privatisation du groupe de huit entreprises filiales de Lintra, en ce qu'elle constate l'incompatibilité avec le marché commun de ces aides en raison du non respect des conditions liées à l'autorisation précédemment accordée par la Commission

Aff. T-116/01
P&O European Ferries (Vizcaya) SA/Commission
Annulation de l'article 2 de la décision 2001/247/CE de la Commission du 29 novembre 2000, relative au régime d'aide appliqué par l'Espagne en faveur de la compagnie maritime Ferries Golfo de Vizcaya SA, actuellement dénomée P&O European Ferries (Vizcaya) SA, ordonnant la restitution de l'aide déclarée incompatible avec le marché commun

Aff. T-121/01
Recours en carence visant à faire constater que la Commission s'est illégalement abstenue de prendre des mesures provisoires et d'adopter une décision définitive suite à la plainte déposée par le requérant sur le fondement des articles 49 et 81 du traité CE (COMP/37, 124 Piau/FIFA) concernant les dispositions du règlement de la Fédération Internationale de Football Association (FIFA) relatives à l'exercice de l'activité d'agent de joueurs

Aff. C-480/99 P
Gerry Plant e.a./Commission des Communautés européennes
Pourvoi formé contre l'ordonnance du Tribunal de première instance (deuxième chambre) du 29 septembre 1999, J.G. Evans e.a. / Commission (T-148/98 et T-162/98), par laquelle le Tribunal a rejeté comme irrecevables des recours visant à l'annulation d'une décision de la Commission, du 30 juillet 1998 (affaire IV/E-3/SWSMA), rejetant les plaintes déposées par les requérants contre le Central Electricity Generating Board (CEGB) et British Coal, relatives à une prétendue entente concernant les prix de vente du charbon destiné à la production d'électricité

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Competition DG's address on the world wide web:

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Coming up:

Competition Policy Newsletter, 2002, Number 1 – February

XXX Report on Competition Policy, 2000 (complete version. The brochure version is already available).

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