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Inside:

And main developments on
Antitrust — Merger control — State aid control

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Swedish Interconnector case /Improving electricity cross-border trade

Philippe Chauve, Elzbieta Glowicka, Martin Godfried, Edouard Leduc and Stefan Siebert ([1])

Introduction

The size of the transmission network is a key determinant of competition in wholesale electricity markets. The larger this network, the more suppliers inject their electricity and hence compete for consumers. However, the Energy Sector Inquiry carried out by the European Commission ([2]) has shown that markets in Europe are mainly national in scope because there are few cross-border links – or 'interconnectors' – between them, and those which exist have limited capacity. As a result, competition between suppliers of electricity across borders is restricted. Given the network constraints, in order to fully benefit from competition it is crucial that available scarce interconnector capacity is fully utilised.

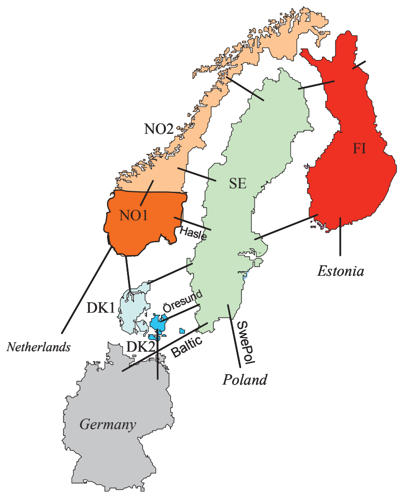
On 14 April 2010, the Commission adopted a commitment decision which addressed the concern that Svenska Kraftnät ('SvK'), the sole operator of the electricity transmission network in Sweden, may have abused its dominant market position according to Article 102 TFEU. SvK may have done so by limiting export capacity on the interconnectors between Sweden and neighbouring EU and EEA Member States when SvK faced congestion problems inside its network. This behaviour distorted wholesale electricity prices in Sweden and in neighbouring countries, and segmented the EU internal market.

The commitment decision in this case makes it binding for SvK to maximise utilisation of the cross-border links between Sweden and its neighbouring countries. This will boost trade and strengthen competition between suppliers on both sides of the borders. Moreover, this case is of systemic value as it sends a signal to all network operators in the EU to respect the European common market when they solve their internal network problems.

The electrical system in Sweden

The starting point of this case is the electrical transmission system in Sweden, which is integrated into the 'Nordic Market'. This includes Denmark, Finland and Norway. The network in Sweden is heavily interconnected with its neighbouring countries (figure 1): Denmark, Germany, Finland, Poland and Sweden. SvK is the monopoly supplier of transmission services in Sweden.

Figure 1. Schematic overview of the Nordic bidding zones and interconnectors on 17 November 2008



Note: The solid lines in the figure indicate interconnectors. The bidding zones were, as of 17 November 2008, North Norway (NO2), South Norway (NO1), Denmark West (DK1), Denmark East (DK2), Sweden (SE) and Finland (FI).

Electricity in the Nordic Market is traded through various trading forums (such as 'over-the-counter' trading and power exchange) and using different products (such as supply contracts for 'day-ahead' and 'year-ahead'). The most important forum for physical trading is the Nord Pool day-ahead market, where approximately 70 % of the total electricity consumption in the Nordic region is traded ([3]).

The Nord Pool day-ahead price is determined by a matching process of hourly ([4]) supply and demand offers ([5]) from market players. Those offers are made by players in predefined bidding zones according to where their production or consumption physically takes place. Those bidding/geographical zones, and the electricity links ('interconnectors') between these zones, are depicted in Figure 1.

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

([2]) http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part2.pdf, page 172.

([3]) See: http://www.nordpoolspot.com/about/.

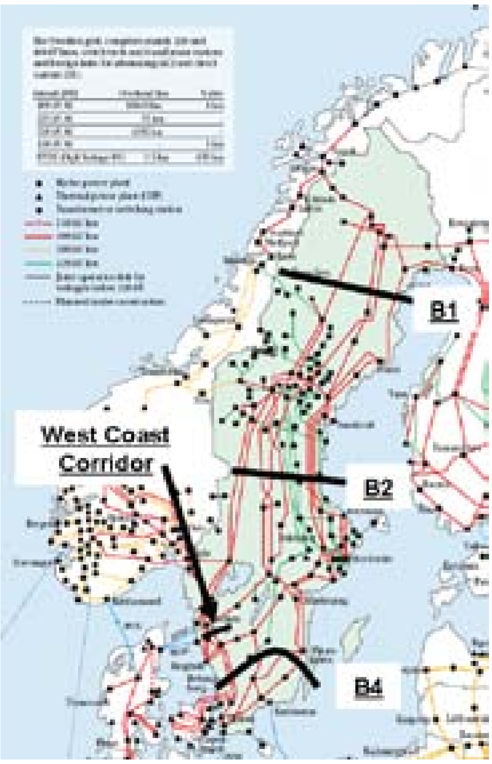
([4]) Electricity markets are organised on an hourly basis because electricity cannot be stored and demand is continuous and fluctuates significantly from hour to hour.

([5]) There are three types of bids available on the ,Elspot' exchange: Hourly Bid, Block Bid and Flexible Hourly Bid.

The demand in Sweden is mainly located in the south (79 % of total) where the major cities are situated, while relatively cheap hydro electricity generation is located in the north of Sweden. In addition to the domestic demand for electricity in south Sweden, there is often demand from South Norway, Denmark, Germany and Poland.

The topology and capacity of the network are such that electricity flows from northern to southern Sweden. However, at times of day when demand is high, the transmission capacity may be insufficient to satisfy all demand in the south of Sweden. This is due, in particular, to the bottlenecks in the Swedish network which are schematically indicated in figure 2: B1, B2, B4 and the 'West Coast Corridor' (6).

Figure 2. The Swedish network with four network bottlenecks



Source: SvK (2009).

Curtailments

The Commission's assessment revealed that, between January 2002 and April 2008, SvK — the Swedish transmission system operator — substantially and systematically limited interconnector capacity on the southern borders to neighbouring countries, for many hours, in order to relieve the internal congestion.

For instance, the assessment showed that, from 2005 to 2008, due to internal bottlenecks, SvK restricted export capacity for 26 % to 34 % of all hours on the interconnectors to Eastern Denmark, Poland, Germany and Norway. On the interconnector to Finland, SvK curtailed capacity less often but still 6 % of all hours, whereas on the interconnectors to central and northern Norway, SvK almost never curtailed export capacity.

The most acute problems of congestion and export capacity limitation were found on the interconnector to Eastern Denmark and to Germany (the 'Baltic Cable'), especially in 2005 and 2007. On the interconnector to southern Norway, frequent congestion and export capacity restrictions occurred in 2003, 2004, 2006 and 2007 and on the SwePol cable (between Sweden and Poland) in 2005, 2006, 2007 and 2008.

On average, SvK curtailed more than half the total capacity of the southern interconnectors between 2005 and 2008, in order to cope with internal congestion.

Legal analysis and theory of harm

SvK has a dominant position within the meaning of Article 102 TFEU on the Swedish electricity transmission market, as Swedish legislation gives it the exclusive right to operate the Swedish electricity transmission network. As a monopolist on this market it has the ability to reduce and thereby control the available export capacity to neighbouring countries.

The Commission had concerns that SvK may have abused its dominant position on the Swedish electricity transmission market according to Article 102 TFEU by curtailing capacity on the Swedish interconnectors when it anticipated internal congestion within the Swedish transmission system (7), thereby discriminating between different network users. By treating requests for transmission for the purpose of consumption within Sweden differently from requests for transmission for the purpose of export, SvK may have artificially segmented the EU (and EEA) internal market and prevented industrial and other users located outside Sweden from reaping the benefits of the internal market.

This behaviour led to several effects that are harmful to competition and, in the end, to consumers. First, there was an immediate price effect. SvK's behaviour meant that consumers abroad were deprived of lower energy prices, as more expensive resources

(6) The West Coast Corridor presents a special case of congestion, which can occur during certain low-load periods when the flow in the Transmission System is reversed (south to north) compared to the prevailing flow (north to south).

(7) There can be legitimate reasons for curtailing capacity on an interconnector, such as a technical failure which reduces the capacity of that interconnector. The Commission is concerned only about curtailment due to internal congestion.

had to be used in place of the energy not delivered from northern Sweden. Moreover, consumers in Sweden were effectively shielded from higher electricity prices, since curtailments kept more of the relatively cheap electricity from the north inside the country. Hence, SvK's behaviour prevented a free trade scenario in which electricity supply would have flowed to higher-price neighbouring areas, thus lowering prices abroad. Secondly, the curtailments distorted the long-term efficiency of the market by changing the incentives for all market players. For instance, incentives to build new transmission lines in order to eliminate bottlenecks were reduced since congestion problems became less visible. Electricity producers' incentives to locate plants in high-demand areas were also reduced because prices in those areas were lower than they would have been without curtailments. Finally, the incentives to avoid consuming electricity in certain areas or at certain times of day were affected, because consumers did not pay market prices. As the result, distorted market signals led to inefficient long-term market outcomes.

Commitments offered

In response to the concerns raised by the Commission, SvK voluntarily offered a set of commitments that would remedy these concerns. Market players were consulted, and in the light of comments from several stakeholders, SvK amended the offered commitments. They include the following.

First, SvK will subdivide the Swedish electricity market into several bidding zones, bordered by congestion points within the Swedish electricity system, and will operate it on this basis by 1 November 2011. This means that the transmission capacity actually available will be reflected in market prices rather than leading to arbitrary curtailment measures at the borders. The configuration of the zones will be flexible: it will be rapidly adaptable to changes in future electricity flow patterns in the Swedish transmission system. Once the zones are in operation, SvK will manage congestion in the Swedish transmission system without limiting trading capacity on interconnectors. There will be one exception to this new system, i.e. congestion in the West Coast Corridor, where there are specific technical constraints. SvK will alleviate congestion in this area by building and operating a new 400 kV transmission line between Stenkullen and Strömma-Lindome, by 30 November 2011.

Before the new market zones come into operation, SvK has undertaken to reduce congestion-related curtailments as much as possible by using an interim measure called 'counter trade'. Counter trade involves paying generators/consumers to adjust their production/consumption schedules, thereby adjusting transmission flows to the capacity actually available. By using counter trade, SvK will as far as possible limit the curtailment of capacity on the interconnectors on its borders. During this intermediate period, which will last 18 months, SvK and market stakeholders will have sufficient time to adapt their operations to the new market design.

Conclusion

The Commitments offered by SvK remove the Commission's concerns. SvK will no longer limit cross-border transmission capacity when faced with internal congestion. This will increase utilisation of the interconnectors south of Sweden, which will improve cross-border trade, provide greater investment incentives and enhance competition between suppliers. This example should also encourage all operators of electricity networks to take a European view that goes beyond purely national boundaries when trying to address network congestion problems.

The New Block Exemption Regulation for the Insurance Sector

Eithne McCarthy and Laura Stefanescu (1)

A block exemption regulation (BER) allows market players the benefit of a safe harbour from the prohibition on anti-competitive agreements, decisions and concerted practices laid down in Article 101(1) of the Treaty on the Functioning of the European Union (the TFEU), provided they comply with the BER's conditions. If they do, they are ex ante in line with EU competition law. Agreements not covered by a BER are not presumed to be illegal, but must be assessed under Article 101(1) and if appropriate, 101(3) of the TFEU.

Following a lengthy review of the functioning of the previous insurance BER, Regulation (EC) No 358/2003, on 24 March 2010 the European Commission adopted Commission Regulation (EU) No 267/2010, the new insurance BER applying Article 101(3) to two categories of agreements, decisions and concerted practices in the insurance sector, namely agreements in relation to (i) joint compilations, tables and studies and (ii) the common coverage of certain types of risks (pools).

The new Regulation entered into force on 1 April 2010, with a six-month transition period for agreements already in force on 31 March 2010 (2) which do not satisfy the conditions for exemption provided for in the new Regulation but which satisfy the conditions for exemption provided for in the previous BER.

A 'first-principles' analysis

The primary original objective of the BER was to facilitate the Commission's task in view of the large number of notifications submitted for Commission review prior to the modernisation of the competition rules by Regulation (EC) No 1/2003. Since this objective is no longer relevant, and given that BERs are exceptional legal instruments, when considering the issue of whether to renew the BER for the insurance sector, the Commission had to determine whether business risks or other issues made this sector special and different from other sectors that operate without a sector-specific BER (the large majority).

The Commission therefore analysed the matter by asking three questions in relation to each of the four forms of cooperation covered by the previous BER: (i) whether the insurance sector is so special as to give rise to an enhanced need for cooperation in comparison with other sectors; (ii) if so, whether this enhanced need for cooperation requires a legal instrument to protect or facilitate it; and (iii) if so, whether a BER is the most appropriate legal instrument for that purpose.

What the review of the previous BER involved

The Commission began the review of the functioning of the previous BER in November of 2007 by compiling its own experiences with the BER and asking the national competition authorities of the European Competition Network (ECN) for their experiences. The Directorate-General for Competition then launched a detailed public consultation in April 2008 and also sent targeted questionnaires to certain stakeholders, in particular to consumer organisations and national supervisory authorities.

On the basis of the evidence gathered (which also includes replies to several sets of targeted questionnaires), on 24 March 2009 the Commission adopted a report to the European Parliament and Council, which was published on the same day with a detailed accompanying working document. The report examined the functioning of the previous BER and made initial proposals for amending it. DG Competition then held a large public event on 2 June 2009 to hear further representations from the industry and other stakeholders on its findings and proposals.

Over the two and a half year period it took to complete the review and adopt a new BER, the Commission worked closely with national competition authorities in order to incorporate their views and amendments.

Non-renewed exemptions

As a result of the review, the Commission decided not to renew two of the four types of cooperation that the previous BER had covered, namely the exemption of agreements concerning (i) standard policy conditions (SPCs) and (ii) security devices.

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

(2) The expiry date of Regulation (EC) No 358/2003 (the previous BER).

This is primarily because the evidence of the review was that these agreements are not specific to the insurance sector and therefore their inclusion in such an exceptional legal instrument may result in unjustified discrimination against other sectors which do not benefit from a BER (such as the banking sector). In addition, although these two forms of cooperation may have some benefits for consumers, the review showed that they can also give rise to competition concerns.

While the use of standard policy conditions can have positive effects, such as facilitating the comparison of insurance contracts, several consumer associations such as Test-Achats in Belgium complained that certain insurance products were excessively standardised because the vast majority of insurers used the same SPCs, which can result in a lack of choice and non-price competition.

As regards security devices, the review showed that the large number of national requirements laid down over time for the insurance industry fragments the European market and may also adversely affect competition in the downstream market for the supply of security devices, in that manufacturers who do not comply with these standards are, *de facto*, excluded from the market because consumers cannot get insurance for such products. Moreover, the remaining scope of the BER was reduced or eliminated due to existing EU-level harmonisation (a condition of the previous BER was that it did not apply where harmonisation already existed at EU level).

For these types of agreements, the Commission therefore considered it more appropriate to conduct a compliance analysis on a case-by-case basis under Article 101(1) and, if appropriate, Article 101(3). Furthermore, agreements on both SPCs and security devices have been included in the standardisation chapter of the Commission's new Horizontal Guidelines.

Joint compilations, tables and studies — renewed exemption

Subject to certain conditions, the previous BER exempted agreements which relate to the joint establishment and distribution of (i) calculations of the average cost of covering a specified risk in the past and (ii) mortality tables and tables showing the frequency of illness, accident and invalidity, in connection with insurance involving an element of capitalisation. It also exempted (subject to certain conditions) [3] 'the joint carrying out of studies of the probable impact of general circumstances external to the interested undertakings, either on the frequency or scale of future claims for a given risk or risk category or on the profitability of different types of investment and the distribution of the results of such studies.

The fact that the costs of insurance products are unknown at the time their price is agreed and the risk covered differentiates the insurance sector from other sectors in terms of assessing the risk. This makes access to past statistical data crucial in order to technically price risks. The Commission therefore considers that cooperation in this area is both specific to the insurance industry and necessary in order to assess risks appropriately.

The review also showed that sharing such information currently allows insurers to calculate risks properly, which enables small and medium-sized firms to enter the market [4]. Many insurers, some supervisory authorities and a risk management federation all argued that without the BER, insurers would no longer cooperate or would not share the outcome of such cooperation with smaller or foreign insurers. Indeed, some large insurers (who, according to insurance associations, would be able to compile the relevant information alone or by involving perhaps one or two other large insurers) may have no incentive to do so. The BER requires that when insurance companies enter into these forms of cooperation, they must give other insurance companies access to the information compiled. It was argued that in the event of non-renewal of the BER, insurers could cooperate to prevent access to the information by, for example, smaller or foreign insurance companies. This would then narrow the market by hindering or preventing smaller/foreign insurers from entering.

In addition, during the review, agreements on joint calculations, tables and studies were found not to be giving rise to significant concerns and there appeared to be general compliance with the conditions in the BER (for example, that only aggregated, historical information is exchanged and that it is made available on reasonable and non-discriminatory terms).

The Commission therefore decided to renew this exemption, but made several modifications/improvements in the new BER:

First, the draft BER published for consultation included a right of access for consumer organisations and other interested third parties to the joint compilations, tables and studies produced. Grant-

(3) Guidelines on the Applicability of Article 101(1) of the TFEU to Horizontal Agreements, 14 December 2010.

(4) A number of respondents during the Review, in particular small and medium sized insurers, said they could not have entered the market without the use of the data-sharing facilitated by this exemption.

ing access to these categories is important in terms of the analysis of the exemption criteria for Article 101(3), since consumers must be allowed a fair share of the resulting benefits. However, several insurance associations were worried that this access could have adverse effects such as: (i) exposing insurers to reputational risk if actuarial expertise were not used to interpret the data; (ii) requiring insurers to spend too much time answering very vague and broad questions; and (iii) allowing third parties to benefit from their efforts without contributing; and (iv) as a result, discouraging insurers from entering into such agreements.

Balancing the objectives of Article 101(3) with these concerns, the Commission amended the final draft to provide that data should be made available, on reasonable, affordable and non-discriminatory terms, to consumer organisations or customer organisations who request access to them in specific and precise terms for a duly justified reason [5].

Second, a public security exception to access to this data was also included in the new BER. The BER includes two examples of when such an exception may be relevant, namely where the information relates to the security systems of nuclear plants or the weakness of flood prevention systems [6].

As regards the alleged risks of withdrawal from cooperation, when it was discussed during the review whether this type of cooperation should still be exempted under the new BER, insurers argued that this exchange of information is indispensable in order to calculate premiums. Therefore, it is not credible that there would be a significant reduction in cooperation as a result of increased transparency.

Third, to reflect comments during the review that insurers are not jointly calculating but in fact jointly compiling information (which 'may involve some statistical calculations' [7]), the term has been amended to 'joint compilations, tables and studies'.

Finally, the new BER clarifies that: (i) the exemption itself allows exchange of information only where it is *necessary* for the compilations, tables and studies; (ii) data should not only be made available on reasonable and non-discriminatory terms, but should also be 'affordable'; and (iii) the information exchanged must not contain any indication of the level of commercial premiums.

Common coverage of certain types of risks — pools — renewed exemption

The Commission recognises that risk sharing for certain types of risks (such as nuclear, terrorism and environmental risks), for which individual insurance companies are reluctant or unable to insure the entire risk alone, is crucial in order to ensure that all such risks can be covered. This makes the insurance sector different from other sectors and triggers an enhanced need for cooperation.

The BER (previous and new) exempts two main categories of pools, under certain conditions:

(i) (given that it is not possible to know what subscription capacity is required to cover a new risk), newly created pools which cover new risks, for a limited period of three years from the date when the group is first set up, regardless of the market share of the group; and

(ii) pools that provide common coverage of a specific category of risks (e.g. nuclear, environmental, terrorism risks), or that have been in existence for more than three years, subject to certain conditions, in particular market share thresholds.

The main market share thresholds have remained the same as in the previous BER, i.e. 20 % for co-insurance pools and 25 % for co-reinsurance pools. Although several insurance associations argued in favour of higher thresholds, the Commission did not find any convincing reasons as to why these thresholds should be raised. However, the flexibility market share thresholds have been raised by 3 % from 22 % to 25 % for coinsurance pools and from 27 % to 30 % for co-reinsurance pools in order to bring them into line with other BERs such as the Specialisation BER. This change allows some additional scope for pools to be covered when their market shares increase.

The new BER, however, significantly changes the approach to market share calculation. The previous BER only took into account the market share of the participating undertakings within the pool. This was not in line with other general and sector-specific competition rules on the assessment of horizontal cooperation. The Commission's *de minimis* Notice refers to the 'aggregate market share held by the parties to the agreement' [8] and not to the market share of the cooperation in question. In addition,

[5] Article 3(2)(e) of Commission Regulation (EU) No 267/2010.

[6] Recital 11 of Commission Regulation (EU) No 267/2010.

[7] See Recital 9 of Commission Regulation (EU) No 267/2010.

[8] The Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty, OJ C 368, 22.12.2001, p. 13 and Guidelines on the effect on trade concept, OJ C 101, 27.4.2004, p. 81.

no other BER, be it general [9] or sector-specific [10], bases its calculation of market share on the cooperation rather than on the aggregate share of all companies involved. Moreover, this methodology was more generous (than was allowed for other sectors), as the turnover of the participating companies outside the co(re)insurance group in the relevant insurance market was not counted. Therefore, the draft BER published for consultation provided that market share of participating companies not only within the pool but also *outside* it should be taken into account.

During the public consultation on the draft BER, several insurance associations pointed out that this new method of calculating market shares would drive most of the large and medium-sized companies out of the pools in which they operate. However, these comments were largely unsupported and did not explain why they consider that the insurance industry requires a different way of calculating market shares to all other sectors, departing from the general rules.

The draft BER published for consultation only provided that when calculating the market share of a pool, the market share of the participating undertakings inside and outside the pool in question should be counted. The final version was revised to make this even clearer by listing exactly what must be counted, i.e.: (i) the market share of the participating undertakings within the pool in question; (ii) their market share within another pool on the same relevant market; and (iii) their market share on the same relevant market outside any pool.

Given that in some Member States, for instance in the Netherlands, there are several overlapping pools which could possibly encourage an anti-competitive exchange of information through networks of pools, the published draft BER also maintained a condition in the previous BER which provided that a pool whose members are also part of another pool does not benefit from the exemption (the double membership prohibition). Many respondents and, in particular, insurance associations strongly opposed this condition, considering that the new method of calculating market share would already significantly reduce the scope of the BER. It was decided, therefore, to delete this clause in the new BER in order to achieve a middle-ground solution.

However, a provision was added in Recital 22 to emphasise that when either the Commission or Member States are considering withdrawal, the negative effects that may derive from the existence of links between participating undertakings within overlapping pools are of particular importance.

As in the previous BER, pools covering new risks benefit from the BER without any market share conditions, for a period of 3 years. In view of several comments received during the review of the BER that the definition of 'new risks' was too narrow, this definition was amended to include, in addition to risks which did not exist before, (in exceptional uses) risks whose nature (on an objective basis) has changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover them. These could be, for instance, climate change risks or certain types of terrorism risks which have never occurred in the past.

Six years before the next review

A serious concern which came to light during the review was that many pools and participating insurers considered that the mere existence of the BER gave them legal certainty and used the pool exemption as a 'blanket' exemption, without carrying out a careful legal assessment of a pool's compliance with the BER. This is clearly not acceptable and Commissioner Joaquín Almunia has stated that 'The Commission together with the national competition authorities will see to it that the industry does not use the exemption as a blanket protection and will enforce competition rules where and whenever necessary' [11]. The Commission also emphasised in its explanatory communication on the new BER [12] that pools must carry out a careful individual legal self-assessment, on a case-by-case basis.

The Commission is required to prepare a report on the functioning and future of this BER for the European Parliament and Council by March 2016. It will automatically expire in March 2017 unless the Commission considers that any parts of it should be renewed at that time.

(9) Article 4 of the Specialisation BER (Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (Official Journal L 304, 5.12.2000, p. 3) refers to the market share 'of the participating undertakings', and Article 3 of the Technology Transfer BER (Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements Official Journal L 123, 27.04.2004, p. 11-17) mentions the 'combined market share of the parties'.

(10) Art. 5(2) of the Liner consortia BER (Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia): 'For the purpose of establishing the market share of a consortium member the total volumes of goods carried by it in the relevant market shall be taken into account'.

(11) See IP/10/359.

(12) Communication from the Commission on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector (2010/C 82/02).

The EDF long term contracts case: addressing foreclosure for the long term benefit of industrial customers

Nicolas Bessot, Maciej Ciszewski, Augustijn van Haasteren (1)

Introduction

On 17 March 2010, the Commission adopted a decision (2) making legally binding the commitments offered by EDF (the incumbent operator) on the French market for the supply of electricity to large industrial customers (3). Following the investigation it started in 2006, the Commission had in December 2008 sent EDF a statement of objections, identifying two competition concerns. First, the Commission was concerned that EDF may have abused its dominant position within the meaning of Article 102 of the TFEU by concluding supply contracts which, given their scope, duration and exclusive nature, had the effect of foreclosing the market. According to the Commission, this behaviour could have significantly hindered other undertakings from concluding contracts for the supply of electricity to large industrial customers in France. Secondly, the Commission concluded that EDF's contracts included resale restrictions limiting the customers' freedom to manage the electricity volumes they purchased from EDF.

In the Commission's view, these practices might have impeded the development of competition on the French electricity market by preventing alternative suppliers from entering or expanding on this market. These practices might also have decreased the market's liquidity, thereby delaying its effective liberalisation.

Faced with the Commission's objections, and while not acknowledging any wrongdoing, EDF decided to offer commitments pursuant to Article 9 of Regulation (EC) No 1/2003.

The competitive situation on the relevant market

Progressive liberalisation of the electricity markets pursuant to the electricity directives (4) started in France with Law No 2000-108 of 10 February 2000, and industrial customers on the relevant market became eligible (5) in February 2003. From this date, therefore, alternative suppliers were in theory able to acquire new industrial customers in order to build a customer base and gain market shares. However, in spite of this new potential competition, the incumbent operator EDF has kept a very large and fairly stable share of the liberalised market, and the Commission considered in its statement of objections that EDF was still dominant on that market.

In the Commission's view, a number of factors, taken together, have contributed to EDF holding a dominant position in the relevant market even today. Apart from its large market share, both in absolute and relative terms with respect to its competitors, there were and still are considerable barriers to entry into the French electricity market. These barriers are created, for instance, by the difficulty of acquiring electricity for resale, by the regulatory framework (6) and by problems in accessing information on customers. EDF's position is further strengthened by other factors, such as the size of its client portfolio and also EDF's vertical integration, which allows it to use a variety of means of production, including the most competitive ones with low variable costs.

In spite of its already privileged position on the market, EDF had – in the Commission's view – behaved in a way that further hindered effective competition. With a large proportion of the industrial customers on the French market EDF had concluded contracts that significantly hindered other firms from competing to supply those customers with

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

(2) See press release IP/10/290 of 17 March 2010.

(3) The relevant market was defined as the supply of electricity in France to large industrial customers who have exercised their eligibility and whose annual consumption is at least 7GWh.

(4) Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity, and Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity.

(5) This means having the right to remain supplied under the regulated tariffs or to opt for a supply contract on the liberalised market.

(6) Such as the introduction and the extension of the TarTAM regime (tarif réglementé transitoire d'ajustement du marché — transitory regulated market adjustment tariff).

electricity (7). In other words, the Commission concluded in its statement of objections that this foreclosure of the market by EDF through its portfolio of contracts was a violation of Article 102 TFEU.

Addressing foreclosure by ensuring regular contestability of customers

The foreclosing effect of EDF contractual portfolio

In the Commission's view, the foreclosure effect of EDF contractual portfolio was the consequence of a combination of three different elements: (i) the volumes covered by EDF contracts on the relevant market, (ii) the actual duration of its contracts (8), and (iii) their nature. According to the Commission, the two first factors taken together meant that alternative suppliers had insufficient opportunities to compete 'for the contracts', i.e. to acquire EDF customers in order to become their sole supplier.

While reinforcing the foreclosure effect of the first two factors, the third one, i.e. the nature of the contract, had the additional effect of preventing the customers from sourcing their electricity from an additional — or secondary — supplier, thereby foreclosing competition 'during the contracts'. Indeed, for the vast majority of EDF contracts, some provisions would either explicitly require the customers to exclusively source their electricity from EDF (*de jure* exclusivity) or would have the same effect by, for instance, imposing high take-or-pay obligations and/or imposing strict obligations on the consumption profile of the clients over specific time periods (*de facto* exclusivity).

The duration of the contract is thus only one factor leading to market foreclosure. Indeed, as a general principle, long-term agreements are not considered anti-competitive as such under the competition rules. They do not fall under Article 101 TFEU, and can even be concluded by dominant companies under Article 102 TFEU, provided that they do not have a foreclosure effect. A good illustration is the Exeltium contractual framework. Exeltium is a consortium of large industrial customers that intended to conclude a contract with EDF for the supply of a substantial amount of electricity over a very long period of time. While reviewing EDF supply contracts in the main case, the Commission raised specific concerns regarding the announced Exeltium framework. Having understood the concerns of the Commission, the parties decided to make substantial amendments to the initial design of the contracts, notably by securing effective opt-outs for members of the consortium wishing to sign contracts with other suppliers, thereby decreasing the potential foreclosure effect of the framework in the medium to long term (9). In the main case, thereafter, the Commission raised no specific objection with regard to this contractual framework; however, the electricity volumes covered by the Exeltium framework were taken into account when analysing the foreclosure effect of EDF's portfolio during the main case investigation (10).

As a result of market foreclosure, alternative suppliers were hindered from competing effectively with EDF on the French electricity market. Access to customers, and their regular contestability are among the essential elements allowing alternative suppliers to compete effectively on the market in France, the other main elements being access to generation capacity and adequate generation portfolio. Addressing market foreclosure was therefore key to improving the competitive landscape of the electricity markets in France.

EDF commitments on foreclosure

EDF submitted commitments addressing the Commission concerns over the foreclosing nature of its contracts. In many respects, they follow the line set by the earlier and similar case in the retail gas sector, namely the Distrigaz decision (11).

The first aim of the commitments was to ensure that alternative suppliers could have a real opportunity to compete for EDF's customers. However, it would have been disproportionate if EDF was obliged to 'give away' some of its customers, which would amount to imposing a market share cap on the electricity operator. Accordingly, in order to ensure regular contestability of the customers by alternative suppliers, EDF undertook that from 1 January 2010 and throughout the duration of the commitments, on average at least 65 % of the electricity supplied to large industrial customers will return to the market (12). This commitment by no means requires EDF to give up every year 65 % of its customers to alternative suppliers. It means that EDF has to organise its contractual portfolio

(7) This applies both to firms acting as the main supplier and to firms acting as the secondary supplier, i.e. providing only part of the customers' electricity needs.

(8) In its analysis, the Commission took into account not only the stated duration of the supply contracts but also whether it was actually possible for a given customer to switch supplier at the end of its contract with EDF, comparing this option with the conditions for renewing the previous contract.

(9) Other modifications included the removal of resale restrictions that were originally foreseen.

(10) See MEMO/08/533 of 31 July 2008.

(11) See IP/07/1487 of 11 October 2007.

(12) The commitments also contain a yearly minimum of 60 %, for each calendar year during which the commitments apply.

in such a way that, every year, the contracts corresponding to 65 % of its portfolio in terms of volume either expire or contain an exercisable opt-out clause, allowing the customer concerned to switch suppliers at no additional cost.

This commitment is binding for a period of 10 years, with a possibility of suspension, under certain market conditions, or early termination should EDF's market share fall below 40 % for two consecutive years.

The second aim of the commitments was to ensure that EDF would not be able to cherry-pick the most profitable customers and secure them via stricter contractual provisions and for a longer period of time. From the perspective of an individual cherry-picked customer, such a situation could ensure a stable supply of electricity in the long term: but it would be contrary to the interests of customers in general, as it would hinder true competition. To ensure the regular contestability of all its customers, therefore, EDF undertook to limit the duration of its supply contracts concluded on the relevant market, without a free opt-out, to five years.

The third and final aim of the commitments was to allow genuine competition during the contract period. EDF undertook to allow its customers real freedom of choice by systematically and simultaneously proposing an alternative which allows the clients to partly source their needs from another supplier. This commitment thus gives customers the opportunity to source electricity simultaneously from two suppliers, or to be supplied under an exclusive contract if the customer considers this a more attractive option.

Market players were consulted on the proposed commitments, and in the light of their response the Commission decided that these commitments adequately addressed the concerns it had expressed in its statement of objections.

Addressing resale restrictions which hinder the development of a liquid wholesale market in France

The second competition concern of the Commission was related to resale restrictions being imposed by EDF in the vast majority of its supply contracts with large industrial customers. These provisions were either explicitly stated in the contractual provisions or were implied in those provisions, for instance by strictly requiring that the electricity supplied be consumed at the point of delivery mentioned in the contract. It should be noted that these restrictions could also apply to volumes that were covered by take-or-pay obligations, i.e. volumes of electricity to be paid for by the customers even if they are neither consumed nor delivered. In its statement of objections, the Commission considered that such clauses could hinder the development of a liquid wholesale market, and that they amounted to an abuse of EDF's dominant position.

In order to address the Commission's concern, EDF offered two commitments. First, it undertook to inform its clients that any resale restriction clause in their supply contracts will cease to be applicable. It also undertook not to include in the future clauses that have the effect of restricting resale. Second, EDF committed itself to more actively helping industrial users to resell the electricity volumes it supplies to them. In practical terms, EDF undertook to accept that one or more of the power delivery points originally indicated in the contract would be replaced by another delivery point or points — possibly those of another customer — provided sufficient notice is given and the new arrangement complies with the consumption profile initially defined in the contract. The commitments related to the issue of resale restrictions were initially applicable as from 1 July 2010. However, following a request for extension from EDF, the Commission decided to postpone the deadline for the implementation of the commitments relating to the resale restrictions until 1 January 2011 ([13]).

These commitments were also tested on the market, and since the Commission considered them adequate to address the competition concerns it declared them binding in its commitment decision and made them applicable for ten years without any possibility of earlier termination.

Conclusion

This case is an important step towards a more liquid and more competitive electricity market in France. However, the achievement of this goal now depends on the alternative electricity operators and the industrial customers themselves. Indeed, these market players will play a central role in monitoring the commitments ([14]), and – most importantly – in reaping the benefits of the new opportunities they offer. The Commission believes that these commitments give alternative electricity suppliers a real chance to compete effectively for EDF's customers and thus to expand their market presence and exert competitive pressure on the incumbent.

([13]) Commission's decision of 11 August 2010, following an EDF's request dated 18 May 2010 further substantiated on 16 June 2010.

([14]) The more formal monitoring of the commitments will take place via annual reports drafted by EDF on the basis of audited figures. Each report will be sent to the Commission and to the French Energy Regulator (CRE) during the year following the calendar year covered. The last report will be presented to the Commission in 2021.

Whilst EDF's commitments constitute an important step forward, they need to be accompanied by other changes to the French electricity landscape. Indeed, while EDF's commitments give its competitors access to its customers, they do not address the remaining problems on the French market. The Commission has been working to open up this market to greater competition by investigating the regulated tariffs. In the wake of this investigation, further action should be taken to give alternative operators easier access to some of EDF's existing nuclear generation in France. This would create positive synergies for the benefit of the customers. The Commission therefore looks forward with great interest to seeing what further steps the French authorities will take to reform the French electricity market ([15]).

([15]) See MEMO/09/394 of 15 September 2009.

Vertical Agreements: New Competition Rules for the Next Decade

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Introduction

On 20 April 2010 the Commission adopted a new Block Exemption Regulation applicable to vertical agreements (2) (hereinafter 'the Regulation'). At the same time it adopted the contents of accompanying Guidelines on vertical restraints (3) ('the Guidelines'), which were subsequently formally adopted in all official languages of the Union by Vice-President Almunia on behalf of the Commission on 10 May 2010. Both of these instruments will be applicable from 1 June 2010.

The competition rules embodied in these instruments are particularly important given the pervasiveness of vertical agreements. Vertical agreements are agreements between firms operating at different levels of the production or distribution chain for the sale and purchase of intermediate products and the purchase and resale of final products. Typical examples of vertical agreements are distribution agreements between manufacturers and distributors, or supply agreements between a manufacturer of a component and a producer of a product using that component. Because each firm has to purchase certain inputs and most firms need to sell their products to producers further downstream or to distributors, most companies are concerned by these rules.

These instruments also play an important part in ensuring a consistent approach to vertical restraints under Article 101 of the Treaty on the Functioning of the European Union, as enforcement is mostly carried out by the national competition authorities and national courts since the 2004 decentralisation. Vertical restraints are restrictions of competition included in vertical agreements which may foreclose and/or segment markets, soften competition and facilitate collusion. For instance, vertical agreements which have as their main element that the manufacturer sells to only one buyer or a limited number of buyers (exclusive distribution or selective distribution) may lead to foreclosure of other buyers and/or to collusion between buyers. Similarly, non-compete obligations which prohibit distributors from purchasing and reselling competing products may foreclose new manufacturers and make the market positions of incumbent manufacturers rigid.

The new rules were adopted following a review process that was launched in the spring of 2008 because of the expiry of the Block Exemption Regulation of 1999 ('the 1999 Regulation') on 31 May 2010. The Commission services took stock of enforcement with the national competition authorities and a consensus was quickly reached confirming that the architecture put in place in 1999 had worked well and only needed some up-dating and clarification. This was subsequently confirmed by a public consultation which elicited a very high response rate.

The 1999 Regulation and Guidelines on vertical restraints formed the very first package of a new generation of block exemption regulations and guidelines inspired by a more economic and effects-based approach, which was subsequently implemented in other antitrust areas. Under this approach, in order to conduct a proper assessment of a vertical agreement, it is necessary to analyse its likely effects on the market. For companies lacking significant market power (i.e. whose market share is below 30 %), the 1999 Regulation provided for a block exemption, because it is presumed that vertical agreements concluded between such companies will either have no anticompetitive effects or, if they do, that the positive effects will outweigh any negative ones. In contrast, for vertical agreements concluded by companies whose market share exceeds 30 %, there is no such safe harbour, but there is no presumption that the agreement is illegal either: it is necessary to assess the agreement's negative effects and positive effects on the market (under Article 101(1) and Article 101(3), respectively). The 1999 Regulation and Guidelines assisted companies in making this assessment and proved particularly important since the discontinuation, in 2004, of the former notification system whereby companies had to notify their agreements to the Commission in order to obtain an exemption.

It was decided to maintain this architecture, but to adapt and update it in the light of two major developments since 1999, namely a considerable increase in online sales, and enforcers' increased attention to and experience with the possible anticompetitive effects of a buyer's market power. This short article does not deal with all the aspects of the Regulation and Guidelines,

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

(2) Commission Regulation (EU) No. 330/210 of 20 April 2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1.

(3) Commission Notice – Guidelines on vertical restraints, OJ C 130, 19.05.2010, p. 1.

but focuses instead on the novelties and clarifications introduced by these recently adopted texts.

Scope of the Regulation

Extension of the 30 % Market Share Threshold to Buyers

The main change to the scope of the Regulation is that the benefit of the block exemption no longer depends only on the supplier's market share not exceeding 30 %, but also on the market share of the buyer not exceeding the same threshold. This reflects increased recognition and evidence that vertical restraints need not generally be supplier-led: also buyers can have market power that may be used to impose anticompetitive vertical restraints ([4]). For instance, an exclusive supply obligation or similar obligation imposed by a powerful buyer (i.e. with a market share above 30 %) on small suppliers (i.e. with a market share below 30 %) may lead to anticompetitive foreclosure of other buyers, and may therefore harm consumers.

In the draft Regulation which was submitted to public consultation, the Commission proposed that the market share of the buyer, as that of the supplier, should be assessed in the downstream market(s) in which it (re)sells the products/services, as it is in these markets that the negative effects on consumers are felt. However, many stakeholders voiced concerns about the increased compliance costs for companies resulting mainly from having to assess the buyer's position on potentially many local downstream markets on which the suppliers themselves are not present.

To remedy these concerns, the market share of the buyer in the Regulation is assessed on the upstream market where the buyer procures the products/services from the supplier. This market is generally wider than the downstream market (in most cases it will be at least national in scope), it is only one market as opposed to several possible downstream markets, and suppliers will know or be able to reasonably estimate the position of their buyers on this market. In most cases the position of the buyer on the upstream market is a good proxy for the buyer's market power in the downstream market ([5]).

([4]) The Commission also added two new sections in the Guidelines on upfront access payments and category management (see sections VI.2.7/8) to give guidance on vertical restraints which are typically buyer-led.

([5]) Where an intermediate product such as steel has multiple uses, the position of the buyer on the upstream market may be more relevant than its position in the downstream market, because it is difficult to see how a buyer with a strong position in a particular downstream market, such as cars, but having only a limited position as purchaser on the steel market, can use its purchasing agreements to foreclose other car manufacturers from having access to the steel market.

Agency Agreements

There is no fundamental change in policy with regard to agency agreements ([6]). Intra-brand restrictions, including prices and conditions at which the agent must sell or purchase the goods or services, fall outside Article 101(1) if the agent does not bear any contract specific risks, such as financing of stocks, or costs for market specific investments, such as the petrol storage tank of a service station. The Guidelines provide the additional clarification that, in order for an agreement to be considered a genuine agency agreement under the EU competition rules (and thus for any intra-brand restrictions to fall outside Article 101(1)), the principal must bear the costs and risks related to other activities that it requires the agent to undertake within the same product market where the agency activity also takes place. Therefore a service station operator can be an independent distributor of shop goods or an independent provider of car wash services without this affecting its agency status with regard to petrol retailing. However, to prevent any 'spill-over effects' of intra-brand restrictions (for instance, price fixing) between the agency activity and the independent activity, the service station operator cannot be, for the purpose of applying article 101(1), a genuine agent for one type of petrol and at the same time be an independent distributor for another type of petrol in the same product market.

Vertical Agreements between Competitors

As a general rule, neither the 1999 Regulation nor the (new) Regulation cover vertical agreements entered into between competitors. Agreements between competitors, also for the distribution of each others' products, are first and foremost assessed as horizontal agreements ([7]). However, the 1999 Regulation did cover a limited number of situations of non-reciprocal vertical agreements between competitors. There are two changes in the Regulation with regard to the coverage of vertical agreements between competitors, both of which set further limits on the scope of the Regulation. Firstly, the 1999 Regulation covered situations in which a producer sold its products to a competing producer that distributed them, as long as the turnover of the latter did not exceed €100 million. This exception has now been removed, because experience shows that, in certain markets, a €100 million company may be the main local or national producer and thus

([6]) See paragraphs 12-21 of the Guidelines.

([7]) See the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, to be published shortly in the OJ.

a major competitor. As a result of this change, such agreements fall outside the scope of the Regulation and will have to be assessed as horizontal agreements. Secondly, not just for goods but also for services, the Regulation's coverage of vertical agreements between competitors is now limited to situations of dual distribution, i.e. where the buyer is active at the distribution level only ([8]). For instance, if a brewer operates its own pubs and thus is active at the retail level, its agreements to supply its beer to independent pubs fall within the scope of the Regulation. The same applies to a franchisor's agreements providing services to its franchisees while also operating its own shops.

Hardcore Restrictions

General Approach to Hardcore Restrictions

Article 4 of the Regulation contains a list of hardcore restrictions, in particular restraints on the buyer's ability to determine its sale price and certain types of (re)sale restrictions. These are considered serious restrictions of competition that should in most cases be prohibited because of the harm they cause to consumers. The consequence of including such a hardcore restriction in an agreement is that the whole vertical agreement is excluded from the scope of application of the Regulation ([9]). In addition, in these cases there is a double presumption, namely that the agreement will have actual or likely negative effects and therefore fall within Article 101(1), and it will not have positive effects that fulfil Article 101(3).

This is, however, rebuttable: in individual cases the parties can bring forward evidence under Article 101(3) that their agreement leads, or is likely to lead to efficiencies that outweigh the negative effects ([10]). Where this is the case, the Commission is required to effectively assess (rather than just presume) the likely negative impact on competition before making a final assessment of whether the conditions of Article 101(3) are fulfilled. In effect this means that the usual order of bringing forward evidence is reversed in the case of a hardcore restriction.

([8]) Previously the requirement that the buyer is only active at the distribution level did not apply to services.

([9]) See paragraph 47 of the Guidelines.

([10]) See in particular paragraphs 63 to 64 of the Guidelines that provide some examples of a possible efficiency defence for hardcore (re)sales restrictions, paragraphs 106 to 109 that describe in general possible efficiencies related to vertical restraints and Section VI.2.10 on resale price restrictions. For general guidance on this see the Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

Resale Price Maintenance

Resale price maintenance (RPM), that is agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer, are treated as hardcore restrictions. However, the practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price is not considered a hardcore restriction.

The section of the Guidelines that deals with RPM provides a good illustration of the above-mentioned general approach to hardcore restrictions, because it explains at length the various ways in which RPM may restrict competition ([11]) but also that RPM may, in particular where it is supplier driven, lead to efficiencies which must be assessed under Article 101(3) ([12]).

Among the negative effects, RPM may facilitate collusion both between suppliers (by enhancing price transparency on the market) and between buyers (by eliminating intra-brand price competition), and more generally soften competition between manufacturers and/or between retailers, particularly when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them. It should also be noted that the immediate effect of RPM is that all or some distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a price increase. Other negative effects include a reduction of dynamism and innovation at the distribution level since, by eliminating price competition between different distributors, RPM may prevent more efficient retailers or distribution formats from entering the market or acquiring sufficient scale with low prices.

Among the positive effects, where a manufacturer introduces a new product, RPM may be helpful during the introductory period of expanding demand as a way to persuade distributors to take more account of the manufacturer's interest in promoting the product. Indeed, RPM may provide the distributors with the means to increase sales efforts. If the distributors on this market are under competitive pressure, this may prompt them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers. Similarly, fixed resale prices, and not just maximum resale prices, may be necessary in order to organise in a franchise system, or similar distribution system applying a uniform distribution format, a coordinated short term low price campaign (2 to 6 weeks in most cases) for the benefit of consumers. In some situations, the extra margin provided by RPM may allow

([11]) See paragraph 224 of the Guidelines.

([12]) See paragraph 225 of the Guidelines.

retailers to provide (additional) pre-sales services, in particular in the case of experience or complex products. In such a situation, RPM may prevent free-riding and its consequences: indeed, if customers take advantage of these services but then purchase the product at a lower price with retailers that do not provide such services, high-service retailers may reduce these services or stop providing them altogether.

Resale Restrictions

Hardcore Resale Restrictions

The hardcore resale restrictions relate to market partitioning by territory or by customer group. In general, the Regulation does not cover agreements that restrict sales by a buyer party to the agreement in so far as those restrictions relate to the territory into which or the customers to whom the buyer may sell the contract goods or services. However, there are a number of exceptions to this general hardcore restriction, which are designed to allow suppliers to sell their products efficiently while preventing the risk of partitioning the internal market.

One such exception is exclusive distribution. Indeed, the Regulation allows a supplier to protect an exclusive distributor from active sales by other distributors in order to encourage that distributor to invest in the exclusively allocated territory or customer group. This is possible, under the block exemption, when the supplier agrees to sell its products only to one distributor for distribution in a particular territory or to a particular customer group and when that exclusive distributor is protected against active selling into its territory or to its customer group by all the other distributors. The Guidelines now clarify that the protection against active sales enjoyed by the exclusive distributor does not need to extend to the sales by the supplier itself ([13]). Moreover, in an exclusive distribution system a supplier can restrict active sales at more than one level of trade. For instance, a supplier can restrict active sales into a territory or customer group exclusively allocated to a wholesaler by all other wholesalers and retailers who are parties to an agreement with that supplier. However, to prevent market partitioning a supplier cannot restrict its distributors from making passive sales, i.e. responding to unsolicited requests from customers and selling to those customers throughout the internal market. Any such restriction of passive sales would be a hardcore restriction of competition.

Selective distribution is another important exception. Under the block exemption, suppliers can implement a selective distribution system which allows them to choose their distributors on the basis of specified criteria and to prohibit any of their sales to unauthorised distributors. The Regulation covers the agreed restrictions of sales to unauthorised distributors in the territory reserved by the supplier to operate selective distribution. A supplier can restrict an appointed distributor from selling, at any level of trade, to unauthorised distributors located in any territory where selective distribution is currently operated or, as is now clarified, where the supplier does not yet sell the contract products ([14]). Any other restriction of the authorised distributors' freedom regarding where and to whom they may sell is considered a hardcore restriction ([15]). Thus, an authorised distributor should be free to sell to any end-consumer and to supply and/or procure supplies from any other authorised distributors. The reason for protecting this freedom of authorised distributors to sell/procure supplies throughout the internal market is that selective distribution implies a high risk of market partitioning and higher prices because, as was explained above, in that system a supplier is allowed to restrict any sales to unauthorised distributors, in particular to parallel traders.

At a more general level, the Regulation now provides for the possibility of a supplier restricting the place of establishment of its distributor, whatever the type of distribution system opted for. It can be agreed that the distributor will restrict its outlet(s) and warehouse(s) to a particular address, place or territory. This is designed to facilitate the parallel use of different types of distribution systems in the internal market by providing the possibility of protecting the investments of other than exclusive distributors ([16]).

([13]) This means that exclusive distribution is covered by the Regulation also if the supplier sells directly to customers otherwise exclusively allocated to a particular distributor, i.e. if the exclusivity is shared between the distributor and the supplier.

([14]) However, if a supplier operates selective distribution in one territory while using another type of distribution system in another territory, that supplier cannot restrict sales to unauthorised distributors located in the territory where the other type of distribution system is used (see however footnote 15).

([15]) This is without prejudice to any other exceptions provided in the Regulation. For instance, authorised distributors can be prohibited from operating out of an unauthorised place of establishment or restricted in their active sales into a territory where exclusive distribution is applied.

([16]) For example, because of differences in the available infrastructure and/or consumer preferences for services, a supplier may rely on a selective distribution network in country A, but decide to use exclusive distribution in country B. In both cases distributors may have to undertake important investments which are worth protecting against 'free riding'. The exclusive distributor in country B is protected against active sales from distributors in country A. On the other hand, the exclusive distributor in country B can be prevented from opening a shop next door to, and free riding on, the shop and services of an authorised distributor in country A. However, any other restrictions on the distributor's active sales from country B into country A, including active sales over the internet, continue to be treated as a hardcore restriction and an individual justification should be advanced for a more radical restriction of their active sales.

It is also permissible, under the Regulation, to restrict a wholesaler from selling to end users. This allows a supplier to keep the wholesale and retail level of trade separate. Thus, a supplier can require the buyers of its products to 'specialise' in the wholesale or retail activity. The novelty here is that it is specified that this does not exclude the possibility that a 'specialised' wholesaler can sell to certain end users, such as bigger end users, while sales to (all) other end users are not allowed.

Restrictions on the Use of the Internet

The general rules explained in the previous section apply to both offline and online sales. Since the internet makes it easy to reach different customers and different territories, restrictions of the distributors' use of the internet are generally considered as hardcore resale restrictions. In principle, every distributor must be allowed to use the internet to sell products. Therefore, the Guidelines make it clear that any obligations on distributors to automatically reroute customers located outside their territory, or to terminate consumers' transactions over the internet if their credit card data reveal an address that is not within the distributor's territory, are hardcore restrictions. Similarly, any obligation that dissuades distributors from using the internet, such as a limit on the proportion of overall sales which a distributor can make over the internet, or the requirement that a distributor must pay a higher purchase price for units sold online than for those sold offline ('dual pricing'), is also considered as a hardcore restriction.

As in the offline world, under the block exemption a supplier can restrict active sales into exclusively allocated territories or customer groups, while passive sales should remain free. The Guidelines contain a careful delineation of active and passive sales, aimed at allowing the internet to continue contributing to cross-border trade in the internal market while preserving the efficiency of exclusive distribution. The general principle is that if the distributor has a website and a customer visits the web site and contacts the distributor (without being solicited), and if such contact leads to a sale, including delivery, then that is considered passive selling. The same is true if a customer opts to be kept (automatically) informed by the distributor and this leads to a sale.

In contrast, any efforts by distributors to be found specifically in a certain territory or by a certain customer group amount to active selling into that territory or to that customer group. For example, paying a search engine or online advertisement provider to have advertisements displayed specifically to users in a particular territory is active selling into that territory. Territory-based banners on third party websites are also a form of active sales into the territory where these banners are shown. However, offering different language options on the website does not, of itself, change the passive character of such selling.

Since suppliers can appoint the exclusive distributor of their choice or implement a selective distribution system which allows them to freely choose their distributors on the basis of specified criteria and to prohibit any of their sales to unauthorised distributors, the block exemption covers a requirement by the supplier that its distributors should have one or more brick-and-mortar shops or showrooms as a condition for becoming a member of its distribution system. In other words, under the Regulation the supplier may choose not to sell its product to internet-only distributors. To ensure an efficient operation of the brick and mortar shops, a supplier can also require from a distributor that it sells at least a certain absolute amount (in value or volume) of the products offline ([17]). A supplier can also pay a fixed fee to its distributor to support the latter's offline sales efforts. However, under the Regulation a supplier cannot restrict the online activities of its appointed distributors since, as was explained above, such a restriction is a hardcore resale restriction. For instance, a supplier cannot apply a 'dual pricing' policy or limit the proportion of overall sales which a distributor may make over the internet. Similarly, a supplier cannot use the brick and mortar requirement to 'punish' a distributor for selling successfully over the internet (in particular in the territories where the supplier/other distributors charge higher prices).

More generally, under the block exemption, the supplier may require quality standards for its distributors' online sales, just as the supplier may require quality standards for offline sales. However, imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick and mortar shops, and which dissuade distributors from using the internet, is a hardcore restriction. This does not mean that the criteria imposed for online sales must be identical to those imposed for offline sales, but rather that they should pursue the same objectives and achieve comparable results and that the difference between the criteria must be justified by the different nature of these two distribution modes ([18]). Similarly, if a distributor wants to distribute contract products via third party platforms, a supplier may require that its distributor uses third party platforms only in accordance with the standards and conditions agreed between the

([17]) This absolute amount of required offline sales can be the same for all buyers, or determined individually for each buyer on the basis of objective criteria, such as the buyer's size in the network or its geographic location.

([18]) Paragraph 56 of the Guidelines provides some examples of quality standards for online/offline sales which are not identical, but which are overall equivalent.

supplier and its distributor for the distributor's use of the internet. For instance, where the distributor's website is hosted by a third party platform, the supplier may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.

Individual Justifications of Hardcore Resale Restrictions

As for RPM, the parties can bring forward evidence in an individual case that their agreement containing hardcore resale restrictions may fall outside the scope of Article 101(1) or may fulfil the conditions of Article 101(3). The Guidelines contain some examples of such individual justifications of hardcore resale restrictions.

Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature [19] and therefore fall outside Article 101(1). For example, a hardcore restriction may be objectively necessary to ensure observance of a public ban on selling dangerous substances to certain customers for health and safety reasons.

Where substantial investments by a distributor are necessary in order to start up and/or develop a new market, any restrictions of (active and) passive sales by other distributors into such a territory or to such a customer group which are necessary for the distributor to recoup those investments generally fall outside the scope of Article 101(1) during the first two years that the distributor is selling the contract goods or services in that territory or to that customer group. This justification relates to a genuine entry of the supplier on the relevant market, where there was previously no demand for that type of product in general or for the particular type of product from that supplier.

In the case of genuine testing of a new product in a limited territory or with a limited customer group, and in the case of the staggered introduction of a new product, the distributors appointed to sell the new product on the test market or to participate in the first round(s) of the staggered introduction may be restricted in their active selling outside the test market or the market(s) where the product is first introduced. This restriction falls outside the scope of Article 101(1) for the period necessary for the testing or introduction of the product.

A restriction of active sales imposed on wholesalers within a selective distribution system may be necessary to solve a possible problem of 'free riding' and therefore may fulfil the conditions of Article 101(3) in an individual case, that is when wholesalers are obliged to invest in promotional activities in 'their' territories to support the sales by appointed retailers and it is not practical to specify in a contract the required promotional activities. Similarly, in some specific circumstances, an agreed 'dual pricing' policy may fulfil the conditions of Article 101(3), that is when online selling by distributors leads to substantially higher costs for the supplier than their offline sales and when a 'dual pricing' policy allows the supplier to recover those additional costs. For example, where offline sales include home installation of a technical product by the distributor but online sales do not, the latter may result in more customer complaints and warranty claims for the manufacturer.

Conclusion

The newly adopted rules mark an evolution and adaptation of the effects-based approach to recent market developments, in particular regarding online sales. While there is a large measure of continuity in the approach embodied in the Regulation and Guidelines, more attention is paid to buyer power issues and online resale restrictions. The rules do not aim to impose or favour particular distribution formats. Instead of forcing manufacturers and distributors to offer all or some distribution models, the rules allow a large measure of freedom for manufacturers to agree with distributors about how they want their products to be distributed. Consumers can then make their choice based on these offers, thereby rewarding the best available options and stimulating business to adapt to what consumers want and to ensure that European supply and distribution remain globally competitive.

[19] See paragraph 18 of Communication from the Commission - Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97.

Oracle/Sun Microsystems: The challenge of reviewing a merger involving open source software

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1. Introduction

On 21 January 2010 the Commission unconditionally cleared the planned takeover of Sun Microsystems ('Sun'), a software and hardware vendor, by Oracle Corporation ('Oracle'), one of the world's leading software companies. The clearance followed an extensive investigation into the database market where Oracle was the leading proprietary vendor and Sun the leading open source vendor. The case also attracted a certain level of public attention and triggered reactions by many parties. The legal test applied in this case was not based on the acquisition or strengthening of a dominant position but on the elimination of an important competitive force, which would be Sun's MySQL. The Horizontal Merger Guidelines (2) recognize that some firms, despite having a relatively small market share may be an important competitive force and that a merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way.

In this context, the Commission was also for the first time faced with the question of how to assess the competitive force of an open source software product such as MySQL. Sun distributed MySQL free of charge and derived revenue mainly from optional service contracts. Therefore MySQL's market share measured in revenue was very low. The open source nature of MySQL moreover required the Commission to look specifically at the incentive and ability of Oracle to degrade or eliminate MySQL after the implementation of the proposed transaction.

The Commission also had to assess how to take into account public pledges made by Oracle on 14 December 2010 considering that they did not constitute formal remedies.

The case also attracted a certain level of public attention and reaction by many parties. Finally, from a procedural point of view the case was interesting because the assessments in the US and in the EU followed different timetables.

2. Oracle, Sun and the IT stack

The US company Oracle is a major business software vendor. It develops and distributes enterprise software solutions and related services, including middleware, databases and enterprise application software. Sun is active in hardware (servers, desktops, microelectronics, and storage devices) and software, including operating systems, Java software development technology, middleware, database software and related services.

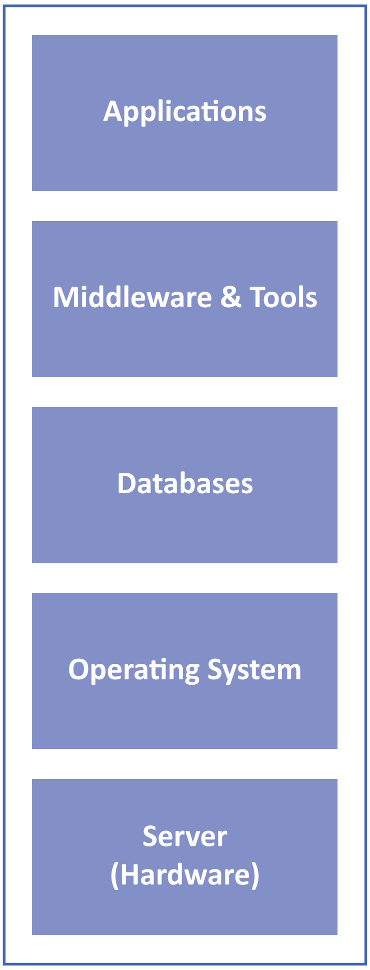
The product offerings of Oracle and Sun can be seen as part of an IT or technology 'stack' which consists of the various hardware and software components necessary for companies to ultimately use business software applications. Hardware products, including servers, storage units and client PCs, constitute the first layer. In order to function, a server needs an operating system. Databases operate on top of the operating systems and enable the storing and systematic retrieval of data. The next layer is middleware, which encompasses a wide category of software products that provide an infrastructure for applications to run on a server, be accessed from a variety of clients over a network and be able to connect to a variety of information sources. The last layer of the stack is applications. One important category of applications is enterprise application software ('EAS') to support the major business functions for example accounting, finance and human resources.

Sun's and Oracle's assets were to a large extent complementary. As a result the proposed transaction allowed the merged entity to become a fully integrated provider of hardware and business software and to offer all layers of the IT stack. However, the transaction also led to some important horizontal overlaps among others in the database market and potential vertical effects relating to the Java development environment.

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

(2) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the Horizontal Merger Guidelines), OJ C 31, 5.2.2004, p. 5.

Graph 1: The IT stack



These two issues will be presented in more detail below.

3. Databases

3.1. The parties' database offerings and the database market

Databases play an important part in the functioning of many enterprises and organisations. They support a variety of applications, whether pre-packaged or customized in-house applications, including web applications, online transaction processing, online analytical processing and data warehousing. Databases can also be 'embedded' in another hardware (for example, a mobile phone or a vehicle) or software products. In that case they are not sold as a standalone product to the end user. The Commission considered embedded databases to form part of a relevant product market comprising all relational databases.

Oracle offers a variety of database products. Its core product is the Oracle database which is suitable for high-end applications. Oracle also offers three stripped down versions of its database targeted at users that do not require all high-end features. Oracle charges a license fee for most of its database products and is the revenue leader in the database market.

Sun's main database product is MySQL. MySQL is available as an open source product. Open source denotes a specific way of developing and distributing software in which the source code of the software is made publicly available. Consequently, MySQL can be downloaded free of charge from the internet for use.

There are different types of open source licenses. MySQL is licensed under the most widely used open source license, the General Public License v2 ('GPL'). One of the characteristics of the GPL is that if a product, which contains modified or unmodified MySQL source code and thus is a 'derived work' in the sense of copyright law, is commercialised, then it must also be licensed under the GPL and its entire source code must be disclosed to the public. This is sometimes described as the 'viral' effect of the GPL.

The database market is very concentrated. In 2008, Oracle, IBM and Microsoft together controlled almost 90 % of the market measured in revenues.

Table 1: Database market shares measures in revenues, 2008 (*Source*: IDC, Gartner)

Database vendor	Market share 2008
Oracle	[40-50] %
IBM	[20-30] %
Microsoft	[10-20] %
Sybase	[0-5] %
Teradata	[0-5] %
Sun (MySQL)	[0-5] %

MySQL's market share measured in revenues is very small. However, even a large number of users of an open source database would not necessarily translate into significant revenue because the software is available free of charge. Therefore revenue figures alone are not sufficient to assess MySQL's competitive significance. There is also no data available on the total size of the database market measured in active installations as open source vendors do not have the ability to track whether, once downloaded, the open source database is actually installed and used.

The database market is characterised by several specificities which have an impact on how competition takes place.

First, marginal costs of selling an additional software license are very low, while sunk costs, mostly for R&D are very high. This leads to significant economies of scale which in turn give the database vendors strong incentives to achieve a high volume of sales.

Second, the market for database software is subject to network effects, i.e. the value of a database for any user increases with the number of other users. This arises because a higher number of users will make it more attractive for providers of IT support services to invest in expert knowledge of the database product. Also the higher the number of users, the more attractive it will be for software developers to integrate the database product into their own offerings or to develop applications that make use of the database product. Significant network effects result in barriers to entry, which in turn are one factor that explains the relatively high degree of concentration in the database market.

Third, the adoption of a database by a buyer often requires significant specific and irrecoverable investments. For example, the buyer will often need to invest in database specific training and in the development of applications customized for the particular database. Migrating data to another database often is no trivial exercise either. Consequently, when switching from one database to another, buyers will face additional and significant expenses compared to a situation in which they continue using the same database.

3.2. The legal test and its application to the specific case

The Horizontal Merger Guidelines recognize that some firms, despite having a relatively small market share, may be an important competitive force. A merger involving such a firm may change the competitive dynamics in a significant, anticompetitive way, in particular where the market is already concentrated (3) (4).

Oracle considered the Commission's theory of harm as unusual, unprecedented and ultimately illegal under the Merger Regulation (5). In particular, Oracle claimed that previously the Commission had nearly always relied on showing dominance and closeness of competition, even in those cases in which the Commission based its theory of harm on the elimination of an important competitive force. Oracle further argued that the Horizontal Merger Guidelines mention, as factors potentially giving rise to an important competitive force, only the fact that the 'maverick' is either a recent entrant poised to exert an important competitive pressure in the future or an innovating firm.

The Commission rejected Oracle's arguments.

First, under the new substantive test introduced by the Merger Regulation (see Article 2 (2) and (3)), the Commission is no longer required to show, in all cases, the creation or strengthening of a dominant position in order to declare a merger incompatible with the common market.

As expressly stated in the Merger Regulation and further specified in the Horizontal Merger Guidelines, the Commission must take into account in its assessment any significant impediment to effective competition likely to be caused by a concentration (6). Beyond the concept of dominance, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, under certain circumstances, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition.

Second, the Commission is not required under this theory of harm to show that the merging parties are the closest competitors on the relevant market. Being closest competitors is only one of the factors listed in the Horizontal Merger Guidelines to assess whether significant non-coordinated effects are likely to result from a merger.

Third, the Horizontal Merger Guidelines do not require for the target of a transaction to be characterised as an important competitive force that it be a recent entrant or an innovating firm.

For the present transaction this theory of harm meant that the Commission assessed whether MySQL constituted an important competitive force in the database market, in particular with regard to competitive constraints on Oracle, and whether this competitive force was likely to be removed after the proposed transaction.

For the present case it also meant assessing the extent to which other current or potential open source competitors as well as forks of MySQL could replace MySQL as competitive force after the proposed transaction. A fork of a software product is created when a developer takes a legal copy of the

(3) Horizontal Merger Guidelines, paragraphs 37 and 38.
(4) It should be noted that the US Antitrust Agencies in the new proposed US Horizontal Merger Guidelines include a comparable theory of harm as brought forward by the Commission in the Oracle/Sun case. According to these proposed Guidelines the Agencies will consider whether a merger may lessen competition by eliminating a 'maverick' firm, i.e. a firm that has played, or likely will play absent the merger, a disruptive role in the market to the benefit of customers.
(5) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the 'Merger Regulation'), OJ L 24, 29.1.2004, p. 15.
(6) Horizontal Merger Guidelines, paragraph 2.

source code from one software package and starts independent development on it, creating a distinct piece of software.

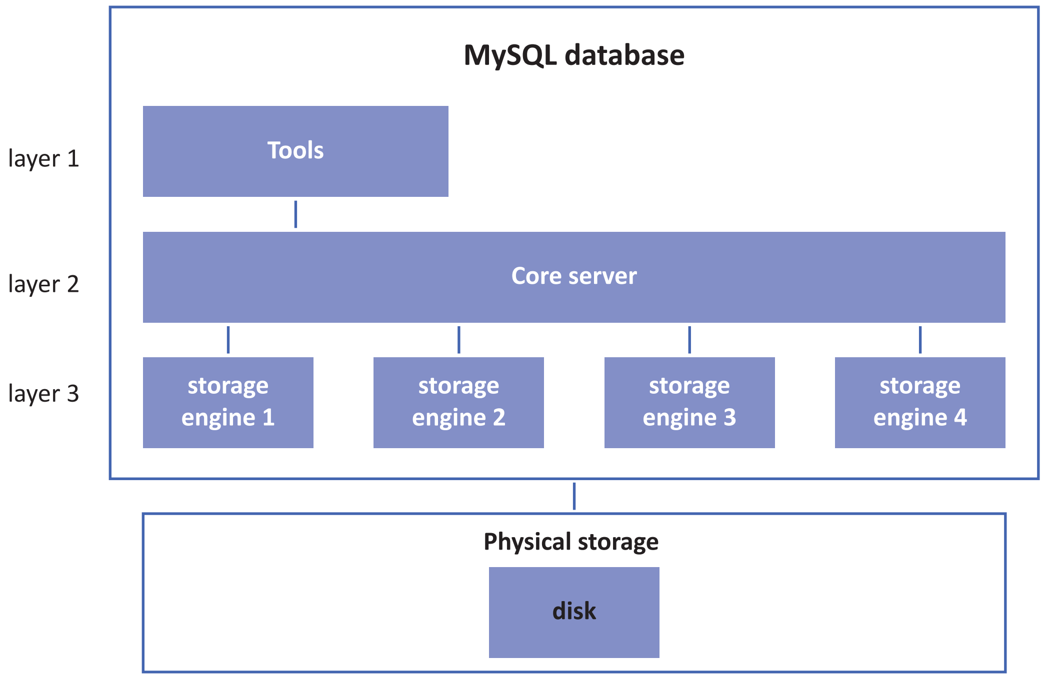
3.3. How to assess the competitive constraint exerted by MySQL?

As MySQL is predominantly distributed under the GPL and free of charge, the Commission considered that its small revenue share in the database market did not appropriately reflect its competitive position. The Commission found indications that MySQL's competitive position in the database market was stronger than suggested by its revenue share. It is generally acknowledged that MySQL is the world's most popular open source database. MySQL is also significantly more widely distributed than any other open source database.

MySQL had certain features which determined the nature of the competitive constraint it exerted. MySQL was designed following a modular approach which differs from all other widely used databases. MySQL consists of three different layers: a top layer with tools for the monitoring and administration of the database, a middle layer consisting of the core database server, and a bottom layer for managing the physical storage of the data (storage engine).

The interfaces between the three different layers are documented and can be used by software developed by other parties. This allows customisation of the tools and storage engines layers.

Graph 2: The MySQL database



MySQL's 'pluggable' architecture has resulted in a wide offer of storage engines, many of which have been designed to address very specific requirements. In addition to a number of storage engines developed and offered by MySQL itself, storage engines are also available from third parties. This choice between specialised storage engines allows customers to choose the best engine for their application. The modular architecture and the availability of multiple storage engines allows MySQL to target different technology segments of the market in parallel, thereby increasing MySQL's competitiveness in various segments of the database market. This modular architecture has generated a very lively and dynamic eco-system of storage engines which in turn created more demand for MySQL (7).

The Commission analysed various sources of information to assess the competitive constraint exerted by MySQL on Oracle. These sources comprised in particular two internal Oracle datasets (described in more detail below), internal documents of Oracle and Sun, surveys as well as input provided by com-

(7) Storage engines providers could obtain commercial license from the IP holder that allows them to market proprietary versions of their storage engines (as opposed to the 'viral' obligation of the GPL) and thereby generate revenues.

petitors and customers of Oracle and MySQL who responded to the Commission's questionnaires.

The two contemporaneous internal datasets submitted by Oracle that the Commission analysed were (i) the Customer Relationship Management database (CRM) and (ii) a dataset consisting of e-mail requests submitted by sales personnel to a centralised email address for executive approval of price discounts to customers (Headquarters Approvals e-mails – HQ Apps).

MySQL rarely appeared in the CRM dataset, which typically lists competitors in any given sales opportunity. However, the Commission found that CRM may be biased against MySQL and open source providers generally. This may arise because sales representatives of Oracle and of proprietary software vendors more generally would not always be aware of the competitive presence of open source vendors (as customers can simply download the software for free).

As for HQ Apps, this is an internal 'dataset' of Oracle that contains the communications between sales teams and Oracle headquarters relating to non-standard rebates offered by Oracle. It was possible to determine for how many customers the sales teams had indicated the presence of specific competitors in order to justify their requests for non-standard rebates in the sample of the HQ Apps documents provided by Oracle. The qualitative and quantitative analysis of the HQ Apps dataset showed that MySQL could not be dismissed as a competitive constraint. A cross-check between HQ Apps and CRM also lent support to the view that the CRM database may be biased against open source providers.

The conclusions drawn from HQ Apps were confirmed by industry surveys. In particular a 2009 survey by Evans Data Corporation, a research firm, found that overall MySQL was the second most used database by number of developers and IT managers in the Europe, Middle East, and Africa (EMEA) region in the past year, just behind Microsoft's SQL Server.

On the basis of all available sources the Commission concluded that MySQL potentially exerted an important competitive constraint on Oracle and other proprietary database vendors. While this potential constraint was found to be particularly strong in some segments like the small and medium enterprise or low end segment and some parts of the 'embedded use' segment, the Commission found that MySQL did not constrain Oracle in the high end segment. In addition to the static view the nature of the constraint also had to be seen dynamically because MySQL's specific modular architecture favours innovation by third parties developing storage engines that enhance MySQL's functionalities so that it can target also higher-end applications.

3.4. Public pledges of Oracle – How should they be taken into account in the assessment?

On 14 December 2009 Oracle made a public announcement containing ten pledges vis-à-vis MySQL users, customers and developers. The announcement covered a wide range of activities related to MySQL and was made shortly after an oral hearing requested by Oracle, which took place on 10 and 11 December 2009, and more than one month after the issuing of a Statement of Objections on 9 November 2009.

With respect to customers, the announcement included, among others, pledges to continue to release enhanced future versions of MySQL under the GPL, to increase spending on MySQL R&D for three years, as well as to set up a customer advisory board.

With respect to storage engine providers, the announcement included, among others, pledges to continue to make storage engine application programming interfaces ('APIs') available and to not assert certain (8) provisions in the GPL against storage engine vendors (9). On the basis of these two pledges it can be expected that third-party storage engine vendors will be allowed to provide to their customers a combination of MySQL under the GPL and the storage engine (including if the latter is under a proprietary license) as an integrated product. Moreover, Oracle pledged to set up a storage engine advisory board.

In line with its public announcement Oracle immediately took steps to implement some of the pledges by sending letters to third-party storage engine vendors. In these letters Oracle pledged to amend the existing contractual terms after the closing of the proposed transaction by reproducing the relevant content of its public announcement.

Oracle's pledges do not constitute formal remedies. The Commission has a long established and consistent practice regarding the remedies that are necessary in order to clear a merger once competition concerns have been established at the end of the investigation. These principles fully apply whenever

(8) Copyleft is a requirement in the GPL that anyone who redistributes the software does so under the same license and also includes the source code.

(9) If asserted, these provisions could force certain storage engine providers to license their storage engine under the GPL. This would reduce the incentives to develop such storage engines because it would prevent storage engine providers to implement a proprietary business model.

the Commission has identified competition concerns. The situation, however, is different when the facts of the case allow the Commission to arrive at the conclusion that a merger will not raise competition concerns.

The public announcement made by Oracle on 14 December 2009, addressed to the general public and in particular to open source users and developers and the subsequent actions taken by Oracle to implement some of the pledges constitute factual elements that the Commission had to take into account, along with all the other elements in its file, in its assessment of the likely impact of the transaction on the database market.

These needed to be taken into account in particular for the assessment of Oracle's incentive and ability to degrade or eliminate MySQL as well as for the assessment of a possible replacement of MySQL's potential competitive constraint by other open source databases or MySQL forks.

Furthermore, under Article 8(6) of the Merger Regulation the Commission may revoke a decision declaring a concentration compatible with the common market if the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible.

3.5. Could Oracle degrade or eliminate MySQL and would this be in Oracle's interest?

After the proposed merger it could be expected that the Oracle database and MySQL would stop competing as they would be offered by the same vendor. Possible concerns were that Oracle might stop offering or developing or might degrade MySQL under the GPL, or that Oracle might remove the constraint exerted by third-party storage engines by modifying the interface or refusing to grant storage engine vendors the commercial licenses that would allow them to market proprietary versions of their storage engines to work with MySQL ([10]).

The Commission's investigation, however, found that Oracle's ability and incentives to degrade and eliminate MySQL after the proposed merger would be constrained due to the availability of MySQL under the GPL. For this assessment the Commission also took into account the public announcement made by Oracle on 14 December 2009.

As part of its ten pledges, Oracle announced that it will continue to enhance MySQL and make subsequent versions of MySQL available under the GPL. Furthermore, Oracle pledged to maintain and periodically enhance MySQL's pluggable storage engine architecture to allow users the flexibility to choose from a portfolio of storage engines, including those developed by third parties. Also, Oracle pledged not to demand that third-party storage engine vendors obtain commercial (non-GPL) licenses in order to implement the application programming interfaces available as part of MySQL's architecture.

Taking into account these pledges and due to the specific characteristics of the open source product MySQL, the Commission found that Oracle was likely to continue offering and enhancing MySQL under the GPL after the proposed transaction. As regards the potential dynamic constraint exerted by MySQL, the public pledges addressing storage engine vendors are likely to sufficiently reduce Oracle's ability to disadvantage features of products that are based on MySQL, including those products that compete in the market with Oracle databases.

3.6. Could other open source databases or MySQL forks replace the competitive constraint exerted by MySQL?

As part of its compatibility assessment, the Commission also needed to examine the extent to which other database vendors would replace the potential competitive constraint previously exerted by MySQL if Oracle were to eliminate or degrade MySQL after the merger. If MySQL's competitive constraint could be replaced by another database, the merger would not give rise to competition concerns.

The Commission assessed the potential of other open source databases or MySQL forks to replace MySQL's competitive constraint. In this context the Commission also took into account the pledges made by Oracle. The Commission found that after the proposed transaction other open source databases, in particular PostgreSQL, would have the potential to constrain Oracle to an important extent and to replace the competitive constraint currently exerted by MySQL in a timely and sufficient manner. The Commission also did not exclude that forks of MySQL could replace the competitive constraint previously exerted by MySQL.

([10]) It should be noted that the incentives of Oracle appear to differ from the incentives of Sun with respect to the development of MySQL since Sun does not offer other database products. Therefore the Commission initially remained concerned that Oracle may have such a commercial interest in adopting a commercial and technology strategy that would degrade MySQL or position it in such a way that the competitive constraint exerted by MySQL would disappear over time.

3.7. Oracle support campaign and SaveMySQL petition: What is the evidentiary value of such campaigns?

The case raised a certain level of public attention and triggered reactions by many parties. Oracle garnered public support from many of its customers. The Commission received letters from more than 200 companies supporting the transaction. Following the oral hearing the Commission also started receiving a large number of e-mails from parties opposing the transaction, the large majority of which appear to have been sent in response to a call made by Monty Widenius, the founder of MySQL and owner of Monty Progam AB, on his blog. A related initiative, the 'SaveMySQL petition', attracted more than 40 000 signatures in a short time.

The Commission questioned the evidentiary value of the supporting letters. It appeared that many of the senders of the letters were motivated to write to the Commission only after they had been contacted by Oracle and encouraged to do so after the Commission had issued a Statement of Objections. These letters thus do not provide a representative and unbiased sample of the position of database customers with respect to the proposed transaction that would have the same standing, for example, as a customer survey. Similar comments could be applied to the e-mails and the petition. It would not be appropriate to base the competitive assessment of a notified concentration solely on a simple count of the number of submissions received for or against the particular concentration, especially when such submissions appear to have been the result of orchestrated campaigns as in this case.

4. Java

Java is a 'development environment' created by Sun about 20 years ago. A development environment is a software platform allowing developers to build and deploy software applications. Java-based applications can run independently of the underlying operating system or hardware. The way Java achieves this 'neutral' approach is through interface software known as the Java Virtual Machine ('JVM'). The JVM, which is available on various computer and device types and architectures (for example, there are JVMs for Windows, Linux, Unix and others), executes Java applications. The main other development environment is Microsoft's .NET, which can only be used for the development of software working on Windows.

Java is available, to a limited extent, under an open source license and free of charge (the OpenJDK platform ([11]), the binary executable versions of the JREs ([12]), etc.). However, in relation to certain uses of the Java IP rights, Sun licensed its rights to a number of software developers (among which EAS and middleware producers) against payment. The Commission investigated possible anti-competitive scenarios based on the fact that Oracle, by gaining control of these rights, could engage in a foreclosure strategy to the detriment of its downstream competitors in the middleware and EAS markets.

The investigation revealed that any possible foreclosure strategy by Oracle would have a limited impact on downstream EAS competitors, given that their dependence on a Java commercial license is limited.

On the other hand, Oracle's competitors for middleware products need commercial licenses for Java Technology Compatibility Kits (TCK) ([13]) in order to commercially distribute Java certified software products. (The freely available versions of the implementation of the J2EE middleware products in many cases are not sufficient for their needs.)

The ability to engage in any foreclosure strategy crucially depended on the legal and procedural framework under which the Java Community Process (JCP) operates. The JCP is constituted by a collection of bilateral contracts between Sun and 1 200 members ([14]). It is a participatory process for developing and revising Java technology specifications to which Sun, before the operation, and now Oracle is bound. Complainants submitted that Oracle, once it had acquired control of Sun, would also 'control' the JCP and, as a consequence, the licensing of Java-related IP rights. The Commission assessed the various assumptions made by the complainants in the light of the complex set of rules governing the JCP. It concluded that, on the basis of the current framework, there were no grounds to conclude that the merged entity would have the ability to engage in a foreclosure strategy by either controlling the development of the Java platform to the detriment of competitors or by degrading the Java licensing mechanisms.

(11) Program developers can use the Java Development Kit ('JDK') to write application software in Java.

(12) The Java Runtime Environment ('JRE') is a component of the Java platform needed to run programs written in the Java language. As a practical matter, the JRE is usually what users download to 'install Java' on their computers.

(13) The TCK is a piece of Java-based software comprising a series of tests, to certify that the firm's own version of the JRE is compliant with a Java platform specification. A company would need to obtain such certification since customers normally request it in order to be reassured that the software they purchase is 'Java compatible'.

(14) Currently, important competitors of both Sun and Oracle are represented in the JCP: IBM, SAP AG, Hewlett Packard, Oracle itself, Cisco Systems, Adobe Systems, RedHat, as well as companies like Google, Motorola, Intel (a competitor of Sun for microprocessors) and Philips.

In addition, as regards the merged entity's incentives, the Commission found that a foreclosure strategy was likely to damage the widespread support that Java currently enjoys among customers. In an industry characterized by strong network effects, the loss of this support would result in a significant reduction of the value of Java compliant applications and of Java as a 'neutral' application development framework. This would adversely affect the competitiveness of the Java based software products of the merged entity itself, to the benefit of the competing .NET platform. The Commission concluded that it was very unlikely that the benefits of foreclosure of access to Java would exceed the costs of such behaviour for the merged entity and that, therefore, the merged entity would have no incentive to foreclose.

5. Cooperation with the US authorities

The takeover of Sun by Oracle was also subject to merger control in the United States of America, where it was reviewed the Department of Justice (DoJ).

Throughout the process, the cooperation between the DoJ and DG Competition was close and frequent, based on full transparency. The continuous dialogue with the DoJ during the review included the attendance of a representative of the DoJ at the oral hearing in Brussels.

However, Oracle chose to notify the transaction to the Commission on 30 July 2009, which was several months after it had initially notified in the US. The two merger review processes were therefore not aligned in terms of timing. The merger was (re-)filed with the DoJ on 27 May 2009 and the DoJ issued a second request on 26 June 2009. The US cleared the transaction unconditionally on 20 August 2009, only a few days before the Commission adopted its decision to initiate an in-depth investigation.

The experience gained during the Oracle/Sun Microsystems investigation showed that in cases involving markets with a global scope companies should try to take into account the different procedural timelines when planning to notify mergers to the various competition authorities in order to allow a coordinated, simultaneous and efficient review by the competent authorities.

6. Conclusions

The Commission eventually took the view that the transaction was unlikely to have significant harmful effects in the database market and in the other markets affected by the transaction.

This case shows that the Commission is prepared to seriously investigate a theory of harm based on the elimination of a special competitive force and to intervene against the proposed concentration in case the evidence supports this theory. This is one of few cases where the Commission followed this type of theory of harm, which is however entirely in line with the Commission's Horizontal Merger Guidelines.

Moreover, the assessment of the database market involved the challenging analysis of the role of open source products, such as Sun's MySQL. Their relevance on the competitive landscape could not be assessed solely on the basis of a traditional revenue-based approach, but had to be evaluated in a wider and more sophisticated perspective. The Commission managed to assess a very broad body of evidence, including Oracle internal datasets, internal documents from the parties, surveys as well as input provided by customers and competitors.

While in any horizontal merger case it can be presumed that after the proposed transaction two previously competing products will no longer compete if they are owned by the same firm, the Commission considered it necessary in the present case, given the open source nature of MySQL, to go further and to assess if Oracle would be able and whether it would be in its interest to degrade or eliminate MySQL after the proposed transaction. The Commission found that this was not the case.

Of spectrum and Radio Access Networks: the T-Mobile/Orange joint venture in the UK

Jocelyn Guitton, Boryana Hristova, Vera Pozzato (1)

1. Introduction

On 8 September 2009, France Télécom and Deutsche Telekom, the French and German incumbent telecommunication operators, announced a 50/50 joint venture between their UK subsidiaries, Orange and T-Mobile, with the purpose of combining their mobile telecommunications businesses.

The operation brought together the third (Orange) and fourth (T-Mobile) players in the UK retail mobile telephony market, behind the market leader O2, and the number two, Vodafone. Pre-merger, 3UK (2) was the number five player, with a significantly smaller market share.

In addition to these five Mobile Network Operators (MNOs), i.e. operators which own their mobile network, there are around 25 other Mobile Virtual Network Operators (MVNOs) in the UK, representing around 5 % of the mobile retail market in total. In the UK wholesale mobile market, T-Mobile was the leading player by number of subscribers and by revenues, mainly because of its wholesale agreement with the MVNO Virgin. Orange had a minor market share, below 10 % by subscribers and by revenues).

The merger investigation of the transaction took place against the background of quickly- evolving regulatory and market circumstances. On the one hand, the United Kingdom was implementing the European Directive (Directive 2009/114/EC (3)) for liberalisation and refarming of the 900 MHz, in order to free it also for 3G traffic. On the other hand, the UK Government, together with the UK telecoms regulator OFCOM, was planning a spectrum auction, in which mobile operators could bid for the 800 MHz band (the so-called Digital Dividend, to be freed by moving from analogue to digital television) and the 2.6 GHz band (the 'Combined Auction') (4).

The preliminary design of the Combined Auction was agreed in the course of 2009 after long negotiations between all UK mobile operators and OFCOM. The result included the introduction of spectrum caps to ensure that mergers between MNOs would not lead to an undue concentration of one spectrum band in the hands of a single mobile operator. Nevertheless, in its consultation document, the 'Digital Britain Report' , the UK Government also stated that, in case of market consolidation, the Competition authorities would remain free to impose remedies other than spectrum caps and that any Direction to OFCOM would be conditional on further remedies imposed by the Competition Authorities that would need to be implemented.

Given the complex regulatory issues involved and the UK focus of the transaction's impact, close cooperation between the Commission and both the Office of Fair Trading (OFT) and OFCOM proved to be very useful.

The transaction attracted broad public attention and a number of complaints from competitors and consumer organisations, which pleaded *inter alia* for the case to be referred to the UK authorities.

The Commission's investigation focussed on four issues, namely (i) direct effects of the transaction on the retail market, (ii) direct effects of the transaction on the wholesale market, (iii) effects on T-Mobile's existing Radio Access Network (RAN) sharing agreement with 3UK and (iv) effects on the distribution on radio frequency spectrum holdings.

2. Retail market

In its investigation, the Commission confirmed the parties' claim that the UK market for retail mobile services was highly competitive and was likely to remain competitive following the proposed transac-

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

(2) 3UK is the UK subsidiary of the multinational group Hutchinson Whampoa Limited.

(3) Directive 2009/114/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directive 87/372/EEC on the frequency bands reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community. The ability to provide 3G services is subject to a requirement for technical co-existence with 2G services.

(4) The design of this auction, which was subject to public consultation, was expected to be finalised on the basis of a Direction to OFCOM, which was supposed to be approved by the Houses of Parliament before the May 2010 general elections were called. However, the previous Parliament did not manage to approve the Direction in time, and the new Government has not yet provided clear indications as to its intentions as regards the Direction (situation as of July 2010).

tion, taking into consideration the market's structure and characteristics.

The penetration rate of the UK mobile communication market was more than 125 %. While the parties would have had a combined [30-40] % market share, the merged entity would face competition from two comparably strong players, O2 and Vodafone, as well as of the smallest MNO, 3UK. The UK mobile communication market was further characterised by the presence of a large number of 'general' MVNOs, such as Virgin and Tesco, and a series of other MVNOs, such as Lebara or Lycamobile, offering low-cost international calls to customers from ethnic and immigrant groups. MVNOs not only competed on price and consumer service with their host networks, but also stimulated competition by introducing innovative business models. The Commission also found that, according to independent surveys and studies, prices of a basket of mobile services had been falling year-on-year. Furthermore, the market was characterised by consumers with significant switching rates among competitors, and by efficient distribution channels. In addition, the parties provided comprehensive switching data showing that they were not particularly close competitors, and that neither of them was a particularly important competitor. Both parties had lost market share over time. Overall, based on numbers of subscriptions, their market share had been decreasing between 2004 and 2008.

The Commission therefore concluded that the transaction would not have a direct negative impact on competition for mobile telephony in the UK retail market.

However, the investigation also addressed the possible effects of the merger on the role of 3UK in this market. 3UK was found to be an important driving force for competition on the UK mobile market. It was the first to introduce a low-cost, flat-rate mobile broadband package and was continuing to maintain its price leadership position in mobile broadband services: it offered the cheapest mobile broadband data package on the market. 3UK was also the first UK operator to introduce new products such as mobile broadband dongles aimed at a mass-market audience.

For reasons further explained below, the Commission came to the conclusion that the transaction might have indirectly affected 3UK's role on the retail market. However, as this aspect also affected the assessment of the wholesale level of the UK mobile communication market, the question as to whether 3UK would have remained a viable competitor after the proposed transaction will be dealt with separately below.

3. Wholesale market

The Commission investigated whether the proposed merger would alter the opportunities for MVNOs to have access to the networks of the MNOs, thereby limiting the competitive pressure that they were able to exert on the largest players (namely, O2, Vodafone, T-Mobile, Orange and 3UK). In particular, the Commission verified whether the transaction could have direct anti-competitive effects as a result of the ensuing reduction in the number of MNOs and/or of a possible capacity reduction that combination of the networks could entail.

3.1. Reduction in the number of MNOs

At the wholesale level, the transaction reduced the number of players from five to four. The merger created the number one player both by subscribers [40-50 %] and by revenues [40-50 %], ahead of O2 ([20-30] % by subscribers, [20-30] % by revenues) and Vodafone ([20-30] % by subscribers, [20-30] % by revenues), while 3UK had only a negligible market share. However, the parties provided switching and bidding data showing strong competition between MNOs at wholesale level. Moreover, the Commission did not receive substantiated complaints on excessive concentration at the wholesale level.

3.2. Reduction in capacity available to MVNOs

The Commission raised the possible effect on capacity at wholesale level at an early stage of the investigation. Sufficient unused network capacity is a key prerequisite for supplying wholesale communications to MVNOs and an incentive to attract new wholesale customers. Network capacity is determined on the basis of the radio frequency spectrum available to the network, the number of sites/cells, and the number of carriers within a cell (5) that transmit the radio signal between the mobile terminal equipment and the antenna. MNOs usually have spare capacity on their network to address increases in demand within the medium term. Consequently, particularly in a situation such as that in the UK, where there are already a significant number of MVNOs present in the market, they do not have the incentive to foreclose MVNOs, as the losses that they would incur in doing so exceed any retail revenues they would pick up should these MVNOs exit the market.

Although the main synergies expected from the merger would stem from the combination of their respective networks, the parties claimed that the

(5) Those factors have a direct incidence on the number of calls that can be handled through a single cell.

combined entity's network rationalisation would eventually lead to a more efficient network, with more capacity. The parties notably explained that there is no direct relation between the number of sites and the capacity of a network, since a single site can host several carriers operating on different spectrum bands.

While the Commission received some complaints from MVNOs indicating that the merger might reduce capacity or bargaining power, none of these complainants suggested that the operation could increase the parties' incentives to foreclose MVNOs. The market investigation revealed, on the contrary, that all MNOs would continue to own unutilised spectrum capacity (though possibly reduced compared to the current situation) and that they would continue to have an incentive to host existing and additional MVNOs, and even possibly have more incentives to compete aggressively to acquire MVNO customers.

Finally, the Commission also found that foreseeable rising needs in capacity necessary to address the exponentially-growing bandwidth demand for data transmission and mobile internet access would limit the parties' incentives to reduce their network capacity, either within the course of network rationalisation, or in view of future investments.

4. T-Mobile's RAN sharing agreement with 3UK

4.1. The existing agreements

3UK is the only MNO in the UK exclusively holding a 3G network. In order to limit operational costs and to enhance the coverage it offers to its customers, in 2007, 3UK entered into two network agreements: a 3G RAN sharing agreement with T-Mobile and a 2G national roaming agreement with Orange ([6]).

3UK and other complainants expressed concerns to the Commission with regard to the future of the RAN sharing agreement, and the negative consequences that termination of it would entail both for 3UK and the UK mobile market in general. The Commission carefully analysed these complaints in view of the fact that 3UK has been a particularly important driver of innovation and competition in the UK in recent years. The Commission investigated whether the merger could potentially change the merged entity's behaviour in relation to 3UK and, in particular, whether the consolidation of Orange's and T-Mobile's network could have a direct negative impact on current agreements with 3UK, leading ultimately to its marginalisation or, in the worst case scenario, to its elimination as an important competitive force.

4.2. Ability of the parties to terminate or severely compromise the RAN sharing agreement

The parties claimed that they would have no real ability to terminate the RAN sharing agreement in the short term, since it had been agreed on a long-term basis, and a unilateral early termination would entail payment of significant penalties. Besides, any breach of the agreement by any of the parties would be sanctioned by significant deterrence payments.

3UK claimed that the parties would *de facto* be able to damage the agreement in the short term without incurring any significant penalty cost.

The Commission found that, although the agreement had a number of safety clauses that could to some extent guarantee 3UK's position, the creation of the JV with Orange might have an effect on T-Mobile's commitment to the agreement. T-Mobile might be able to use certain provisions related to the decision-making process within the joint venture with 3UK as a tool to slow down and hinder 3G RAN's development to the detriment of 3UK.

Furthermore, the Commission noted that it had still not been agreed how completion of the integration of T-Mobile's and 3UK's RAN on the one hand, and T-Mobile's and Orange's networks on the other, would be carried out. This aspect could potentially cause serious damage to the development and maintenance of the RAN shared network and, as a consequence, seriously compromise 3UK's ability to compete effectively.

Therefore, the Commission concluded that, in the absence of appropriate remedies, the parties post-merger might have the ability to terminate early, or, at least, to compromise the functioning of the existing 3G RAN sharing agreement, to the detriment of 3UK.

([6]) 3UK explained that the 2G roaming agreement is currently necessary to ensure the extensive coverage required by customers of mainly voice and text messaging services. Once the integration of T-Mobile's and 3UK's 3G networks is completed, the relevance of the 2G agreement with Orange will significantly decrease. Under the RAN share, the companies agreed to merge their existing RANs to create a single 13 000 site network and set up a joint venture to manage the integration (hereinafter 'the RAN sharing JV'). Once completed, the network is supposed to increase 3UK's sites footprint and guarantee to 3UK an extensive coverage of service, for both voice/messaging and data transmission.

4.3. Incentives of the parties to terminate or severely compromise the RAN sharing agreement

The Commission observed that the calculation of incentives in this case, as presented by the parties and 3UK, was particularly complex, as it involved a comparison between cost savings (from maintaining the RAN agreement running) and possible profit gains from acquisition of the competitors' customers (in the case of marginalisation of 3UK) and would probably deserve an in-depth investigation. This concern was shared by the OFT.

However, the Commission also noted that it could not be excluded that T-Mobile, instead of trying to terminate the agreement, might instead try to reduce the quality of the RAN with 3UK (for instance, as mentioned above, by using certain deadlock provisions) to weaken the quality of its services to customers. Ultimately, T-Mobile, without incurring the high liabilities provided for by the contract, might prefer to accelerate the integration of its network with Orange's network, while slowing down the integration of the RAN with 3UK, or reducing the RAN's quality. As a consequence of a lower quality service, 3UK's competitive pressure on the JV might be significantly reduced and the JV might gain a large number of 3UK customers.

Therefore, the Commission concluded that the parties, post-merger, might have the incentive to terminate early, or to compromise the functioning of the existing 3G RAN sharing agreement to the detriment of 3UK.

The possible disappearance of 3UK or the degradation of its competitive position could consequently have a serious impact on the UK retail mobile communication market. That would mean the merger could, in a worst-case scenario, ultimately lead to concentration from five to three players. The OFT and OFCOM also expressed concerns on this issue. In order to resolve the competition concerns raised by this element of the transaction, the parties submitted commitments (see below).

5. Concentration of spectrum

5.1. Spectrum holdings of UK MNOs

Following the operation as initially notified, T-Mobile and Orange would have held a combined amount of contiguous spectrum at the 1 800 MHz frequency level significantly larger than their competitors:

	900MHz	1800 MHz	2100 MHz	Total
Orange	-	2x30 MHz	2x10 MHz	2x40 MHz
T-Mobile	-	2x30 MHz	2x10 MHz	2x40 MHz
Combined	-	*2x60 MHz*	*2x20 MHz*	*2x80 MHz*
Vodafone	2x17.4 MHz	2x5.8 MHz	2x15 MHz	2x38.2 MHz
O2	2x17.4 MHz	2x5.8 MHz	2x10 MHz	2x33.2 MHz
3UK	-	-	2x15 MHz	2x15 MHz
Total	2x35 MHz	2x72 MHz	2x60 MHz	2x167 MHz

In the context of mobile broadband communication, three dimensions of an operator's spectrum holdings are particularly relevant: (i) the aggregate amount of spectrum available, which is the main determinant for capacity, (ii) the frequency band used, since different frequency bands present different propagation characteristics: lower frequency spectrum (e.g. 900 MHz) is generally preferable to higher frequency spectrum — e.g. 1800 MHz or 2600 MHz — as lower frequency signals generally travel further and penetrate more deeply into buildings than do higher frequency signals; and (iii) the amount of contiguous spectrum available. Contiguous spectrum is generally preferable, as this can allow both the provision of higher speed end-user services and the provision of moderate speed end-user services more consistently over a larger area.

In addition to the spectrum described above, two further bands of spectrum are due to be made available within the next few years (2x30MHz of spectrum in the 800MHz band and 2x70MHz in the 2 600 MHz band). At the time of the investigation, the UK Government was holding a consultation on proposals that would entail the auctioning of these two bands of spectrum together in the first half of 2011.

5.2. Next generation — Long Term Evolution

Long Term Evolution ('LTE') technology, also referred to as fourth generation ('4G') will be developed in UK within the coming years. Compared to previous generations (3G or HSPA), it is expected to provide higher bandwidths, especially suitable for faster data transmission.

The Commission investigation revealed that the distribution of spectrum among competitors for the provision of next generation mobile broadband services is likely to have a significant impact on the shape of future competition for the provision of mobile services. Notably, in order to deploy the most efficient and fastest download speed LTE technology, contiguous spectrum of 2x20 MHz is preferable, and necessary to achieve the maximum bandwidth possible (a speed of 100 Megabit per second – 'Mbps'). While LTE can also be launched on 2x10 MHz or even smaller bands, on the basis of current technologies, the full speed will not be reached if this smaller amount of spectrum is used.

5.3. Adverse impact on competition

As a result of the combination of the 1 800 MHz spectrum bands currently held by T-Mobile and Orange, the merged entity could have been the only MNO with a clear path to full coverage maximum-speed LTE technology in the UK. It seemed plausible that the 1800 MHz spectrum could have been used by the JV to launch a national 2x20 MHz LTE network in the near future, notably due to the fact that it could have used its significant amount of spectrum at the 1800 MHz level (2x60 MHz combined) to clear 2x20 MHz within a short time frame, while migrating customers from one of the merging parties' networks to the other, offering up to 100Mbps speed. On the basis of current technology, a competitor with less than 2x20 MHz exclusively dedicated to LTE would not be able to offer this speed.

The merger could thus possibly have led the parties to have the only full-speed national LTE network in the short to medium term, since the amount and type of spectrum held by an MNO dictates its ability to launch a LTE network as well as the speed of that LTE network.

5.4. The situation in the absence of the merger

In the absence of the merger, several scenarios could have been envisaged. The allocation of spectrum pre-merger would have allowed for up to five networks to be built in the medium/long term. A key point is that the additional spectrum to be auctioned could have enabled the different MNOs, including the parties on a stand-alone basis, to launch a mixed frequency LTE network, by combining (a) rural LTE networks using either 800 MHz or 900 MHz spectrum and; (b) an urban LTE network using 1 800 MHz or 2 600 MHz spectrum. Another option available to MNOs, which would have allowed the earlier launch of full coverage 2x20 MHz LTE networks, would have been to pool spectrum in the 1 800 MHz band. Therefore, in the absence of the merger, it seems likely that more than one LTE network would have emerged in the UK market.

The concentration of spectrum in the 1 800 MHz band could therefore have an anti-competitive impact on the future of the UK mobile telephony market, both at wholesale and at retail level. The OFT and OFCOM also expressed concerns on this issue. In order to resolve the competition concerns raised by this element of the transaction, the parties submitted commitments (see immediately below).

6. Remedies

The parties submitted formal commitments to address competition concerns identified in relation to (i) 3UK's position on the market and (ii) the concentration of spectrum in the 1 800 MHz band. Following comments received after the Commission market test and contacts with the OFT and OFCOM, the parties submitted a final revised set of commitments on 11 February 2010.

6.1. T-Mobile's RAN sharing agreement with 3UK

The parties initially offered a unilateral commitment to modify and amend the 3G RAN sharing agreement and the 2G national roaming agreement according to terms set out in a draft agreement attached to the commitments. The Commission's main concern regarding the binding unconditional offer proposed by the parties is that the offer did not meet the criteria the Commission had established in relation to remedies offered in first phase (7). A unilateral commitment which depends on the agreement of a third party not bound by the commitments themselves does not resolve the problem identified in a clear-cut manner.

(7) 'The remedies [should be] so clear-cut that it is not necessary to enter into an in-depth investigation and that the commitments are sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) of the Merger Regulation', Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, paragraph 81, OJ 2008/C 267/01.

The parties subsequently managed to reach an agreement with 3UK on 19 February 2010. The object of that agreement was:

(i) the timing of the consolidation of the 3G RANs of T-Mobile and 3UK;

(ii) the cancellation of certain early termination rights;

(iii) the extension of the 2G agreement and the reduction of charges thereof;

(iv) a mutual commitment to negotiate and conclude a network integration plan between the parties and 3UK; and

(v) a fast-track dispute resolution mechanism to guarantee the speedy resolution of any related dispute.

The Commission considered that the agreement reached with 3UK clearly met the competition concerns raised during the market investigation. In particular, the parties and 3UK reached certainty on the terms of the plan to integrate the respective networks, one of the most serious concerns in the Commission's *prima facie* assessment. Given that a clear sequence of events had been established and that a fast-track dispute resolution mechanism had been introduced, the possibility of the parties reducing the quality of the shared RAN with 3UK had been severely limited.

6.2. Spectrum

In order to remove possible concern as regards the JV's spectrum holding following the proposed transaction in the UK market, France Télécom and Deutsche Telekom made a commitment to divest, either by way of a private sale or in the OFCOM auction (see above), 2x15 MHz of the JV's 1 800 MHz spectrum band (the 'Divestment Spectrum').

The Divestment Spectrum consists of:

(i) 2x10 MHz of the JV's 1 800 MHz spectrum ('Divestment Spectrum I'); and

(ii) further 2x5 MHz of the JV's 1 800 MHz spectrum ('Divestment Spectrum II').

The parties made a commitment to divest or procure the divestment of the Divestment Spectrum I and II by a defined deadline. In addition, the parties made an undertaking that the Divestment Spectrum I would be cleared and all related licences would be surrendered to OFCOM by no later than 30 months after the end of the OFCOM auction, and no later than 30 September 2013, whichever is earlier.

The parties undertook that the Divestment Spectrum II would be cleared and all related licences would be surrendered to OFCOM by no later than 30 September 2015.

After the market test, and on the basis of observations raised by both OFCOM and OFT, the parties submitted further specifications to address a number of uncertainties connected to the sequence of the private sale and of the auction options for divestiture. This concern was related to the fact that, in making spectrum purchasing decisions, operators need to have a clear idea of the spectrum holdings of the various competitors. In addition, the revised set of commitments took into account a number of concerns that had been raised either by the respondents to the market test or by the UK Authorities.

The amendments to the text of the commitments ensure greater clarity as to the time-line for the different alternative divestment processes for the Divestment Spectrum. Regarding the possibility of making a private sale of the Divestment Spectrum under national law, OFCOM has confirmed to the Commission that it intends to legislate in order to enable lawful trading of the 1 800 MHz spectrum licenses. The text expressly indicates that the purchaser of the 2x10 MHz should also be the purchaser of the 2x5 MHz. This will ensure that the purchaser holds a sufficient amount of spectrum to allow independent deployment of a competitive LTE network. The divestiture mechanism of the commitments provides that, if the spectrum were to be offered unconditionally in an OFCOM auction, the Commission would have to approve the successful bidder on the basis of the same criteria established for the potential purchaser. The Commission will therefore retain control over the possible successful bidder in the auction.

The Commission concluded that the above commitments clearly solved the *prima facie* serious doubts expressed with respect to T-Mobile's radio access network-sharing agreement with 3UK and to the excessive concentration of spectrum in the hands of the merged entity.

7. Cooperation with the UK authorities

The transaction provides an excellent example of close and productive cooperation between competition and regulatory authorities (OFCOM) and between the Commission and a national competition authority (OFT). Given that the transaction had a Union dimension, the parties opted for a notification to the Commission from the start. However, given the UK focus of the transaction and the regulatory issues at stake, a referral request to the UK from the OFT was considered likely. As of pre-notification, the Commission therefore engaged in close cooperation with OFCOM and the OFT.

On 3 February 2010, following a public consultation, the OFT submitted a request to the Commission to accept a referral to examine the proposed transaction pursuant to Article 9 (2) (a) of the EU Merger Regulation. The OFT based its request on the concerns that the Commission had already identified.

Subsequently, the parties proposed a package of remedies, which was market-tested and fine-tuned in the course of the investigation. Both UK authorities were also very cooperative during the remedies negotiations. The Commission benefited in particular from OFCOM's regulatory knowledge of the British mobile telephony market.

In the light of the commitments offered by the parties, the OFT withdrew its referral request on 1 March 2010.

8. Conclusion

This case presented a number of challenges not only for the Commission, but also for its two UK counterparts, OFT and OFCOM.

(1) The analysis of the UK regulatory framework proved to be a demanding exercise. In particular, there was uncertainty connected with the future of the Government's direction regarding the spectrum auction.

(2) At a very early stage of the investigation, the Commission became aware of the importance of the outcome of the merger with respect to the future allocation of the spectrum and the future dynamics of the UK mobile telecommunications market.

(3) As the parties decided not to request a pre-notification referral of the case to the UK authorities, the Commission had to cooperate closely quite early in the process with both the Office of Fair Trading, which expressed its interest in requesting a referral pursuant to Article 9 of the Merger Regulation, and OFCOM, whose concern about the concentration was dictated by the importance of the outcome of the merger with respect to the allocation of the spectrum and the future dynamics of the UK mobile telecommunications market.

(4) Finally, a small number of active complainants were particularly vigilant regarding the transaction, and submitted technically detailed complaints that had to be taken into account in the Commission's assessment.

In conclusion, close cooperation between the Commission and the two UK authorities, as well as the positive attitude the parties showed in dealing with a complex process, were particularly crucial in allowing the authorities to achieve their shared goal, namely to maintain competition in the UK mobile telephony market for the benefit of consumers.

Merger: main developments between 1 January and 30 April 2010

John Gatti [1]

1. Introduction

During the period from 1 January to 30 April 2010 the number of notifications received fell to 81 from 109, 26 % less than in the previous period. However this represented a rise from the 75 cases notified in the corresponding period of 2009. The Commission adopted a total of 84 first phase decisions of which 74 were unconditional clearances. Decisions adopted under the simplified procedure accounted for 43 of the first phase total or 53 %. Seven first phase decisions were cleared conditionally and one case was cleared after an in-depth second phase investigation. Four decisions were taken under Article 4(4) to refer cases with a Union dimension back to Member States. Member States accepted 7 requests from parties for cases to be referred to the Commission and refused one under Article 4(5). The Commission also accepted the request of five Member States under Article 22 to examine a case with no Community dimension [2]. The Commission refused the request of a sixth Member State. Finally the Commission referred two cases to Member States following requests made under Article 9.

2. Summaries of decisions taken in the period

2.1. Summaries of decisions taken under Article 6(2)

Kraft / Cadbury

The European Commission cleared, on January, the proposed acquisition of Cadbury PLC of the UK by Kraft Foods Inc. of the US. The decision is conditional upon the divestment of Cadbury's Polish and Romanian chocolate confectionary businesses.

Kraft is a worldwide food and beverage company active in more than 150 countries. Cadbury is a worldwide producer and seller of chocolate and sugar confectionery products in over 60 countries.

Both Kraft and Cadbury are strong players in the chocolate confectionary business in the EEA. With its main chocolate brands Milka, Côte d'Or and Toblerone, Kraft has a very strong presence in most Member States, with the exception of the UK and Ireland where customers' preferences remain strong for traditional British chocolate. Cadbury is the market leader in the UK and Ireland, in particular with its Dairy Milk brand. In continental Europe Cadbury is mainly active in France, Poland, Romania and Portugal, with local brands.

Cadbury has very significant market shares in the UK and Ireland, however, the penetration of Kraft's brands in these markets remains low. In addition, Kraft's and Cadbury's brands are not close competitors, given the strong preference of UK and Irish customers for traditional 'British' chocolate as opposed to 'continental' chocolate. Therefore, the Commission found no competition concerns in the UK and Irish markets.

However, the Commission identified competition concerns within chocolate confectionery in Poland and Romania, where the combined market share of Kraft/Cadbury is particularly high and their brands compete closely, in particular in the chocolate tablets markets.

To remedy these concerns, Kraft committed to divest Cadbury's Polish confectionery business marketed under the Wedel brand and Cadbury's domestic chocolate confectionery business in Romania.

After market testing the proposed commitments, the Commission considered that they would remove the identified competition concerns and therefore concluded that the proposed transaction, as modified by the commitments, would not raise competition concerns.

Agilent / Varian

On 21 January the Commission cleared the proposed acquisition of Varian Inc by Agilent Technologies Inc, both of the US. The decision is conditional upon the divestment of Agilent's entire micro/portable gas chromatography instrument business and Varian's entire laboratory gas chromatography, triple quadruple gas chromatography-mass spectrometry and inductively coupled plasma-mass spectrometry instrument businesses

Both Agilent and Varian are active in the design, development, manufacture and sale of bio-analytical measurement products, including analytical and life

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

(2) M.5828 *Proctor and Gamble: Sara Lee – Air Care.*

science instruments and the associated services, consumables and software.

The activities of the parties overlap in relation to a number of sectors within the analytical instrumentation and consumables in the EEA. The Commission identified competition concerns in relation to each of the Laboratory Gas Chromatography (Lab GC), micro/portable Gas chromatography, triple quadruple Gas Chromatography-Mass Spectrometry instruments (triple quad GC-MS) and Inductively Coupled Plasma-mass Spectrometry (ICP-MS) instrument markets in the EEA. These instruments are used to detect and quantify molecular and atomic components in a given sample.

The proposed transaction would bring together close competitors in the EEA Lab GC, micro/portable GC and ICP-MS instrument markets where the combined entity would have significant market shares.

As regards the EEA triple quad GC-MS instrument market, the proposed transaction would result in the elimination of an important competitive force in the market. Varian already has a large market share on this market and, although a recent entrant, Agilent competes closely with Varian on this market and had rapidly established a significant presence.

To remedy the concerns raised by the Commission in relation to each of these markets, Agilent and Varian have committed to divest Agilent's entire global micro/portable GC instrument business and Varian's entire global Lab GC, triple quad GC-MS and ICP-MS instrument businesses.

After market testing the proposed commitments, the Commission concluded that they would remove the competition concerns identified and ensure that effective competition would not be impeded as a result of the proposed transaction.

TLP / Ermewa

The Commission has cleared the proposed acquisition of the Swiss company Financière Ermewa (Ermewa) by Transport et Logistique Partenaires SA (TLP) owned by the French railway company SNCF on 22 January. This clearance is conditional upon the divestment of Ermewa's European activities involving axial hopper wagon hire for cereal transportation and its involvement in the organisation of cereal transport by rail. This transaction results in a change of control for the Ermewa Group from joint control (TLP and Citerne Invest) to sole control by TLP.

TLP is fully owned by SNCF Participations, a subsidiary of the SNCF. TLP holds the group's shareholdings in the freight wagon hire and transport organisation sector (particularly for cereals) and in combined transport. The SNCF group provides passenger rail transport services on the national rail network together with other rail transport services.

Ermewa is involved in freight wagon hire and the organisation of transport (of cereals in particular), and in tank container hire, in several EU Member States.

After the transaction the parties' activities will overlap in the wagon hire, transport commissioning, and freight wagon repair and maintenance markets. The operation will also result in the creation or reinforcement of certain vertical links, in particular between rail traction and rail transport commissioning, and between rail transport commissioning and tank container hire.

It emerged from the Commission's market investigation that the planned transaction was likely to raise competition concerns on markets linked to the transportation of cereals by rail, in particular the market for the hire of axial hopper wagon, and on the cereal rail transport commissioning market in France, Benelux, Italy and the part of Germany where such wagons are used. The planned transaction would have had the effect of bringing together the two main operators in this field, leading to the creation of an unavoidable partner for cereal shippers in the areas in question.

To address these concerns, TLP offered to divest all its commissioning activities for the transportation of cereals by rail and a fleet of cereal hopper wagons. After market testing the proposed remedies the Commission considered that they would address the competition concerns identified in its market investigation and, therefore, concluded that the planned transaction, as modified by the commitments, would not raise competition concerns.

Abbott / Solvay Pharmaceuticals

On 11 February the Commission approved the proposed acquisition of Solvay Pharma (Belgium) by Abbott Laboratories (USA). The decision is conditional upon the divestment of the Cystic Fibrosis testing business of Solvay Pharma's subsidiary Innogenetics in the European Economic Area (EEA).

Abbott is a global company active in pharmaceutical and nutritional products, medical devices and diagnostics products. Solvay Pharma is the pharmaceutical division of Solvay S.A. It is active in the in-vitro diagnostic ('IVD') sector following its acquisition in 2008 of Innogenetics N.V., a Belgian biotechnological company active in this field. IVD systems comprise dedicated items of equipment and reagents that allow tests for various diseases to be carried out (e.g. from samples of tissue or blood).

The Commission's investigation found that competition concerns could be excluded in the pharmaceutical markets, due to the limited horizontal overlaps between the parties' activities and low combined market shares.

The Commission also investigated the potential effects of the proposed transaction on IVD markets where competition concerns could be excluded in most of these markets due to small increments and the presence of a sufficient number of credible competitors.

However, the Commission found that the proposed operation would raise competition concerns in relation to cystic fibrosis testing on an EEA-wide level as well as in a number of individual Member States. In these markets, the parties' combined market shares would have been very high. The Commission was concerned that customers would face increased prices and reduced choice.

To address the Commission's concerns, Abbott offered to divest the Cystic Fibrosis testing business of Innogenetics in all EEA countries. In view of these commitments, and following a market test, the Commission concluded that the transaction would no longer raise competition concerns.

Otto / Primondo Assets

The Commission cleared, on 16 February, the proposed acquisition of certain assets of the insolvent Primondo by Otto, both Germany-based home-shopping companies. Otto acquires trademarks, including the Quelle brand, trademark applications, internet domains and the right to use the Quelle customer data base for Germany. The decision is conditional upon the divestiture of certain trademarks and the trademark purchasers having the right to use the Quelle customer data base under the same conditions as Otto.

Otto is a trading and service company, which is internationally active through its subsidiaries in various retail channels (including home-shopping), financial and other services. Home-shopping comprises sales to consumers by catalogue, e-commerce and other means of distance selling. Quelle was active in the retail business and focussed on home-shopping. Quelle belonged to the insolvent Primondo group and went into insolvency proceedings on 1 September 2009. Otto is the market leader in the German home-shopping market where, prior to its insolvency Quelle was Otto's strongest competitor.

The transaction raised competition concerns in eight different product categories of the German home-shopping market, for example women's clothes and sport textiles. The Commission's investigation showed that through the acquisition of the Quelle trademark and the use of the Quelle customer data, Otto would be able to take over a significant part of the Quelle business.

To address these competition concerns, Otto offered to divest certain trademarks including, Webschatz, Universum or Casamaxx. In addition, the purchaser of the trademarks would be given the right to use the Quelle customer data to the same extent and under the same conditions as Otto. Following a market test, the Commission concluded that the commitments offered by Otto remedy the competition concerns.

The Commission's clearance decision also covers the acquisition of Quelle Russia by Otto which is part of the same concentration and which did not raise any competition concerns.

Orange / T-Mobile

The Commission cleared, 1 March, the proposed merger of Orange UK and T-Mobile UK, respectively France Télécom's (FT) and Deutsche Telekom's (DT) UK subsidiaries. The decision is conditional, firstly upon the amendment of an existing network sharing agreement with Hutchison 3G UK (3UK), to ensure that sufficient competitors remain in the market, and secondly the divestiture of a quarter of the merging parties' combined spectrum in the 1 800 MHz band, which is one of three frequency bands currently used for mobile communications in the UK.

Orange UK is a wholly-owned subsidiary of the French incumbent telecommunications operator France Telecom. It provides mobile telephony services in the UK and, to a lesser extent, broadband internet access services on a fixed network. T-Mobile UK is a wholly-owned subsidiary of the German incumbent telecommunications operator Deutsche Telekom. It provides mobile telephony services in the UK.

In the course of the investigation, the Commission identified no direct concerns in relation to the market for the provision of mobile telecommunications services to end-consumers, the wholesale market for access and call origination on public mobile telephones and the wholesale market for international roaming and related markets.

However, the Commission investigation showed that the transaction might endanger the future of T-Mobile's Radio Access Network sharing agreement with 3UK (the Radio Access Network being one of the main infrastructure elements of a mobile network). 3UK is the smallest mobile network operator (MNO) in the UK and is owned by Hutchison Whampoa. This could threaten 3UK's viability and possibly lead to the elimination a competitor. With the merger of the subsidiaries of FT and DT there will be only four players in the UK, hence the concerns about the fate of 3UK.

Second, the investigation also revealed that the contiguous spectrum held by the combined entity at the 1 800 MHz level (60 MHz) would be significantly larger than that of their competitors. This could result in the new entity being the only MNO in the UK able to offer next-generation mobile data services medium term through Long Term Evolution (LTE) technology at the best possible speeds.

In order to address the competition concerns identified by the Commission, the parties concluded a revised agreement with 3UK which will secure its position as a competitive force on the market, and offered to divest 15 MHz of spectrum at the 1 800 MHz level. The Commission concluded that the commitments offered by the parties remedy the identified competition concerns.

The Commission cooperated closely with both the OFT and the UK's telecommunications regulator OFCOM throughout the investigation. On 2 February 2010, the OFT submitted a request to the Commission to refer to it the examination of the proposed transaction pursuant to Article 9 (2) (a) of the EU Merger Regulation. However, in light of the commitments offered by the parties, the OFT withdrew its referral request on 1 March 2010.

Cisco / Tandberg

On 29 March the Commission approved under the EU Merger Regulation the proposed acquisition of Tandberg, a vendor of videoconferencing products with dual headquarters in Norway and in the US, by Cisco of the US. The approval is conditional upon the divestment of a protocol developed by Cisco for its videoconference solutions, called 'TIP', to ensure the interoperability of the merged entity's products with those of its competitors.

Cisco Systems is active globally in the development and sale of networking products. In particular it designs, manufactures, and sells Internet Protocol (IP)-based networking products related to the communications and information technology industries, and, specifically, to video communications solutions systems. Tandberg is also a vendor of a broad range of video communications solutions systems. In addition, Tandberg produces Multipoint Control Units ('MCUs') which are devices needed for communications that are not simply 'point-to-point' connections between compatible videoconferencing formats.

The proposed transaction would result in horizontal overlaps in the markets for video conferencing solutions. The concentration would also give rise to vertical and conglomerate effects, as Tandberg is active in the upstream MCUs market and Cisco in the neighbouring markets for networking products. The Commission's market investigation confirmed that there were no significant concerns with regard to the markets for multipurpose room and desktop solutions, or in relation to the vertical and conglomerate effects of the proposed transaction.

In the course of its investigation, the Commission identified serious competitive concerns in relation to the market for high-end video conferencing products video conferencing solutions (dedicated-room solutions) often referred to as 'telepresence', where the combined entity would have high market shares.

In order to address these concerns, Cisco committed, *inter alia*, to divest the rights attached to its proprietary protocol TIP to an independent industry body, to ensure interoperability with Cisco's solutions and to allow competitors to participate in the development and in the updates of the protocol. Following a market test, the Commission concluded that the commitments were suitable to remove the competition concerns.

This structural remedy facilitates market entry or expansion irrespective of where the competitor or its target customers are located. Moreover, the remedy is designed to ensure that an independent industry body will develop an industry-based proposal for a standard protocol; this proposal will then be submitted to a standard setting organization.

2.2. Summaries of decisions taken under Article 8

Oracle / Sun Microsystems

The Commission approved, on 20 January, the proposed acquisition of US hardware and software vendor Sun Microsystems Inc. by Oracle Corporation, a US enterprise software company. After an in-depth examination the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

Oracle is a supplier of business software, including middleware (i.e. software that connects software components applications), database software, enterprise application software and related services.

Sun provides network computing infrastructure solutions that include computer systems, software, storage and services. In 2008, Sun acquired the open source database, MySQL.

The Commission's second phase investigation assessed whether the acquisition of the world's leading open source database MySQL by Oracle, the leading proprietary database vendor, would lead to a significant impediment of effective competition within the EEA. The database market is highly concentrated with the three main proprietary database vendors – Oracle, IBM and Microsoft – accounting for approximately 85 % of the market in terms of revenue.

Sun's share of the database market in terms of revenue is low because MySQL is open source users can download and use the database for free. The Commission's investigation therefore focussed on the nature and extent of the competitive constraint that MySQL currently exerts on Oracle and whether this would be affected by the proposed transaction.

The Commission's investigation showed that although MySQL and Oracle compete in certain parts of the database market, they are not close competitors in others, such as the high-end segment.

Given that MySQL is an open source product, the Commission also assessed Oracle's ability and incentive to remove the constraint exerted by MySQL after the merger and the extent to which this constraint could, if necessary, be replaced by other actors on the database market.The Commission's investigation showed that another open source database, PostgreSQL, is considered by many database users to be a credible alternative to MySQL and could be expected to replace to some extent the competitive force currently exerted by MySQL on the database market. In addition, the Commission found that 'forks' (branches of the MySQL code base), which are legally possible given MySQL's open source nature, might also develop in future to exercise a competitive constraint on Oracle in a sufficient and timely manner. Given the specificities of the open source software industry, the Commission also took into account Oracle's public announcement of 14 December 2009 of a number of pledges to customers, users and developers of MySQL concerning issues such as the continued release of future versions of MySQL under the GPL (General Public Licence) open source licence. Oracle has already taken action to implement some of its pledges by making binding offers to third parties who currently have a licensing contract for MySQL with Sun to amend their contracts. This is likely to allow third parties to continue to develop storage engines to be integrated with MySQL and to extend the functionality of MySQL.

The Commission examined the potential impact of Oracle's acquisition of the intellectual property (IP) rights connected to the Java development platform in the context of the proposed transaction. It found that Oracle's ability to deny its competitors access to important IP rights would be limited by the functioning of the Java Community Process (JCP) which is a participative process for developing and revising Java technology specifications involving numerous other players in the IT industry, including Oracle's competitors.

The Commission also found that Oracle would not have the incentives to restrict its competitors' access to the Java IP rights as this would jeopardise the gains derived from broad adoption of the Java platform and therefore the proposed transaction would raise no competition concerns in respect of the licensing of IP rights connected with Java.

Finally the Commission looked at the potential effects on the market for middleware and in the 'IT stack', where the merger would strengthen Oracle's presence. It concluded that no competition concerns would arise in these areas in the light of the merged entity's market shares and prevailing competition in the markets.

2.3. Summaries of cases taken under Article 9

Schuitema / Super de Boer Assets

On 25 January the Commission referred the acquisition by Schuitema of the Super de Boer assets (SBA) to the Ducth competition authority the Nederlandse Medingingsautoriteit (NMa).

Schuitema is engaged in the procurement, wholesale and retail supermarket business in the Netherlands. It is primarily a wholesale organization, which supplies goods and services to approximately 330 stores operated by franchisees (under Schuitema's store formula C1000). Schuitema also operates 39 of its own stores.

The SBA consist of 21 owned supermarkets and 59 franchised supermarkets, currently operating in The Netherlands under the Super de Boer franchise formula.

In December 2009 the NMA made a request under Article 9(2)(b) of the EC Merger Regulation seeking the referral of the whole of the notified concentration on the basis that the concentration in question affected competition in a number of markets within The Netherlands, which present all the characteristics of distinct markets and which do not constitute a substantial part of the common market. Alternatively, the NMa requested a referral under Article 9(2)(a).

After examination the European Commission concluded that the proposed transaction met the criteria for referral under both Article 9(2)(a) and 9(2)(b). It further concluded that as the effects of the operation would be felt only the Netherlands and because the NMa had recent experience of the markets concerned that the NMa was the best placed competition authority to examine the impact of the operation. Consequently the European Commission referred the entire case to the Dutch authorities.

Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings

The Commission has referred to the Hellenic Competition Authority the examination of the proposed acquisition of Shell's oil sector activities in Greece by Motor Oil of Greece, on 15 March. The transaction includes the creation of a joint venture with Shell Overseas Holdings Limited (SOHL) of the UK for the supply of aviation fuel at Greek airports.

In January, the European Commission received a notification whereby Motor Oil would acquire sole control of the Greek-based companies, Shell Gas Commercial and Industrial and of Shell Hellas, from the Royal Dutch Shell Group. Simultaneously, Motor Oil and Shell Overseas Holdings Limited (SOHL, UK), a subsidiary of Royal Dutch Shell, would create a joint venture which would be active in the supply of aviation fuel at Greek airports.

In February 2010 the Hellenic Competition Commission (HCC) asked that the case be referred to Greece, pointing out that the planned operation would threaten to significantly affect competition because it would result in high market shares in various retail markets for fuels in Greece as well as in various non retail markets for fuels and bitumen. The HCC argued that various affected markets were local in nature and it was better placed to appreciate the competitive impact of the operations.

The Commission found that the HCC's request met the criteria of Article 9 of the Merger Regulation. It further found that the Greek competition authority would be best placed to assess the impact of the proposed transaction as only the Greek markets for fuels and bitumen would be affected. Consequently, it referred the case to Greece to be assessed under the Greek merger control law.

The Microsoft / Yahoo! Search Business case

Teresa Vecchi, Jerome Vidal and Viveca Fallenius (1)

1. Introduction

On 18 February 2010 the Commission cleared the acquisition of the Yahoo Search Business by Microsoft (2). This was the first case of a concentration between two major search engines and one which raised a number of interesting issues.

The first challenge concerning the transaction was to determine whether it fell within the scope of Council Regulation (EC) No 139/2004 ('the Merger Regulation') (3). The structure of the operation was complex and it included a number of cooperative features that made it a case between a concentration and a commercial agreement.

This case was also noteworthy for the fact that the Commission had to analyse the functioning and the economics of the complex and dynamic market of online search, which is a relatively new market characterised by the presence of two-sided platforms that provide on one hand, free internet search to users and, on the other hand, remunerate search advertising to advertisers. In its competitive assessment, the Commission had to consider and weigh up two aspects of the transaction. On the one hand, the two companies involved had a small combined market share which was significantly lower than that of their main competitor, Google, and historically these companies had encountered serious difficulties in competing effectively against Google as separate entities. On the other hand, the concentration was a merger from three to two between the second and third players, in a market where barriers to entry appeared to be high. For these reasons, the Commission conducted a relatively extensive first phase market investigation.

This article describes in details the Commission's assessment of this concentration. Another article published in this issue of the Competition Policy Newsletter offers an economic background for the analysis conducted by the Commission which can be read as a useful complement of the present article (4).

2. The parties and the transaction

Microsoft Corporation ('Microsoft') is involved in the design, development and supply of computer software and the supply of related services worldwide. The transaction concerned its Online Services Business segment and, more specifically, Microsoft's on-line search platform, Bing, and its online advertising platform, adCenter.

Yahoo is a global internet consumer brand and one of the most trafficked internet destinations worldwide. The transaction concerned Yahoo's web-wide algorithmic search and search advertising business, including Yahoo's search advertising platform, Panama (the 'Yahoo Search Business').

The transaction whereby Microsoft and Yahoo combined their online web-wide algorithmic search and search advertising businesses had a complex structure. The parties entered into a Licence Agreement and a binding Search and Advertising Services and Sales Agreement (the 'Agreements') which provided for the transfer to Microsoft of the Yahoo Search Business through the transfer of relevant assets (technology and customers relations) and also employees.

More particularly, the Agreements provided that Microsoft would acquire a ten-year exclusive licence to Yahoo's core search technologies, that Yahoo would exclusively use Microsoft's search engine on Yahoo sites. Microsoft would therefore become the exclusive search advertising provider used by Yahoo. While Yahoo would continue to independently determine the content and user interface of its sites, Yahoo's advertising platform, Panama, would be discontinued and Yahoo's customers would be migrated to Microsoft's adCenter. Finally, Microsoft agreed to hire not less than 400 employees from Yahoo.

A peculiar aspect of the Agreements was the fact that, under the Agreements, Yahoo would become the exclusive worldwide relationship sales force for the services provided by adCenter to so-called Premium Direct Advertisers ('PDAs') (5).

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

(2) http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5727.

(3) OJ L 24, 29-1-2004, p. 1.

(4) Economic background of the Microsoft/Yahoo case by Andrea Amelio and Dimitrios Magos.

(5) PDAs purchase advertising space through Microsoft's and Yahoo's advertising platforms, but in addition have a contract with Microsoft or Yahoo's sales force in which additional services such as keyword optimisation and rebates may be agreed. They oppose to self-served customers, which purchase advertising space on Microsoft's and Yahoo's search pages online via adCenter and/or Panama, without interaction from a sales force.

The coexistence of cooperative and concentrative features in the transaction raised the question of whether it amounted to a concentration. The Commission analysed each element of the transaction in line with the criteria laid down by the Merger Regulation and in the Consolidated Jurisdictional Notice ('CJN') ([6]). In particular, the Commission addressed the following questions: (i) whether the technology, the customer relations and the employees of the Yahoo Search Business which would be transferred to Microsoft constitute a business to which turnover could be attributed, (ii) whether a ten-year licence agreement with early termination clauses and the transfer of customers and employees could be considered as a way of bringing about a change of control on a lasting basis, (iii) whether the entity would indeed be solely controlled by Microsoft or whether Yahoo's control over the customer relationship with PDAs would involve Yahoo retaining joint control over at least some parts of the new business.

2.1. Object of control: the assets and employees of the Yahoo! Search Business transferred to Microsoft constitute a business to which turnover can be attributed

According to the Merger Regulation and the CJN, the acquisition of control over assets can be deemed to be a concentration, if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence to which a turnover can be clearly attributed. The underlying idea is that the transferred assets must allow the purchaser to at least develop a market presence. In particular, according to the Commission's practice, a concentration can be based on a combination of assets containing the necessary elements for a business (such as production facilities, goodwill and market access) ([7]).

The Commission assessed all aspects of the transaction, including those that could militate against the findings that the assets involved could constitute a business, such as the fact that not all the technology licensed to Microsoft was licensed on an exclusive basis. With regard to this aspect, the Commission found that the granting to Microsoft of an exclusive, ten-year term licence for non-patent IP rights (such as copyright as regards software code) seemed to be sufficient to prevent both Yahoo and any other actors from using Yahoo's core search technology in competition with Microsoft.

([6]) OJ C 95, 16-04-2008 p. 1.

([7]) See, for example, Cases M.3583 *Flextronics/Nortel* at paragraph 4, M.3410 *Total/Gaz de France* at paragraphs 6 to 8, M.890 *Blokkers/Toys'R'us* at paragraphs 6 to 11 and M.286 *Zurich/MMI* at paragraph 5.

On this basis, and taking into account that (i) search and advertising platform technology, (ii) human capital and (iii) advertising customers are the three most essential elements for a search advertising businesses, the Commission concluded that the assets transferred were a business with a market presence to which a turnover could be attributed.

2.2. Lasting basis: the transaction brings about a change of control on a lasting basis

In assessing whether the transaction was capable of bringing about a change of control on a lasting basis, the Commission took into consideration the fact that the industry involved is characterized by rapid, continuous developments in technology, and constant innovation. Consequently, a period of ten-years – a duration which is also in line with the CJN ([8]) – was seen as a particularly long period in the field of internet search.

The Commission also assessed the early termination provisions in the agreement and concluded that none of the events taken into account were sufficiently likely and close in time as to deprive the transaction of its long-lasting character. Moreover, the Commission considered that, even if the transaction was terminated early, there was no provision of forced return for the employees and the customers transferred to Microsoft. Similarly, the technology licence would remain in effect and become non-exclusive, which would still allow Microsoft to exploit it.

On this basis, the Commission considered that the acquisition of control occurred on a lasting basis because the transfer of technology assets, employees and customers was to be regarded as irreversible.

2.3. Sole control: the entity is solely controlled by Microsoft

As the Agreements did not create a joint venture in which the parties shared the voting rights equally, the Commission considered whether joint control could arise out of veto rights (or similar means) or out of a commonality of interests.

In particular, the Commission assessed whether the fact that Yahoo would become the exclusive sales force of the new business for PDAs would mean that Yahoo would retain control over this part of the business. However, in the light of the industry-wide practice of rebates, Yahoo's potential ability to decide on the commercial strategy in relation to PDAs was not considered sufficient to be regarded as a strategic decision conferring, per se, control

([8]) Paragraph 28 and footnote 34.

over a business. Moreover, the Commission considered that Yahoo was not offering a '*vital contribution*' to the business other than internet traffic and sales services and that therefore there was not a sufficiently '*high degree of mutual dependency*' between Yahoo and Microsoft to reach the '*strategic objectives*' of a JV (7) beyond the common interest inherent in any long-term commercial agreement.

On the basis of the above, the Commission concluded that the transaction constituted an acquisition of sole control by Microsoft over a part of an undertaking (the Yahoo! Search Business).

3. The industry and the characteristics of the markets

The transaction concerned the markets for internet search and online advertising which are relatively new, complex and characterized by innovation. Both markets are served by search engines that operate two-sided platforms connecting users and advertisers.

3.1. Internet search users

On the user side, an internet search engine, like www.bing.com, www.google.com and www.search.yahoo.com, is a tool designed to search for information on the internet. Search boxes in which queries can be typed have become a widespread and familiar tool to most internet users. Search engines use algorithms to find relevant search results that are then displayed in a ranked list of links that can also include maps, videos, images etc. The results of a user's query are known as natural algorithmic search or organic results.

Users can perform different types of searches. Searches that are performed on one of the above search engines are general internet searches and their results are based on software that searches the content of the whole World Wide Web (so-called 'web crawlers'). However, searches could also be performed on specific search engines that focus on specific topics (such as legal, medical or travel issues) and carry out their search only on a segment of the web that is relevant to the pre-defined topic/s. These searches are vertical internet searches. Finally, searches could be limited only to the content of a specific webpage ('site searches'), such as newspaper or social websites like Facebook. The following chart illustrates the different searches that a user can perform.

(7) Paragraph 77 of the CJN.

3.2. Advertisers

While internet search results are usually provided free of charge to users, search engines are financed by advertising revenue that is generated by selling space ('inventory') on their search results pages to advertisers, where search advertisements ('sponsored links') can be displayed. This means that, in practice, users conducting a search receive on a results page both organic search results and sponsored links consisting of advertisements related to the query and provided by the internet search engine.

Advertisers buy search advertising space for those sponsored links on the basis of keywords included in search queries of users. Keywords are 'auctioned off' to advertisers through advertising platforms that allocate a ranking to an ad based on how much advertisers bid per click for a given keyword query and how many clicks the platform expects each ad to generate ('ad relevance'). The auction mechanism is further explained in the article 'Economic background of the Microsoft/Yahoo case' published in this issue of the CPN. An important feature of this system is that advertisers only pay when the user clicks on the hyperlinked search directing the user to a web page determined by the advertiser ('landing page').

3.3. Interdependence between the two sides of the platform

Demands from users and advertisers are interdependent. Users value the relevance of the internet search, including both organic and advertising results. Advertisers aim to reach a large audience and monetize their investment in advertising. In both cases, what matters is the amount of search traffic that is conveyed to one search engine, as significant search traffic will, on the one hand, increase the search engines' ability to provide relevant search results to users and, on the other hand, attract a larger number of advertisers.

The Commission analysed data concerning users' habits and profiles and the distribution of advertisers among the main search platforms. Although the Commission's analysis was not conclusive in terms of the users' profiles, it did confirm that users tend to 'single-home', meaning that they perform over 90% of their search queries within a month on one single search engine. Unlike users, most advertisers who responded to the market investigation indicated that they 'multi-home' on all three ad platforms, meaning that they advertise on adCenter, Panama and adWords, in order to reach the largest possible audience.

In order to increase search traffic, search engines try to attract users by multiplying the ways in which users can access their internet search services. Users can access internet search services not only through the search engine home page (destination page) but also through other 'entry points'.

3.4. Distribution channels

Search engines can use so-called 'distribution agreements' with hardware manufacturers, Independent Software Vendors, and Internet Service Providers to distribute automatic search in the address field, toolbars and search boxes on the internet browser and establish default settings that direct user searches to the search engine. These types of entry points, when used, cause the user to land on the search engine's website itself. The following chart provides an overview of possible entry points.

Users can also access search services indirectly on third party websites which have concluded syndication agreements with a search engine. Syndication enables publishers, such as online newspapers, to use search technology on their websites and it allows users to carry out searches directly on the site of the publisher. The searches can be limited to the site or include the whole web. For example, syndication agreements can be concluded with newspaper web-pages: web-readers of newspaper can perform searches on the web-site of the newspaper using the technology of the search engine and its ad platform that will provide the search results and the ads next to the search results. The publishers will be paid a percentage of the advertising revenues (known as a traffic acquisition cost, 'TAC').

4. Market definition

4.1. Online advertising

Search advertising is one kind of online advertising. As in previous cases ([10]), the market investigation confirmed that online advertising is a separate market from offline advertising. The Commission also assessed whether the market for online advertising could be further subdivided according to the selection mechanism (search or non search, or behaviourally targeted ads), the appearance or format (text, video, display), the user device (mobile, laptop) and the pricing mechanism (cost per click, cost per thousand impressions).

In line with the previous market definitions as provided in the Google/DoubleClick case, the market investigation indicated that search advertising could possibly be considered as a separate market, in particular because search advertising ensures direct targeting in response to the search user's expressed intent, whereas other methods, such as display ads, aim primarily at increasing or creating brand awareness.

The market investigation also provided indications that mobile advertising might be considered as a separate market in light of its distinguishing features both technically (for example, the size of the ads) and commercially (for example, the possibility to advertise outlets near to the actual location of the holder of the smartphone). According to some respondents, mobile advertising represents one of the most important recent developments in online advertising.

In the end, the Commission left the exact market definition open, as the merger did not raise serious doubts in the EEA under any alternative market definition.

([10]) COMP/M.4731 *Google/DoubleClick*.

Geographically, in line with the Google/DoubleClick case, the Commission found that the market for online advertising should be defined based on linguistic borders within the EEA.

4.2. Internet search

For the first time, the Commission considered whether online search constitutes a relevant market, and assessed all relevant elements militating for or against a separate market for online search.

On the one hand, it could be argued that online search does not constitute a relevant market since the services (the search results) are provided free of charge to the users, and therefore a monopolist would be unable to control prices. For instance, in the two-sided market for free-to-air TV, the Commission considered only the market for advertising to be a relevant market, whereas it did not consider the 'free' TV side to be a market.

On the other hand, competition for users is fierce and the quality of internet search strongly influences the success of a search engine. It is also worth noting that other free products, such as internet browsers and open source software, have been considered as competitors on their respective markets. Finally, in State Aid cases, the Commission has scrutinised the public financing of public service broadcasters, even if those services (and the services of competing free-to-air broadcasters) are provided free of charge.

Ultimately, the Commission left the product market definition open.

As regards the geographic scope of internet search, while the largest search engines operate on global basis, many users require a search engine and search results in their own language. Ultimately, the Commission left the geographic market definition open.

4.3. Other markets

The Commission also considered a possible market for intermediation in online advertising, where both parties are active, and whether there was a separate market for distribution agreements on entry points to search engines. As the proposed transaction raised no serious doubts in either case, the market definition was again left open.

5. Competitive situation in the relevant markets

In its competitive assessment, the Commission carefully assessed all the various elements of this transaction, and in particular the fact that this operation would have resulted in a concentration from three to two players in a market where barriers to entry appeared to be high [11]. At the same time, the Commission was also conscious of the limited combined market shares held by Yahoo and Microsoft in the EEA, which were below 10 % in both search and search advertising. Nonetheless, the Commission decided to conduct a relatively extensive first phase market investigation due to the complexity of this relatively new industry, the high entry barriers and the fact that competition in these markets takes place in terms of quality and innovation. The Commission's analysis covered two aspects. Firstly, the Commission assessed the relevant counterfactual, namely the expected market evolution if there were no merger, and the overall effects of the transaction against such a background. Secondly, due to the multi-sided nature of these markets, the Commission assessed the impact of the transaction for each relevant group of players, namely advertisers, users, publishers and distributors. In its analysis the Commission also took into account the almost unanimously positive replies to the market survey, where respondents not only did not raise any competition concerns, but actually indicated that the transaction would have had pro-competition effects. Finally, the Commission also considered the possible beneficial effects for the consumers.

5.1. The relevant counterfactual

As regards search advertising within the EEA, Microsoft and Yahoo only competed in France and in the UK and the information provided to the Commission indicated that they both held very small market shares. Moreover, Microsoft's internal documents indicated that Microsoft had no intention of expanding its adCenter advertising platform in other EEA Member States in the foreseeable future. Therefore the Commission considered that the elimination of potential competition in the rest of the EEA was limited.

The information and the data collected by the Commission also consistently indicated that both Yahoo and Microsoft were experiencing serious difficulties in competing effectively with Google, which enjoyed market shares mostly in excess of 90 % and had recently gained further market share, mainly at the expense of Yahoo. According to the parties' submissions, these difficulties were mainly due to a lack of scale. Indeed, a search business requires substantial and continuous investments in the quality of search and related R&D, and it is subject to network effects in that scale can improve the quality of the search results and the quality of the matching of the ads with the queries. The market investigation confirmed that scale is an important aspect in the economics of the industry.

At the time of the notification, the competitiveness of Yahoo had been declining gradually but significantly for some years within the EEA and it did not appear to have the financial strength to reverse this trend. The market investigation confirmed that the performance of Yahoo's search engine was decreasing and that Yahoo was no longer considered an important innovator in search advertising. The Commission took the view that these difficulties were likely to continue absent the merger and that Yahoo was unlikely to become an effective competitor.

Microsoft also faced difficulties in becoming a credible alternative provider to Google. Despite very significant investments in its internet search and search advertising business, Microsoft's organic growth was limited and its scale and market shares remained modest and, financially, loss-making. According to Microsoft, it was the lack of scale that hampered its ability to innovate effectively and compete. During the market investigation, advertisers almost unanimously made the point that Microsoft did not have enough traffic to compete effectively with Google.

Finally, the Commission assessed Microsoft's and Yahoo's position against that of Google, who was the undisputed market leader in search advertising in the EEA and worldwide. The market investigation confirmed that Google's search traffic made it a 'must have' for search advertising campaigns and the data provided to the Commission indicated that the vast majority of users 'single-homed' on Google.

5.2. Detailed assessment of the different players

The Commission assessed in detail the potential effects of the proposed transaction on the various market players, namely advertisers, users, distributors and publishers.

As regards advertisers, the Commission investigated whether the combination of adCenter and Panama into a single search advertising platform could have led to an increase in the auction price and in the minimum bids. The Commission's theory of harm was based on two elements (i) the elimination of Panama as a competitive constraint and (ii) the increase in the bidder density for a particular keyword due to the pooling of advertisers on adCenter [12].

(11) Barriers to entry to this market include among others, hardware, cost of indexing the web, human capital, cost of developing and updating the algorithm and IP patents.

(12) See article 'Auction design and the interdependence between organic and sponsored links in the Microsoft/Yahoo case: an economic view' by Andrea Amelio and Dimitrios Magos.

The market investigation indicated that an increase in the auction price would have been unlikely and, even if it had taken place, its effects would have been limited. Firstly, with regard to the elimination of Panama's constraint, any such constraint was limited to France and the United Kingdom - the only two Member States where Microsoft and Yahoo were competing pre-merger. Secondly, with regard to the possible increase in the bidder density, many of the respondent advertisers were already conducting search advertising campaigns on all three platforms in parallel. Therefore, the potential number of additional advertisers bidding for the same keywords on adCenter was limited to those that were previously present only on Panama and not on adCenter. Finally, the market investigation indicated that while the cost per click is an important consideration for an advertiser, advertisers' decisions are mainly driven by their return on investment on a platform and that they are willing to pay a higher cost per click if the relevance of the ad displayed is higher, as it then leads to a higher return on investment. On this point, the majority of the advertisers said that they expected the transaction to allow Microsoft to compete more effectively against Google.

As regards search users, the Commission's main question was whether, post-merger, with the elimination of an algorithmic search engine, the combined platform might diminish the relevance of the organic search results ([13]). The Commission also investigated whether there would have been a lower incentive to innovate and whether users would have been harmed by the loss of variety of the differentiated services offered by different platforms.

The market investigation confirmed that the quality and relevance of the algorithmic search engine is the most important factor in attracting users to a particular search engine. However, the Commission considered that a very limited proportion of users multi-homed between Microsoft and Yahoo, and thus users rarely ran checks between these two platforms. Moreover, given the structure of the transaction, the publishing businesses of Microsoft and Yahoo would have remained separate post-merger and Yahoo would still have offered its independent complementary services. The Commission therefore considered that Yahoo would still have an incentive to compete for users and thereby innovate on the overall users' experience post-transaction.

As regards online publishers and distributors, the Commission investigated whether the removal of one advertisement platform and independent search engine would have limited publishers' opportunities to monetize their web pages and lowered the remuneration of distribution deals.

The market investigation indicated that, with regard to these agreements, the parties either competed to a very limited extent or not at all. Moreover, according to the agreement, Yahoo would have continued to compete for distribution and syndication deals post-merger. Finally, the respondents to the market investigation indicated that they expected the transaction to increase the parties' ability to compete with Google in this sector.

With regard to distribution agreements, the Commission also investigated whether, in a conglomerate context, the proposed transaction would have increased Microsoft's ability to leverage its market power in areas other than online advertising (for example, PC operating systems and personal productivity applications) when negotiating distribution agreements for its search technology (for example by bundling products). On the basis of the result of the market investigation, which did not reveal any merger-specific conglomerate effects, the Commission concluded that the Agreements did not contain anything to suggest that the transaction would have increased Microsoft's ability and/or incentive to leverage its strong market position in non-search areas.

5.3. Possible beneficial effects

In its analysis, the Commission also considered Microsoft's arguments that the transaction would have had positive effects. According to Microsoft, the rationale of the transaction was the acquisition of Yahoo's scale, which would enable Microsoft to become an effective competitor to Google and thus provide greater value to both users and advertisers. On the one hand, increased traffic volumes would make more experiments possible, leading to improved search results, especially for less frequent queries. On the other hand a higher degree of user engagement would have a positive effect on advertisers' return on investment.

Overall, the market investigation confirmed that scale is an important factor in order to be an effective competitor in this sector. The market investigation further confirmed that the proposed transaction was perceived as having pro-competition effects, as it would have created a stronger competitor to Google. The Commission did not adopt a final position on this point, as its assessment was

([13]) Theoretically, the rationale for possibly degrading the organic search stems from the trade off that search platforms appear to face between the incentive to provide relevant organic and paid results. The trade off arises because when a platform tries to attract more users through greater relevance on the organic search it runs the risk of losing revenues on the advertising side (i.e. less clicks on ads) due to users clicking predominantly on the organic side (especially if both types of clicks would bring the user to the same kind of information) (see article 'Economic background of the Microsoft/Yahoo case' by Andrea Amelio and Dimitrios Magos).

based mainly on the counterfactual and the elements described above.

6. Cooperation with the US authorities

This case was also interesting because it was assessed both in the United States of America and in Europe. The transaction was filed with the US Department of Justice (DoJ) in August 2009 and was the subject of a Second Request. While each authority carried out its independent assessment, they cooperated closely and extensively throughout both the pre-notification phase and the investigation of the case, and ultimately reached similar conclusions on the same date.

7. Conclusion

On the basis of its investigation, the Commission concluded that this three to two merger would be unlikely to have harmful effects on competition, particularly in the light of the serious difficulties that both Yahoo and Microsoft were facing in competing with Google and of the limited market shares that the two parties held in the EEA. The Commission thus cleared the transaction on 18 February 2010.

This case represents an important step towards a better understanding of the complex industry for online searches and search advertising – an industry characterised by the presence of two-sided platforms providing, at one and the same time, free internet search to users and remunerated search advertising to advertisers. The investigation conducted by the Commission revealed the high level of interconnection between the different sides of the business and the importance of scale in being able to run regular experiments aimed at improving search and search advertising platforms.

Economic background of the Microsoft/Yahoo! case

Andrea Amelio and Dimitrios Magos (1)

Introduction

This paper offers an economic background for the analysis conducted by the Commission during the recent M.5727 Microsoft/Yahoo! transaction and complements the article 'The Microsoft/Yahoo! Search business case' published in this issue of the Competition Policy Newsletter that describes more in details the Commission decision (2).

Search platforms are designed to search for information on the World Wide Web by providing the links to the information that the user is looking for in a fraction of the time that he would need in the absence of this tool. Search engines are a widespread tool among internet users. In the light of the importance and the resources allocated to search advertising (3), the economic literature has shown a growing interest in understanding the business model of search engines.

This paper focuses on recent results of the economic literature in relation to two fundamental characteristics of internet search. The first section of the paper deals with the current auction mechanism selected by the most popular search engines and explains how prices form in the advertising market. In the second section, the paper focuses on the role of search engines in terms of providing relevant results to users. More precisely, we discuss what are the incentives for search engines to provide relevance to users when a results page includes revenue generating (sponsored) links alongside organic links.

The economic literature referred to for the purposes of this article served as a background for understanding the functioning of the internet search market and also provided valuable insights for the Commission to make its own assessment, especially concerning the development of theories of harm and the likely effects of the transaction on advertisers and end-users (4).

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors. The authors work at DG Competition in the Chief Economist Team.

(2) For reference, please see 'The Microsoft/Yahoo! Search business case' published in this issue of the Competition Policy Newsletter.

(3) In 2008 search advertising revenues are estimated at approximately EUR 5 500 million (Source IAB Europe/PWC).

(4) See COMP/M. 5727 Microsoft/Yahoo! page 28-37.

The auction system

The understanding of the auction system — and all the related implementation choices — that search platforms have devised is instrumental in order to assess the existence of a significant effect on effective competition brought about by the merger on advertisers. These strategic decisions determine the current structure of the search advertising market and are at the core of the price formation mechanism in the advertising market (5). Furthermore, given the pay per click nature of search advertising, in internet search, an advertiser can better attribute the cost of an ad to the sale that is generated. This ultimately is likely to modify the nature of advertising costs from typically a fixed to a variable cost which may be passed on to consumers in the form of higher price for the product/service the advertiser provides.

The choice of search platforms to post ads alongside the algorithmic search requires strategic implementation decisions. One of the most important decisions is how to allocate advertising spots across advertisers since this task has implications for the level of search platforms' revenue. Different positions on the search result page have different values for advertisers (and thus involve a different willingness to pay): an ad shown at the top of a page is more likely to be clicked than an ad shown at the bottom. To perform this task of allocating advertising spots effectively, search engines have developed auction mechanisms. 'Overture' was the first search platform to introduce an auction mechanism whereby advertisers bid and pay on a per click basis for a particular search query term, known as the keyword (keyword bidding systems). For a given keyword, a real time auction allocated several ad slots at the same time. The outcome of such an auction (also known as a 'position auction') was thus a ranking/positioning of several ads. Currently, auction mechanisms are in widespread use for internet searches, albeit in a different format from the original Overture auction.

(5) The merger effects in the advertising market, as described in COMP/M. 5727 Microsoft/Yahoo! §178-200, were evaluated against this background.

All major search engines are currently making use of a second price auction [6] (generalised second price or 'GSP') with a reserve price instead of the Overture's first price auction. In the GSP auction, the winner of a given ad slot pays the bid of the next highest bidder (as long as the latter bid exceeds the reserve price) and the reserve price determines the minimum bid below which participation in the auction is not permitted. Another change carried out by search platforms in the auction mechanism is the use of weighted bids. As a result, advertisers' bids alone determine neither the price that the advertisers pay nor the slot in which an ad is placed. In weighted auctions, search platforms rank advertisers according to the revenue that they are expected to generate for the platform. The expected revenue from an ad is contingent on the probability that an ad is clicked (measured by the likelihood that users click on ads, also known as the Click Through Rate ('CTR')) since advertisers pay platforms only when users click on the displayed ads. Search platforms use a 'quality' score, that reflects the expected CTR, to adjust the ranking accordingly [7]. Google was the first to introduce the idea of ranking the ads in 2002 by weighting the advertisers' bids with the 'quality score'. As explained on its web site, Google currently uses a variety of indicators that try to measure quality and determine the quality score of an advertiser [8].

The auction design in internet search is currently the subject of several economic papers that are endeavouring to understand the underlying incentives for such auction mechanism choices (and their impacts on consumers), including the use of reserve prices and also of weighted bids. In the context of the merger review, these two elements were particularly important as two potential tools through which the merged entity could have increased prices as a result of the merger. Particular scrutiny was thus given to them [9].

Reserve prices in standard auctions increase the revenue for the platform [10] and decrease social welfare, since some transactions that would be beneficial for both sides of the platform if they occurred do not materialise (see also Edelman and Schwarz (2006)). However, Athey and Ellison (2009) show that, in a model where consumers incur costs of clicking on ads and act rationally in deciding how many ads to click and in what order, this result may change. In a setup like this, reserve prices may avoid some of the inefficient search costs that arise when clicking on low quality links; reserve prices act as a commitment device not to list products of low quality. This may in turn increase the number of searches that users are willing to make. In this setup, therefore, reserve prices can increase both search engine revenue and consumer surplus [11].

Also weighted auctions increase the revenues of the search platform, because ads are ranked according to their potential contribution to search engine revenues. Weighted auctions therefore appear to distort the efficiency of the auction mechanism (as

(6) In a standard second price auction (or Vickrey auction) a single indivisible good is being sold and the highest bidder wins while the price paid is the second highest bid. In a standard first price auction, the highest bid wins and the price paid is the highest bid.

(7) As illustrated by Edelman et al. (2007), advertisers are ranked by the product of their bids and the quality score (expected revenue). Furthermore, advertiser (i) ends up paying the bid of the next lowest revenue generator (j) weighted by the ration of the quality scores of the advertiser j and own quality score

$$\text{Per click cost (i)} = \frac{\text{per click bid(j)} * \text{quality score(j)}}{\text{quality score(i)}}$$

(8) See http://adwords.google.com/support/aw/bin/answer.py?hl=en&answer=10215

(9) Another economic issue under debate is whether the generalised second price auction (GSP) is the most efficient auction design and the choice of auction mechanism has implications in terms of platform revenues and efficiency. In standard auction theory, efficiency is maximised when, as a result of the auction, the object ends up in the hand of the bidder that values it the most. GSP is shown not to always achieve such an efficient outcome. In the equilibrium of a second price position auction (or GSP) each bidder prefers the position he is in to any other position (see Varian 2006). In choosing its bid the advertiser considers the incremental cost of moving up or down one position per click. If the incremental cost per click of moving up one position were less than the value per click, the advertiser would increase its bid. In equilibrium the incremental cost of moving up one position should exceed the bidder's value per click, and the reverse applies to moving down one position. Using this logic, it is possible to construct equilibria in which the advertiser with the highest valuation would not be placed in the highest position. The underlying rationale is that an advertiser may be better off by shading his bid below his actual valuation for some given bid strategies of other advertisers. Therefore, GSP does not necessarily lead to an efficient positioning of the advertisers. An alternative auction mechanism that has attracted interest in the auction theory and is efficient is the Vickrey Clarke Groves (VCG) mechanism, i.e. the generalisation of the Vickrey (second bid) auction for position auctions (see Herman (1983)).

(10) A standard result in auction theory is that it is optimal for a seller (platform) to exclude some bidders (advertisers) through the introduction of a small reserve price, see Krishna (2002).

(11) Ad relevance is also a parameter of interest for search platforms i.e. their tolerance for irrelevant ads. Athey and Ellison (2009) argue that this dimension can be considered as similar to the reserve price question; users will be hurt when they click on irrelevant ads and anticipating this they will make fewer searches.

defined in standard auction theory), since it is possible that the advertiser with the highest valuation is not ranked highest. Note that the question of efficiency as described here considers only the welfare of advertisers; the welfare of users is not specifically addressed. However, users may have a different valuation on the efficient outcome of an auction and therefore there is an externality imposed on them as a result of the positioning of the ads via the auction mechanism. Therefore, broader welfare measures should also be considered, for instance including users' benefits. In this broader perspective, advertisers that are more likely to be clicked (and implicitly more appreciated by consumers) have a greater chance of being placed higher up in the ranking. Thus, it seems possible that weighting bids weighted by the expected CTR can benefit consumers. However, Athey and Ellison (2009) show instances where weighting of an auction produces an inefficient outcome. In a setup where consumers incur search costs, either imperfections in accurately predicting the relevance of the advertisers by means of 'quality' scores or the strategic behaviour of advertisers may result in welfare losses.

This analysis is consistent with the search platforms' ability to control the pricing mechanism and extract rent from the advertisers. This arises from several aspects that go beyond the bid that advertisers have placed such as the weighted auctions and the use of reserve prices. Stronger competition may ultimately affect the efficiency and advertiser's surplus and therefore the transaction merited an in depth analysis of its effects on advertisers as described in the M.5727 Microsoft/Yahoo! decision.

Organic search vs. paid search

As explained in the article 'The Microsoft/Yahoo! Search business case', the Commission's investigation focused also on the possible existence of a significant effect on effective competition on search users. In particular, the Commission has assessed whether as a result of the merger there are any possible anti-competitive effect as regards the incentives for search engines to provide relevant organic search results to users. This section describes a part of the theoretical background that informed the Commission's assessment [12].

Search engines can generate economic efficiencies because they are gateways for a large number of economic transactions. Search engines can contribute to social welfare by providing consumers with relevant information about the quality of sponsored links, and this information allows them to search more efficiently [13]. Spulber (2009) refers to the internet search engine as the 'map of commerce' and argues that these economic efficiencies depend on the strength of competition between search firms. Competition can play an important role in penalising platforms that attempt to lower the quality of the ads and may slow down innovation [14].

The merger decision analyses the incentive to decrease the relevance of the organic search. The theoretical rationale for possibly degrading the organic search [15] may stem from the trade-off with which search platforms appear to be confronted between the incentive to provide relevant organic results and to monetise its paid results. The trade-off may arise because when a platform tries to attract more users through greater relevance on the organic search results it runs the risk of losing revenues on the advertising side (i.e. users clicking less ads) due to users clicking predominantly on the organic side. This could be more likely to arise if both types of links were to lead the user to the same kind of information (thereby being substitutes). Therefore, supplying relevant results may run counter to incentives to maximise the platform's revenue by prompting users to click on ads.

The degradation of organic search could occur by various means. For example, platforms might have an incentive to design the results page so as to allocate less space to organic results and more to searching advertising links, thereby providing proportionally more advertising links. As long as the advertising links are less relevant than the organic links, the relevance of the results page will decrease. Alternatively, the platforms may alter the ranking of the organic search results such that, from the user's perspective, firms offering competing products to the sponsored links are given a less-than-optimal ranking on the organic side. For instance, instead of displaying links to additional merchants in the organic search results, search engines could display links to 'informational' sites or placing the links winning the auctions also in prominent positions in the organic search results [16], in order to decrease substitution between organic and paid searches.

A search engine may have such an incentive to 'bias its results' as long as the revenues lost from users who may stop using the platform are compensated

(12) See COMP/M. 5727 Microsoft/Yahoo! §201-226.

(13) See also Athey and Ellison (2008) for welfare analysis.

(14) As described in COMP/M. 5727 Microsoft/Yahoo! §§ 202 to 205 and 214 to 226, a global assessment of these possible anti-competitive effects has been carried out by the Commission.

(15) See § 204 of the decision.

(16) Empirically, Ghose and Yang (2009) examine the interdependence between paid search and organic search, and they find a positive interdependence between the two forms of listings with regard to their impact on click through rates. Therefore the strategy explained above can be profit maximizing.

for by more clicks from the remaining users. Given that platforms, at least to some degree, provide different organic results and that users typically are not aware of the full range of the information available on the web (which is, in turn, the reason why they tend to rely on the search engines that are better placed), it is difficult for the user to assess whether the platform is engaging in this behaviour. It is precisely this role that competition would play in this market; alternative search platforms may offer 'checks and balances' against such incentives from the search platforms. Therefore, the theory goes that in the absence of strong competitive constraints, platforms may take advantage of this information advantage (i.e. asymmetric information) and, as a result, there will be biases in favour of advertising listings that might be harmful to users, to the extent that the relevance of their search will be reduced, and to social welfare.

This trade-off has been discussed in the economic literature. There are several papers that attempt to study the interaction between the organic results and the sponsored links, albeit on the basis of restrictive assumptions ([17]). For example, White (2008) builds on the two-sided markets literature to examine the motivations to distort the quality of organic search results. He claims that high quality search results have the potential to reduce a search engine's profits and that a dominant search engine is in a position to wield a great deal of influence. Also, given the asymmetric information between users and platforms on the available information, he argues that it is not such a straightforward matter to identify 'manipulative' behaviour. At the same time he claims that users constrain the extent of such a trade-off, since few users would use a low relevance search engine otherwise ([18]) ([19]).

In summary, the literature suggests that an important role for competition is to induce search engines to provide more relevance. This ultimately affects the welfare of users. There is interdependence between paid search and organic search and search platforms are confronted with the trade-off between providing relevant results and monetizing paid search. Search platforms can control to a certain extent the interaction between organic and paid search and maintaining high degree of competition among search platforms may indeed preserve search platforms' incentive to provide relevant results for final users.

A description of these issues to the particular case is set out in 'The Microsoft/Yahoo! Search business case'.

([17]) The general analysis of the auction mechanism (such as Athey and Ellison (2009)) does not incorporate such considerations.

([18]) The model, however, does not consider the auction mechanism of the search advertising and the search platform unilaterally sets the advertising price; this may affect the results of the model with respect to the effects in the product market of greater user participation in the platform.

([19]) Katona and Sarvary (2008) study the interaction between search engine's service of finding relevant sites and its private aim of selling sponsored links on search pages. They examine the optimal weights used to correct advertisers' bids, taking into account consumers' behaviour on the search page. They find that sites that rank high on the search engine's organic results list are likely to derive less benefit from advertising links.

Conclusion

This short article has reviewed two topics on internet search that arose during the Microsoft/Yahoo! merger and that served as a background for the Commission's assessment of the transaction. These topics have been widely studied in the literature and have also prominently spurred the recent economic debate. The economic literature has analysed different features of the auction mechanism providing insights into the functioning of the search advertising market. It supports the view that search engines may be able to influence the prices that advertisers pay, even if the price mechanism works through an auction, making use of quality scores and reserve prices. Furthermore, the economic literature suggesting an interdependent relationship between the organic and the sponsored links provided part of the background to the Commission's analysis of potentially negative effects on the relevance of the search results.

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State Aid and Public Funding for Universities and other Research Organisations

Bernhard von Wendland ([1])

Introduction

This paper discusses the relation between public funding for research organisations (hereinafter 'ROs') ([2]) and State aid rules. That relation is determined by two key principles. On the one hand, strengthening R&D is one of the Union's objectives, and the Commission takes a favourable stance towards fostering research, development and innovation (R&D&I) ([3]). On the other hand, any funding that meets the criteria of Article 107(1) TFEU will be considered to be State aid ([4]), regardless of its possibly laudable objectives ([5]). While Article 107(1) TFEU in principle prohibits State aid, such aid may however be compatible with the common market on the basis of Article 107(2) and (3) TFEU ([6]). In order to ensure the compatibility of State aid, it shall either be notified to the Commission, pursuant to Article 108 (3) TFEU or it shall meet all the criteria for exemption from notification ([7]).

In short, public funding for ROs may contain State aid, which will be compatible with the internal market if it is in line with State aid rules. The Commission applies specific criteria to assess the State aid character of public funding for ROs. These criteria are set forth in the Community framework for state aid for research and development and innovation ([8]) (hereinafter '**the framework**').Experience in implementing the framework so far has shown that its criteria for ROs do not need material review. However, communication with Member States' authorities and other stakeholders has shown that several issues need discussing and clarifying.

In particular, the following issues have arisen when applying the framework:

- When is an RO an 'undertaking' and thus a potential beneficiary of State aid ? What is the definition of 'economic activity'?

- How to conform with the definition of 'RO' for state-aid purposes? In particular, are an RO's 'primary activities' necessarily non-economic?

- State aid rules require profits to be reinvested in the RO's 'primary activities'. Does this mean that no reinvestment can be made in 'economic activities'?

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

([2]) The broad term 'ROs' embraces entities such as universities or research institutes, whatever their legal status (organised under public or private law) or ways of financing, as defined by EU State aid rules.

([3]) Pursuant to Article 179 TFEU, one of the Union's objectives is to strengthen its scientific and technological bases, by achieving a European research area in which researchers, scientific knowledge and technology circulate freely and by encouraging it to become more competitive, including in its industry. In the Lisbon Strategy context, the Commission's favourable stance on more public and private-sector investment in R&D, is set out in the Communication from the Commission, 'Investing in research: an action plan for Europe', 4.6.2003, COM(2003) 226 final/2, p. 11 *et seq*; and, most recently, in the Communication from the Commission, 'Europe 2020', 3.3.2010, COM(2010) 2020, p. 8 *et seq*.

([4]) Pursuant to Article 107 (1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

([5]) In its judgment in Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 20, the Court held that Article 92 of the EC Treaty [Article 107(1) TFEU] does not distinguish between the measures of State intervention concerned by reference to their causes or aims, but defines them in relation to their effects. This was confirmed most recently in case C-487/06 P, *British Aggregates Association vs. Commission*, not yet reported in the ECR.

([6]) State aid rules are an instrument for fostering the Union's objectives and are implemented within the limits of appreciation set by Article 107 TFEU; (see EU rules on State aid for R&D&I '…State aid for R&D&I shall be compatible if the aid can be expected to lead to additional R&D&I and if the distortion of competition is not considered to be contrary to the common interest, which the Commission equates for the purposes of this framework with economic efficiency', Point 1.1 of the Community framework for state aid for research and development and innovation, OJ C 323 , 30.12.2006, p. 1).

([7]) For example, in accordance with Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation. OJ. 2008 No. L 214 p. 3).

([8]) OJ C 323, 30.12.2006, p. 1. The framework entered into force on 1 January 2007.

- How to separate economic from non-economic activities and thus prevent any spill-over of public funding of non-economic activities into economic activities?
- How to assess if there is any State aid element in technology transfer and licensing?
- Is State aid involved in funding for private universities?
- What are the options when public funding is granted for the economic activities of an RO?

Relevant State aid rules

State aid for R&D&I can primarily be justified on the basis of Article 107(3)(b) and 107(3)(c) TFEU. Both the framework and a specific section in the General Block Exemption Regulation (hereinafter '**GBER**') apply to R&D&I State aid. This article will not, however, deal with the many legal differences between the framework and the Regulation ([9]).

Chapter 3 of the framework provides guidance as to whether or not State aid is present in R&D&I related situations where ROs are involved. In particular, the framework addresses public funding for ROs and innovation intermediaries, contract research or research services on behalf of undertakings, technology transfer, and collaboration of undertakings and ROs. The framework's other chapters set out the rules which the Commission will apply in assessing R&D&I State aid. The assessment of whether or not financing for ROs contains State aid in the first place is therefore 'upstream' of the actual compatibility assessment of State aid.

Contrary to the framework, the GBER does not provide for such 'upstream' guidance. Rather, that Regulation applies to situations where State aid is certainly present, but can be exempt from the requirement of prior notification and Commission approval.

When is a research organisation an 'undertaking' and thus a potential beneficiary of State aid ? What is the definition of 'economic activity'?

State aid is selective in that it favours 'undertakings'. Hence it is vital to determine whether or not an RO acts as an undertaking.

The framework answers this question 'in accordance with general State aid principles'. Consequently, and in line with Article 107(1) TFEU and the case-law of the Court, a research organisation might qualify as an undertaking if it carries out an economic activity, which is an activity whereby goods and/or services are offered on a given market ([10]). This does not depend on the RO's legal status (organised under public or private law) or economic nature (profit making or not).

The framework provides a definition of an 'RO' for its purposes. However, the definition is neutral with respect to the economic character of activities:

'RO' means an entity, such as a university or a research institute, irrespective of its legal status (organised under public or private law) or ways of financing, whose primary goal is to conduct fundamental research, industrial research or experimental development and to disseminate their results by way of teaching, publication or technology transfer; all profits are reinvested in these activities, the dissemination of their results or teaching; undertakings that can exert influence upon such an entity, in the quality of shareholders or members for example, shall enjoy no preferential access to the research capacities of such an entity or to the research results generated by it.' ([11])

As well as its definition of 'RO', the framework stipulates that the primary activities of ROs are 'normally' non-economic and include: education for more and better skilled human resources; the conduct of independent R&D for more knowledge and better understanding including collaborative R&D; and the dissemination of research results ([12]). Moreover, the framework gives a broad outline of economic activities: 'in particular research carried out under contract with industry, the renting out of research infrastructure and consultancy work' ([13]). 'Secondary' activities do not pursue the primary goals and may be of an economic nature.

In summary, the framework establishes the definition of 'RO' for State aid purposes. That definition lays down certain 'primary' activities that an entity must pursue, in principle irrespective of the eco-

([9]) The framework is a non-binding legal act of the Commission governing the application of Article 107 TFEU. It sets out the compatibility criteria that apply to aid for certain R&D&I measures. The GBER is immediately applicable, pursuant to Article 188 (2) TFEU. Its compatibility rules do not cover all the objectives mentioned in the framework. Nor do they apply to large aid beyond certain thresholds, *ad-hoc* aid to large enterprises, or certain forms of aid that are considered to be 'non transparent'.

([10]) Point 3.1 of the framework with reference to settled case law, in particular Court cases 118/85 *Commission v. Italy* [1987] ECR 2599, paragraph 7; C-35/96 *Commission v. Italy* [1998] ECR I-3851, paragraph 36; C-309/99 *Wouters* [2002] ECR I-1577, paragraph 46. The Court has constantly held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed, and that any activity whereby goods and services are offered on a given market is an economic activity.

([11]) Point 2.2. d) of the framework. In essence the GBER (Article 30 No 1) gives the same definition.

([12]) Point 3.1.1 of the Framework.

([13]) Footnote 24 to point 3.1.1 of the framework.

nomic character of these activities. The framework, however, provides guidance as to which activities are 'normally' non-economic.

Are 'not-for-profit' and/or public research organisations exempt from the concept of 'undertaking' and thus in a 'privileged' position compared to profit-making entities?

Insofar as the legal status of ROs (public, private), their ways of financing (entirely state-funded, mixed funding, entirely private), or their economic nature (not-for-profit, profit-seeking) are immaterial in assessing whether or not they are beneficiaries of State aid, the framework does away with any (mistaken) perception that not-for-profit (e.g. public) ROs are 'privileged' and thus to a large extent exempt from Article 108 (1) TFEU ([14]). In fact, universities and other ROs have never benefited from any 'university privilege' under Treaty rules ([15]).

How to conform to the definition of 'research organisation' for State aid purposes?

The framework contains special criteria that apply to ROs. Knowing whether or not an entity conforms to the framework's definition of 'RO' is decisive, first and foremost because funding for non-economic primary activities does not constitute State aid at all, and secondly because other rules of the framework require 'research-organisation' status ([16]).

How to delimit genuine research organisations from industry research?

Pursuant to the framework, an RO's primary goal is to carry out R&D and to disseminate R&D results by way of teaching, publication or technology transfer. The framework also requires that undertakings that can exert influence upon a RO do not enjoy preferential access to its R&D capacities and results. Hence, an entity that pursues R&D exclusively without disseminating its results (e.g. a (joint) research institute catering to industry, or an R&D department in an enterprise) would not meet that criterion.

Must a research organisation's 'primary activities' be non-economic?

While there is no reference in the framework's definition to the economic or non-economic character of 'primary' activities ([17]), some of these primary activities are considered as 'normally' non-economic, among them 'independent R&D'. It is obvious that contract R&D on behalf of industry is a) economic and b) dependent. However, in the framework's logic, the carrying out of such economic and dependent activities should not jeopardise the status of an RO as such, provided all the other criteria set out in the definition are met. Consequently, while an RO maintains its status, it might act as an undertaking in certain situations, for instance when carrying out contract research on behalf of industry.

In this context, one further criterion of the said definition is crucial, namely that all profits are reinvested in the RO's primary activities ([18]).

Does the requirement to reinvest profits in the research organisation's 'primary activities' mean that reinvestment in 'economic activities' is not allowed?

Given the definition's neutrality with respect to the economic nature of primary activities, reinvestment can be made in both non-economic as well as economic primary activities. Reinvestment in primary activities is necessary to maintain RO status within the meaning of the framework.

([14]) This perception seems to have been common when the preceding Community framework for State aid for research and development (OJ C 45, 17.2.1996, p. 5) was in force, especially in view of the rather vague wording of its point 2.4. For a discussion of the notion of 'privilege' in the light of the new framework's approach see : Thibaut Kleiner, The New framework for Research, Development and Innovation, 2007-2013, in European State Aid Law Quartely (EStAL) 2/2007, p. 238.

([15]) Commission Memo, State aid: new framework for Research, Development and Innovation — frequently asked questions, 22.11.2006, Memo/06/441, p. 4. For a discussion of the notion of 'privilege' in the light of the new framework's approach see: Thibaut Kleiner, The New framework for Research, Development and Innovation, 2007-2013, in: European State Aid Law Quartely (EStAL) 2/2007, p. 238.

([16]) This article does not cover the rules on indirect aid via ROs to industry (point 3.2), on basic aid intensities (point 5.1.2), on bonuses for collaboration with ROs (point 5.1.3. b) ii), and on highly-qualified personnel (point 5.7).

([17]) For instance, industrial research carried out under contract with industry still qualifies, in the literal sense, as 'conducting industrial research' as defined by point 2.2 d) of the framework. In particular, when performing such research, teaching, publication and technology transfer may take place. Such a research contract might be part of the strategy and research path pursued by the organisation and it may even be necessary to comply with the organisation's statutes.

([18]) 'All profits are reinvested in these activities, the dissemination of their results or teaching.' In this passage of the definition in point 2.2 d) of the framework, 'activity' refers to the activities previously mentioned in the definition, namely 'to conduct fundamental research, industrial research or experimental development'; by 'dissemination of results' any activity referred to in the previous clause.

One common misunderstanding should, however, be clarified. The fact that profits generated by economic activities are duly reinvested does not 'neutralise' the economic character of the 'profit-generating' activity as such.

In addition to 'primary activities' there may well be 'secondary' activities, such as canteens and cafeterias, student apartments, student theatres, university bookshops, etc. These activities are certainly not linked to the primary goals and may be of an economic nature. The wording of the framework's reinvestment clause implies that only profits generated by primary activities are concerned. 'Closed-cycle' reinvestment of profits from 'secondary' economic activities in those same activities does not jeopardise the status of the ROs if the financing and costs of such secondary activities are clearly separate from the university's primary activities (both economic and non-economic).

While the reinvestment of profits from 'secondary' economic activities into non-economic primary activities does not raise State aid concerns, reinvestment into economic primary activities could lead to the continuous extension of a research organisation's economic divisions ([19]). However, responsibility for categorising an entity as an 'RO' for State aid purposes and monitoring compliance with that concept lies first and foremost with the Member State.

Keeping clear of State aid: separation of economic from non-economic activities and prevention of cross-subsidisation

As already discussed, an RO can maintain its status but still act as an undertaking in situations of economic activity. This raises the issue of separating economic from non-economic activities.

In fact, many ROs rely on economic activities such as contract research and thus may act on markets and compete with other enterprises. According to a project report by the European University Association (EUA), 'national private funds are the second most important source of university funds. (…) Private funds may reach the institution from students and their families or entities with a different legal status operating in the private sector (…). Income from individuals usually comes in the form of tuition, academic or registration fees, but also as payment for student accommodation and meals, or as a fee for services not only to students but also to the general public — museums, souvenir shops, etc. Income from companies takes the form either of fees charged for R&D contracts and other services or of endowments' ([20]). For example, Fraunhofer-Gesellschaft, a large German RO that promotes and undertakes applied research, receives funding both from the public sector (approximately 40 %) and through contract research earnings (roughly 60 %) ([21]).

Contract research and consultancy for industry are not solely for generating income, but may be part of an RO's or a Member State's policy to promote knowledge transfer and to gear R&D capabilities towards the needs of industry ([22]).

The framework provides guidance as to the State aid implications of pursuing both kinds of activities:

'If the same entity carries out activities of both an economic and non-economic nature, in order to avoid cross-subsidisation of the economic activity, the public funding of the non-economic activities will not fall under Art. 107 (1) TFEU [Art. 87 EC-Treaty], if the two kinds of activities and their costs and funding can be clearly separated. Evidence that the costs have been allocated correctly can consist of annual financial statements of the universities and ROs' ([23]).

As a result, there is a legal presumption of spill-over of public funding into economic activities if the two types of activities cannot be properly separated. In this case, the entire RO and its funding are subject to State aid rules, just as any undertaking. Spill-over

([19]) In its Communication on the role of the universities in the Europe of knowledge, the Commission reports that in Europe universities tend to undertake applied research directly for the business sector, extending even to the provision of scientific services, which if taken to excess could endanger their capacity to contribute to the progress of knowledge. Communication from the Commission, The role of the universities in the Europe of knowledge, 5.2.2003, COM(2003) 58 final, p. 8.

([20]) European University Association, Financially Sustainable Universities — Towards Full Costing in European Universities; Brussels, 2008, p. 23. The project provided an analysis of the current state of both the understanding and development of 'full costing' in higher education institutions in selected European universities and countries and identified the drivers, benefits and obstacles in this process.

([21]) http://www.fraunhofer.de/en/about-fraunhofer/business-model/.

([22]) With its 'research bonus scheme', for example, Germany aims to increase the standard of R&D activities in publicly funded research organisations ('*Forschungsprämie*' and '*Forschungsprämie zwei*'). The research bonus is a grant for new, additional activities (primarily for structural improvements in the transfer of knowledge and technology), for a stronger orientation towards industry and commercial exploitation, and for the development of competences for better cooperation with industry, in particular with SMEs. The interesting point here is that, as a necessary condition for receiving the grant, a research organisation has to have concluded an R&D related service contract with an enterprise at market price and provided the service. The funding must be used to improve R&D, knowledge transfer, education and collaboration; http://www.ideen-zuenden.de/en/131.php.

([23]) Point 3.1.1 of the framework.

from economic activities into non-economic activities does not raise any State aid concerns.

There is, however, no clear guidance on what is proper evidence of cost allocation. This is no doubt due to the limitation of the Union's competence in education, as set out in Article165 (1) of the TFEU ([24]). Rather, the framework attempts firstly to take into account the diverse legal situation in 27 Member States, secondly to respect the limits of this competence and thirdly to ensure a clear separation between economic and non-economic activities.

Nonetheless, the framework hints at 'annual financial statements'. Using such statements to demonstrate proper cost allocation is a recommended option but is not obligatory. If spill-over of state funding from non-economic activities into economic activities is to be avoided there will have to be adequate appraisal methods, market prices and a clear allocation of costs and revenues for both type of activities. Unless ROs (probably universities in the majority of cases) keep their own balance sheets and profit-and-loss accounts, an annual compilation of the proceeds, profits and costs of economic activities (on a project base) appears to be sufficient.

Decision practice: Assessment of the proper separation of economic and non-economic activities

Decision practice shows that the Commission has assessed the effective prevention of spill-over on a case-by-case basis. Such assessment was primarily based on information provided by the Member State concerned, relating to the control and accounting systems that apply to the notified measure. As the examples below show, the Commission concluded that the accounting practices in place prevent any possible spill-over of public funding into potential economic activities, so that the support granted to ROs does not constitute State aid.

Approximately 40 ROs were expected to participate in State aid scheme N 112/2007 (Germany) ([25]). During the assessment process, Germany informed the Commission that these institutions might carry out activities of an economic nature. However, only the non-economic activities of such institutions were eligible under the scheme. The funding provisions required annual controls, and any undue appropriation would result in a revocation of the grant.

In the case of beneficiary institutes with separate accounting for economic and non-economic activities in place, the documentation relating to due separation would be checked at the time of the audit of the research institutes' annual financial statements.

Research institutes which had not yet adopted and implemented separate accounts would be obliged to confirm in writing that, in so far as they pursue both types of activities, these would be carried out separately. Furthermore, these institutes would be obliged to submit adequate financial statements until such time as they too had separate cost accounting in place. The Commission found that accounting practices or compulsory declarations by the beneficiaries would prevent any possible spill-over of public funding into potential economic activities.

In the R&D&I scheme 'Guidelines for R&D&I Promotion', N 667/2007 (Germany) ([26]), eligible ROs were also not excluded from pursuing economic activities. In the notification process, Germany provided information on the precautions taken in order to prevent any possible spill-over of public funding into potential economic activities. In its decision, the Commission noted that:

'Firstly, ROs will be obliged to declare whether or not they pursue economic as well as non-economic activities. Secondly, they must provide corresponding confirmation by the German fiscal authorities. Where an RO pursues both kinds of activities, it must provide proof that both activities are clearly separate. In that context, a detailed and verifiable work-time and cost plan, which unequivocally distinguishes between economic and non-economic activities, must be submitted. Moreover, grant decisions will stipulate that ROs demonstrate due separation of said activities in their annual financial statements, upon verification of due allocation of the aid. Such evidence will have to be confirmed by an independent chartered accountant/tax accountant or other auditor approved by the German authorities'.

On that basis, the Commission considered that any possible spill-over would be prevented. Thus, support granted to ROs under that scheme did not constitute State aid.

Individual aid N 365/2007 (Germany) was notified as a measure to fund the setting up, construction and equipment of the Fraunhofer Center for Silicon Photovoltaics (hereinafter CSP) ([27]). CSP is an affiliate institute of the Fraunhofer Association for the Promotion of Applied Research (Fraunhofer Gesellschaft zur Förderung der angewandten Forschung

([24]) Pursuant to Article 165 (1) TFEU, the Union shall fully respect the responsibility of the Member States for *inter alia* the organisation of education systems.

([25]) Decision of 17.7.2007, case No 112/2007 *THESEUS*.

([26]) Decision of 7.4.2008, Case No 667/2007 — Deutschland (Mecklenburg-Vorpommern) FuEuI-Regelung 'Richtlinie zur Förderung von Forschung, Entwicklung und Innovation'.

([27]) Decision of 30.1.2008, Case N 365/2007 *Deutschland (Land Sachsen-Anhalt)* Errichtung des Fraunhofer Center for Silicon Photovoltaics.

e.V.; hereinafter FHG). According to the Commission's decision, the primary activity of FHG and its affiliates is to conduct independent fundamental research, industrial research and experimental development, with a focus on applied research.

Germany pointed out that the funding will not defray any operations or project-related costs and provided supplementary information on the economic and non-economic activities pursued by FHG and CSP. According to information provided by Germany, FHG would demonstrate that no undue cross-subsidisation would occur. This would be achieved by separate accounting for economic and non-economic activities, their costs and financing. Such separate accounting would be applied throughout the entire FHG structure, including all its affiliate institutes.

The Commission further noted that FHG has been implementing industry-standard cost accounting since 1970, while constantly amplifying and refining it. Germany confirmed that FHG applied the full costs method, at the level of each institute. The German authorities further argued that, since FHG's cost accounting system was detailed and project-based, all activities could be identified according to their specific costs and financing. On that basis, the German authorities found that the system in place prevented any cross-subsidisation of economic activities from funding for non-economic activities. The Commission decided that the funding in question did not constitute State aid.

Full costing in research organisations

Full costing would be an ideal tool for separating economic and non-economic activities and their costs and funding, and for delivering evidence that the relevant costs have been correctly allocated. In general terms, 'full costing' can be defined as the ability to identify and calculate all direct and indirect costs per activity and/or project that need to be considered in carrying out these activities ([28]).

According to the abovementioned EUA project report, there are wide differences in the status of full costing at both national and institutional levels. The study excludes universities which have not started to look at full costing. When the study was carried out, universities seemed to be in the process of developing, implementing or running their full costing systems. Development efforts ranged from the very early stages of discussion to the design of the desired system. Implementation measures included the setting up of a project management structure as well as a communication strategy, while systems in operation enabled universities to identify effectively the direct and indirect costs of their activities. However, even at that stage, the features of the costing systems varied considerably ([29]). In summary, national costing systems seem to be diverse. There is no black and white guidance on how to ensure proper allocation of costs and funding. It is therefore up to Member States to identify possible State aid issues in public funding for ROs in the first place. In case of doubt, legal certainty can be sought by pre-notifying or notifying the aid measure to the Commission ([30]).

Technology transfer and State aid

One of the primary goals of an RO is the dissemination of results, namely through technology transfer (TT) ([31]). The framework defines TT as 'licensing, spin-off creation or other forms of management of knowledge created by the RO' ([32]). The framework's concept of TT relates to 'the management of knowledge' and is narrower than the concept of 'knowledge transfer' which, according to the Commission, 'involves the processes for capturing, collecting and sharing explicit and tacit knowledge, including skills and competence. Knowledge transfer includes both commercial and non-commercial activities such as research collaborations, consultancy, licensing, spin-off creation, researcher mobility, publication, etc. While the emphasis is on scientific and technological knowledge, other forms such as technology-enabled business processes are also concerned' ([33]).

However, the framework's definition of TT does not include just 'technology', but also 'knowledge created by the RO'. TT, as 'knowledge management', is thus a distinct activity within the broader activity of 'knowledge dissemination'. Experts noticed that there is no universally accepted definition

([28]) The EUA defines the term but also points to the differences in terminology and concepts that influence the understanding of full costing in Europe. Definition according to the European University Association, Financially Sustainable Universities — Towards Full Costing in European Universities, Brussels, 2008, p. 17; discussion of terminology *ibid,* p. 18 *et seq.*

([29]) *ibid*, p. 28.

([30]) Pre-notification is an informal process, see the Code of Best Practice for the conduct of State aid control procedures; OJ C 136, 16.6.2009, p. 13. Notification is a formal process pursuant to Article 108 (3) TFEU and is governed in detail by Regulation (EC) No 659/1999, OJ L 83, 27.3.1999, p. 1, and Commission Regulation (EC) No 794/2004, which implements Regulation (EC) No 659/1999, OJ L 140, 30.4.2004, p. 1.

([31]) Point 2.2.d) of the framework.

([32]) Point 3.1.1 of the framework.

([33]) Commission Communication, Improving knowledge transfer between research institutions and industry across Europe: embracing open innovation; 4.4.2007, COM(2007) 182 final, p. 3.

of knowledge ([34]); they did, however, identify 'major forms in which knowledge can be carried and hence transferred:

- as *codified* knowledge, expressed through language (including mathematics), for example as scientific literature or patents;
- as internalised by *people* who have acquired codified knowledge and knowhow through study, instruction, and experience, for example graduates or experienced researchers leaving their institutions to work in an enterprise that they may (but need not) have set up themselves;
- as embedded in *artefacts* more or less 'ready to use' such as machinery or software or new materials or modified organisms, often called 'technology' ([35]).

Pursuant to the framework, TT can be deemed to be non-economic '…if these activities are of an internal nature and all income from these activities is reinvested in the primary activities of the ROs' ([36]).

The framework explains what the Commission means by 'internal nature' ([37]):

'By internal nature, the Commission means a situation where the management of the knowledge of the RO(s) is conducted either by a department or a subsidiary of the RO or jointly with other ROs. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities'.

The framework concedes, however, that 'For all remaining kinds of technology transfer receiving State funding, the Commission does not consider itself in a position, on the basis of its current knowledge, to decide in a general manner upon the State aid character of the funding of such activities. It underlines the obligation of the Member States under Article 108(3) TFEU to assess the character of such measures in each case and to notify them to the Commission, in case they consider them to represent State aid' ([38]).

It is therefore vital to determine whether or not the dissemination of knowledge through TT is an economic activity. In this context, it is important to note firstly, that TT only falls within the primary goals if it exclusively concerns 'knowledge' that was created by the RO concerned. Secondly, if TT is conducted by the RO concerned, or jointly with other ROs, it is of an 'internal nature', and thus 'non-economic'. Thirdly, outsourcing TT activities by public tender, thus guaranteeing that the TT-service is delivered at market prices, does not affect the 'internal-nature' assumption either. Fourthly, reinvesting the income deriving from TT in primary activities ensures that TT is non-economic, as it allows maintaining overall research organisation status.

TT as defined by the framework means the transfer as such (e.g. the granting of a licence). The framework's concept of TT does not include the subsequent commercial use of the knowledge transferred. As such commercial use is an economic activity in its own right, the issue is not dealt with in this article.

Is State aid involved in funding for private universities, business schools etc?

There still seems to be some uncertainty among stakeholders regarding the State aid implications of funding, in particular for investments or personnel costs of private universities, business schools, technical academies and the like (hereinafter referred to as 'private universities').

With respect to national education, the European Court of Justice ruled that the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duty towards its own population in the social, cultural and educational field. Moreover, according to the Court, 'courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services within the meaning of Article 59 of the EEC Treaty [now Article 49 EC Treaty], properly construed' ([39]).

The Commission reflected case law and decision practice in its 2007 Communication on services of general interest, as well as in a staff working paper that is dedicated to State aid issues in that area. The Communication states that education is a service of general interest 'that can be defined as a service, both economic and non-economic, which the public authorities classify as being of general interest and subject to specific public service obligations. This means that it is essentially the responsibility of public authorities, at the relevant level, to decide on the nature and scope of a service of general interest. Public authorities can decide to carry out the services themselves or they can decide to entrust them to other entities, which can be public or private, and can act either for-profit

([34]) European Commission, Metrics for Knowledge Transfer from Public ROs in Europe, Report from the European Commission's Expert Group on Knowledge Transfer Metrics, Brussels, 2009, p. 4.
([35]) European Commission, Metrics for Knowledge Transfer from Public ROs in Europe, Report from the European Commission's Expert Group on Knowledge Transfer Metrics, Brussels, 2009, p. 5.
([36]) Point 3.1.1 of the framework.
([37]) in Footnote (25) to Point 3.1.1.
([38]) in Footnote (26) to Point 3.1.1.

([39]) Case C-263/86 Belgian State vs. René Humbel and Marie-Thérèse Edel [1988] 05365, paragraphs 18 and 20.

or not for-profit' [40]. According to the staff working paper, the provision of public education financed as a general rule by the public budget and carrying out a State task in the social, cultural and educational fields towards the population is an example of a non-economic activity of a purely social nature [41].

In a specific Decision the Commission dealt with a subsidy for a publicly funded Hungarian College to develop a Service Centre which provided for training programmes, established a Virtual Campus with traditional and remote training methods and set up a Cooperative R&D Centre to improve innovation and competitiveness through PPP. The College made a clear distinction between any economic activities and non-economic activities and their costs and funding in the annual financial statements. The Commission decided that the subsidy was not State aid, as the College was an RO in the meaning of the framework and only its non-economic activities received State support. In particular, the Commission established firstly that the services rendered by the Service Centre were available to anyone free of charge, secondly that the training activities provided by the Virtual Campus were aimed exclusively at individuals, and thirdly that the activities of the College's Cooperative R&D Centre were non-economic in compliance with point 3.1.1, paragraphs 2 and 3, of the framework [42].

As a result the concept of 'normally non-economic primary activities' (education, R&D etc.) can be applied regardless of a university's legal form (public or private) or source of funding. Consequently, State funding for private universities, colleges etc. does not amount to State aid under certain conditions. On the one hand, activities eligible for State subsidies must either be conducted within the national educational system or conform to 'normally non-economic activities' as defined by the framework. On the other hand, under either approach, clear separation of economic and non-economic activities is a necessary precondition.

How to deal with situations where State aid is involved in funding for research organisations?

When State funding for an RO is granted for an economic activity that is identifiable and separable, the framework provides for two main options.

One option is that the RO could act as a mere 'intermediary', passing on the advantage of State funding to the enterprise to which it delivers a service.

'However, if the RO or not-for-profit innovation intermediary can prove that the totality of the State funding that it received to provide certain services has been passed on to the final recipient, and that there is no advantage granted to the intermediary, the intermediary organisation may not be recipient of State aid' [43].

In that case, State aid rules (either the framework's or the GBER's compatibility criteria) apply to the enterprise in question. The RO is not a beneficiary of aid.

A second option is that the RO does not act as an intermediary, but charges market prices for its services. Thus, no State aid is passed on to the enterprise. Rather, it is retained in the sphere of the RO, which then becomes the beneficiary, albeit only as regards the specific economic activity (e.g. a research service that was provided by using a publicly funded laboratory and its staff). Under these circumstances, the framework's or the GBER's compatibility criteria apply at the level of the RO.

There is a theoretical third option that is, however, not explicitly laid down in the framework and is based on the market-economy investor principle [44]. ROs could pass the State aid element back to the State by paying remuneration that would be established under normal market conditions (e.g. a market-based 'lease' or other form of compensation fee to the State for the use of the laboratory or compensation for man-hours accounted for). However, it would be difficult to establish 'normal market conditions' as, in the context of R&D&I and education, the State 'investor' may be in a situation which is very different from that of a private undertaking acting under normal market conditions. It is doubtful whether a private undertaking would invest in fundamental research infrastructure, for example. In such cases, normal market conditions, which are necessarily hypothetical, must be assessed with reference to the objective and verifiable elements that are available [45]. The pre-condition is, however, that

(40) Commission Communication on Services of general interest, including social services of general interest; 20.11.2007, COM(2007) 725 final, p. 3-4.

(41) Commission staff working document, Frequently asked questions (…), 20.11.2007, SEC(2007) 1516 final, p. 10.

(42) Commission Decision of 26.11.2008, case No 343/2008 *Individual aid to the College of Nyíregyháza for the development of the Partium Knowledge Centre*. This is consistent with decision practice prior to the entry into force of the framework, e.g. Decision of 8.11.2006 in case NN 54/2006 *Přerov Logistics College*, where the Commission found that an investment subsidy for a Czech College was not a State aid as the College did not conduct any economic activity but pursued an educational role of general interest. The decision was based on the fact that profits, if any, could only be reinvested in that central activity, and could not be distributed. In this context, the Commission considered that the College did not seek to make an economic profit and that its aim was not to offer a service for remuneration.

(43) Point 3.1.2 of the framework.

(44) Case C-39/1994 *SFEI vs. La Poste* [1996] ECR I-3547, paragraphs 60-62.

(45) Joined Cases C-83/01 P, C-93/01 P and C-94/01 P Chronopost SA, La Poste and French Republic. vs Union française de l'express (Ufex) and Others [2003] ECR I-6993, paragraph 38.

the market price for such compensation can be calculated with full-cost accounting [46].

General conclusion

Universities and other ROs may be subject to State aid rules. The economic character of their activities is decisive. In order to avoid the most difficult of all scenarios, namely that all public funding to such organisations is deemed to be State aid, economic and non-economic activities must be separated. There are no comprehensive and uniform rules that can be applied to ensure proper separation of economic and non-economic activities for State aid purposes. The burden of proof is on the Member State. So far the Commission has not assessed the actual principle of funding public research institutions by Member States. However, there is decision practice that can provide guidance on a case-by-case basis.

On the one hand, State aid practice and discussions with Member States show that there is still some diversity as regards due cost separation and the understanding of economic and non-economic activities. On the other hand, there is some pressure to conform to State aid rules in that regard. The framework entered into force on 1 January 2007. The Commission proposed, and Member States agreed, *inter alia* that existing R&D aid schemes should be amended, where necessary, to bring them into line with the provisions laid down in point 3.1.1 of the framework, namely due separation of costs and financing and non-economic primary activities [47]. The Member States have had 24 months to do so.

[46] Stefan Huber, Julia Prikoszovits, Universitäre Drittmittelforschung und EG-Beihilfenrecht, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 6/2008, p. 174.

[47] Point 10.2 of the framework lays down certain appropriate measures as proposed by the Commission, pursuant to Article 108 (1) TFEU.

The Dexia restructuring decision

Yassine Boudghene, Laurent Le Mouël, Martin Löffler, Sandrine Scheller, Guillaume Schwall ([1])

On 26 February 2010, the Commission took a final, conditional decision ([2]) approving the State aid package to, and the restructuring of, Dexia SA ('Dexia'), which benefited from a large State aid package. This conditional decision follows an in-depth investigation opened in March 2009 ([3]). In this article we briefly describe the situation of the bank (1), the measures involved (2), the procedural context (3) and the assessment of the restructuring measures (4), before drawing some concise conclusions (5).

1. Dexia and the need for State aid

Dexia is a European financial services group created by a merger, in 1996, between the Crédit Communal de Belgique and the Crédit Local de France, both of which specialised in lending to local authorities. Since the merger, Dexia has grown rapidly: Its total assets increased by 152 % between 2000 (258 billion euros) and 2008 (651 billion euros), an average growth rate of 12.3 % per annum. The balance sheet growth stemmed mainly from the accumulation of a very large bond portfolio and the development of public finance lending outside its traditional markets, especially through the acquisition or creation of new subsidiaries in Italy (Dexia Crediop), Spain (Dexia Banco Sabadell), Germany (Dexia Kommunalbank Deutschland), Japan, the United Kingdom and the United States (where the bank acquired, in 2000, the monoline FSA — Financial Security Assurance). Hence, Dexia had to rely heavily on wholesale markets to fund its growing public finance activities, as a material increase in its customer deposit-taking activities was not possible.

This business model, consisting to a large extent of short-term funding raised on wholesale markets to finance long-term and low-margin loans to the public sector, worked well while liquidity was flooding at very low cost in wholesale markets. However, in September 2008, in the aftermath of the collapse of Lehman Brothers, liquidity in the interbank and capital markets dried up, leaving Dexia with a material short-term liquidity gap. The bank's situation was made worse by impairments on a large portfolio of structured credit assets, either held directly or insured by FSA, by its large exposure to banking and sovereign counterparties in difficulty (e.g. US, Irish, and Icelandic banks), and by the equity market downfall. Total losses and impairments recorded by Dexia as a result of the financial crisis amounted to 6.6 billion euros in December 2009 (of which 5.9 billion euros were booked in 2008).

These major difficulties led the three Member States where Dexia's main legal entities are incorporated, namely Belgium, France and Luxembourg, to agree on a rescue package which would enable the bank to withstand the crisis and pursue its activity.

2. Description of the State aid measures

2.1. Capital injection

On 30 September 2008, the Governments of Belgium, France and Luxembourg publicly announced a capital increase of 6.4 billion euros for Dexia. Of this total amount, 3 billion euros of newly issued shares were subscribed by the French state (1 billion euros) and the Belgian federal and regional states (2 billion euros). In all 3 billion euros were subscribed by the bank's key shareholders, most of them closely linked to the public sector: Caisse des Dépôts et Consignation and CNP Assurances in France; Holding Communal SA, Arcofin SCRL, and Ethias, in Belgium. An additional 376 million euros of hybrid capital to be issued by Dexia BIL in Luxembourg were to be subscribed by the State of Luxembourg.

2.2. The State guarantee on funding

Beyond recapitalisation, Dexia also urgently needed to regain access to wholesale funding in order to pursue its activities. Hence, the same three Member States announced on 9 October 2008 that they would jointly guarantee all new funding raised by Dexia with an initial maturity of up to 3 years and for a maximum amount of 150 billion euros. This guarantee, split into 60.5 % for Belgium, 36.5 % for France, and 3 % for Luxembourg, was mainly targeted at wholesale deposits, commercial papers and bonds. One year later, in October 2009, the maximum guaranteed amount was reduced to 100 billion euros and maximum maturity was extended to 31 October 2014 (up to 5 years). Financings with

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

([2]) Commission Decision of 26 February 2010 in State aid case No C9/2009 (ex NN45/2008, NN49/2008 and NN50/2008) implemented by Belgium, France and Luxembourg in favour of Dexia SA, not yet published.

([3]) OJ C 181, 4.8.2009, p. 42.

a maturity lower than one month were excluded from the scope of the guarantee.

During the last quarter of 2008, in order to meet its commitments, Dexia was also able to rely on emergency liquidity assistance (ELA) granted jointly by the National Bank of Belgium and the Bank of France. The facility granted by the National Bank of Belgium was explicitly guaranteed by the Belgian State [4].

2.3. The impaired assets measure

The rescue package was finally topped up in November 2008 by an additional guarantee granted by the Belgian and French States (for 62.4 % and 37.6 % respectively) on a sub-portfolio of structured credit assets (covered assets) totalling 12.48 billion US dollars in nominal value, part of a total portfolio of 16.98 billion US dollars held by Dexia's loss-making US monoline subsidiary FSA (the 'FSA measure'). The FSA measure was granted to facilitate the sale of FSA, which closed on 1 July 2009. The portfolio was primarily made up of US residential mortgage-backed securities (RMBS) and collateralised debt obligations (CDO)/collateralised loan obligations (CLO) that were ring-fenced from the scope of assets to be sold, and counter-guaranteed by the Belgian and French States.

3. Procedural issues

In the light of Dexia's overall situation in September and October 2008, the Commission concluded on 19 November 2008 that the bank was in difficulties and authorised the capital injection and the State guarantee on Dexia's funding as a rescue measure to avoid a serious disruption of the economy of the Member States concerned, provided that a restructuring plan for the bank was submitted to the Commission within a six-month period. In its decision the Commission considered that the recapitalisation and the guarantee amounted to State aid, pursuant to Article 107 of the Treaty on the Functioning of the European Union (TFEU), since they were granted from State resources and created an advantage for Dexia, which would not have had access to wholesale and capital markets without them, thereby distorting competition across Member States.

In February 2009, the three Member States submitted to the Commission an initial restructuring plan for Dexia. One of the main measures of the plan was the sale of FSA to Assured Guarantee, which would reduce the group's risk profile. Closure of the deal was, however, conditional on implementation of the FSA measure by the Belgian and French governments. On 13 March 2009, the Commission concluded in this respect that the FSA measure was in line with the principles set out in its communication on the treatment of impaired assets in the Community banking sector [5], except for the asset valuation aspects, which needed a more detailed assessment. In its decision of 13 March 2009, however, the Commission expressed some doubts as to the ability of the proposed restructuring measures to restore the long-term viability of the bank, to share the cost of restructuring among stakeholders, and to compensate for the distortions of competition caused by the aid. As a result, while declaring the FSA measure compatible with the internal market, the Commission opened in-depth investigations on the restructuring plan.

4. Dexia's restructuring plan

Intensive discussions took place between the Commission, the authorities of the Member States, and Dexia from April 2009 to February 2010. During this period the Member States clarified and completed Dexia's restructuring plan. Additional restructuring measures were notified to the Commission on 9 February 2010.

In its decision of 26 February 2010 closing the in-depth investigation, the Commission: (i) confirmed the State aid elements of the Belgian State's guarantee on the liquidity assistance provided by the National Bank of Belgium; (ii) established the amount of State aid involved in the recapitalisation measure [6] and in the FSA measure; and (iii) confirmed that the bank's restructuring plan, as notified on 9 February 2010, was in line with the principles set out in the Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules [7].

As the March 2009 decision was not comprehensive with respect to the assessment of the FSA measure, the Commission also reviewed the valuation of the portfolio with the assistance of external experts and concluded that the level of the first tranche of losses finally borne by Dexia (in cash) and amounting to 4.5 billion US dollars was satisfactory, given the real economic value of the portfolio, and that the remuneration paid to the States was appropriate.

In total, the Commission assessed the amount of aid received by Dexia at 8.4 billion euros for the recapitalisation and the FSA measure, and up to 135 billion euros for the State guarantees on Dexia's

(4) See Moniteur belge of 17.10.2008, 2nd edition, p. 55637.

(5) OJ C 72, 26.3.2009, p. 1-22.

(6) This corresponds to the total recapitalisation amount excluding equity shares subscribed by Arcofin SCRL, Ethias, and CNP Assurance, all considered as private shareholders.

(7) OJ C 195, 19.8.2009, p. 9-20.

liabilities and on the ELA. The Commission also assessed Dexia's complete restructuring plan and concluded that it was appropriate to restore the long-term viability of the bank, share the cost of restructuring across the bank, and compensate for the distortions of competition, as explained below.

4.1. Measures to restore long-term viability

In its assessment of the bank's business model, the Commission identified major issues regarding viability. In the first place, despite recent improvements Dexia still relies to a large extent on wholesale funding, especially short-term funding. This makes the group vulnerable to market disruptions and credit spread variations. This is particularly the case for Dexia Crédit Local (France), while the funding sources for Dexia Bank Belgium and Dexia BIL (Luxembourg) are more stable. Secondly, Dexia has to cope with a very large and slowly amortising stock of assets (mostly bonds and public finance loans), making it harder to deleverage and to pass through the increased cost of funding, thus putting pressure on refinancing needs. Thirdly, margins ([8]) on such assets are very low and potentially not high enough to absorb sustained increases in funding costs and provisions. In the fourth place, Dexia's funding cost, especially for capital markets financing (e.g. covered bonds and senior unsecured bonds), has increased significantly and is still materially higher than pre-crisis levels, despite the sharp improvement in market conditions over 2009. Fifth, Dexia has developed quickly and in geographical regions outside its core markets, taking in non-traditional and riskier activities, such as monoline insurance services in the US. Finally, Dexia keeps a certain amount of exposure to a portfolio of structured credit securities mainly made up of US RMBS and CDO/CLO, and is overexposed to sovereign and sub-sovereign risks, through both its bond and loan portfolios.

In order to address these viability issues, the main elements of Dexia's restructuring plan were (i) to focus on its core markets and business segments and engage in profitable lending only; (ii) to reduce its risk profile by deleveraging and improving its liquidity profile; and (iii) to improve its cost structure.

The restructuring plan achieves this goal through commitments of the Member States to ensure that Dexia will implement the following measures: (i) refocusing activities in public and wholesale banking (PWB), as well as retail and commercial banking (RCB), mainly on the group's core markets (Belgium, France and Luxembourg) and putting into run-off several non-strategic loan and bond portfolios; (ii) reducing the balance sheet size by 35 % over the restructuring period (until the end of 2014), including organic growth; (iii) accelerating the deleveraging through the selective (and realistic) sale of bonds in the run-off portfolio; (iv) reducing the proportion of short-term funding, increasing the proportion of more stable funding sources and increasing the average duration of liabilities gradually over the restructuring period according to a pre-agreed schedule; (v) engaging in lending to PWB customers only if a minimum risk-adjusted return on capital (RAROC) of 10 % can be achieved; (vi) reducing its cost base by 15 %; and (vii) stopping proprietary trading activities. All these measures will be subject to periodic monitoring by the Commission over the restructuring period, with the support of a monitoring trustee.

To assess whether the planned measures are sufficient to restore the long-term viability of the group at the end of the restructuring period, the Commission has reviewed Dexia's business plan, together with the results of different stress tests performed by the bank. Such tests are aimed at assessing: (i) the resistance of the group to severe macro-economic shocks; (ii) the vulnerability of the group to material increases in the cost of wholesale funding; and (iii) the liquidity of the group under severe assumptions. The Commission also relied on the expertise of the regulatory authorities.

The various stress testing exercises were used to identify the group's weaknesses and formulate measures to address them. Dexia demonstrated that at the end of the restructuring period, its level of regulatory capital should be sufficient to withstand a severe recession and that its liquidity should gradually improve to make the group more resilient to external shocks in the future. Therefore, the Commission's assessment concluded that the measures contained in the restructuring plan were sufficient to restore the long-term viability of Dexia at the end of the restructuring period.

4.2. Measures to share the restructuring costs (burden sharing)

First, Dexia will sell a significant amount of ownership stakes, including Dexia Crediop in Italy, Dexia Banco Sabadell in Spain, Dexia Banka Slovensko in Slovakia, and Dexia Epargne Pension in France. Second, Dexia's historical shareholders have taken on a part of the burden, because their share in the bank's capital has been diluted by the recapitalisation subscribed by the Belgian and French Governments. Shareholders and holders of hybrid capital instruments further participate in the cost of restructuring through a partial ban on dividend and coupon

([8]) Above interbank rates.

payments. Third, the total fees paid by the bank to the Member States for the guarantee granted on its liabilities and on impaired assets (through the FSA measure) are appropriate and amount to significant burden sharing for Dexia.

Therefore, the Commission considered that the large-scale divestments, the fees paid for the State guarantees and the asset relief measure, the dilution effect of the recapitalisation, and the partial suspension of payments of dividends and interests provided for in the plan limit the aid to the minimum necessary and ensure an adequate contribution by the bank and its owners to the restructuring.

4.3. Measures to limit distortions of competition

As already mentioned, the restructuring plan includes divestment measures in certain activities and the sale by Dexia of certain subsidiaries, which de facto limit the distortions of competition. In addition, in its core markets, certain limitations on new volumes of PWB loans will be applied each year throughout the entire restructuring period. These measures address the Commission's concerns regarding possible undue distortions of competition due to the extent of the aid granted.

In addition to divestments, the bank will also be subject to a general two-year acquisition ban. However, because of the specific nature of public finance lending practices, often based on public tendering, the Commission did not impose a price leadership ban on Dexia but, instead, required that a minimum profitability of PWB loans (measured through RAROC) is ensured and that the French and Belgian Governments increase the transparency of public finance tenders.

On this basis, the Commission considered that Dexia had sufficiently mitigated the distortions of competition triggered by the State aid it had received.

5. Conclusion

Dexia being one of the most severely hit banks following Lehman's filing for bankruptcy, the decision provides an illustration of how the Commission is dealing with banks whose business models were completely challenged by the crisis. The handling of the Dexia case by the Commission is therefore interesting for two specific reasons:

- On the one hand, the Commission undertook a detailed assessment of the bank's viability issues and reviewed the results of three types of stress tests performed by the bank. The set of measures to achieve the bank's return to long-term viability were designed in order to address the most important weaknesses of the bank and were translated into periodic, pragmatic and realistic milestones for the bank to reach.
- On the other hand, the Commission has again demonstrated that it is helping to overcome the financial crisis by not blocking large-scale rescue measures undertaken by Member States. However, the Commission needs to ensure that such measures take place in an adequate framework which provides for a return to the long-term viability of the bank, a sharing of restructuring costs among stakeholders, and measures to limit the distortions of competition created by the aid.

State aid: main developments between 1 January and 30 April 2010

By Koen Van de Casteele ([1])

Policy developments

Temporary Framework

In October 2009, Member States submitted a first report on the application of the Temporary Framework, in line with the requirement set out in point 6 of the Framework ([2]).

On 17 March 2010, DG Competition sent a new questionnaire to Member States in order to gather further and more up-to-date evidence on the use of the Temporary Framework, taking the prevailing economic circumstances into account. The questionnaire was open for comments until 26 April 2010.

Financial crisis

On 30 April 2010, DG Competition prepared a staff working document on the application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010. The document proposes a review of the conditions under which guarantee schemes can be approved by the Commission. The fee for a government guarantee is to be increased compared to the formula recommended by the ECB in October 2008 at the height of the crisis. Furthermore, banks that continue to rely heavily on government guarantees (i.e. > 5 % of total guaranteed liabilities outstanding over total liabilities of the bank, and total amount of outstanding guaranteed debt of more than €500 million) would be required to submit a review demonstrating to the Commission the bank's long-term viability. These requirements would initiate the phasing-out process concerning the various forms of assistance to banks, starting with the unwinding of government guarantee schemes.

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

([2]) '… a report on the measures put in place on the basis of this Communication should be provided to the Commission by Member States by 31 October 2009. In particular, the report should provide elements indicating the need for the Commission to maintain the measures provided for by this Communication after 31 December 2009, as well as detailed information on the environmental benefits of the subsidised loans.'

Cases adopted ([3])

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

La Poste

On 26 January 2010, the Commission completed its investigation ([4]) into the unlimited state guarantee enjoyed by the French Post Office ('La Poste') because of its special status as a public body, following the adoption by the French Parliament of the law on the public enterprise La Poste and on postal activities. The Commission has concluded that converting La Poste into a public limited company ('société anonyme'), as envisaged in this law, will have the effect of removing the guarantee.

In 2007 the Commission launched an in-depth investigation under the existing aid procedure into the state guarantee implicitly granted to La Poste ([5]). The Commission considered that La Poste enjoys an implicit state guarantee because of its status. The guarantee is unlimited, is provided free of charge, and is not confined to universal postal service activities but also covers La Poste's commercial activities, thus conferring on it an economic advantage over its competitors, which are obliged to operate without such a guarantee. The guarantee therefore distorts competition on the postal markets, which makes it incompatible with the common market.

The Commission's decision in no way calls into question the public service mission or public ownership of La Poste. The Commission is neutral with regard to the ownership arrangements adopted in the Member States. It takes the view that the guarantee enjoyed by La Poste by reason of its special status, and not by reason of its ownership arrangements, is State aid incompatible with the common market and therefore must be withdrawn.

The conversion of La Poste into a public limited company on 1 March 2010, as provided for by the Law on the public enterprise La Poste ('loi sur l'entreprise publique La Poste') adopted on 12 January 2010, is therefore a measure that will remove the State aid in question.

([3]) This is only a selection of the cases adopted in the period under review.

([4]) C 56/2007

([5]) C 56/2007, OJ C 135, 3.6.2008, p. 7.

Dutch public broadcasters

Since 2002 the Commission has received complaints from several commercial broadcasters and other media undertakings about various aspects of the financing regime applying to Dutch public service broadcasters. The complainants raised concerns about entrustment and the lack of a precise definition of the public service task, including the financing of online activities, and about the proportionality of the financing.

In March 2005 the Commission had opened a preliminary investigation and requested The Netherlands to clarify the role and financing of the public service broadcasters. The Commission expressed concerns on a number of points, in particular regarding the definition of the public service remit especially for new audiovisual services, the new audiovisual services entrusted to it, and the proportionality of the financing, both as regards adequate mechanisms to prevent overcompensation for public service activities and respect for market principles.

The Dutch authorities came forward with proposals for amending the financing regime and embarked on a reform of the applicable media act, including how to address the initial concerns expressed by the Commission. A new media act entered into force in the Netherlands in December 2008. In November 2009, following further discussions between the Commission and the Dutch authorities, the Dutch authorities submitted undertakings to amend the new financing regime so as to ensure its compliance with the State aid rules.

The Dutch authorities have undertaken to clarify in advance and in sufficient detail the scope of the public service task which will be entrusted to the public service broadcasters. In addition, the Dutch authorities have given an undertaking that new audiovisual services, including pay services, will be subject to a prior evaluation before being entrusted to public service broadcasters. The Dutch authorities will ensure that the prior evaluation process will be conducted in a transparent manner. As part of this prior evaluation process, interested parties will be consulted and the market effects of new audiovisual services will be assessed and balanced against the benefits of the new service for Dutch society. The Dutch authorities have further undertaken to amend the financing mechanism, by limiting the compensation of public service broadcasters to ensure that the public funding does not exceed what is necessary to fulfil the public service tasks, including the control of overcompensation.

On that basis, on 26 January 2010 the Commission cleared the annual financing regime for the Dutch public service broadcasters [6]. This was the second decision taken under the Commission's revised Broadcasting Communication of 2 July 2009.

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

Banking

Schemes

Hungarian liquidity scheme

The Commission has approved [7] a Hungarian measure aimed at providing liquidity to eligible financial institutions in Hungary to support lending to the economy.

In the period from late 2008 to early 2009, the Hungarian financial markets and economy were particularly affected by the global financial crisis. Liquidity sources dried up completely for both financial institutions and the Hungarian State itself, leaving the State with limited financing options and having to resort to external support in the form of a financing package provided jointly by the IMF, the European Union and the World Bank in November 2008.

In this context, Hungary adopted in March 2009 a liquidity scheme aimed at providing loans to Hungarian financial institutions to enable them to maintain lending to the real economy in spite of the severe liquidity shortage. The liquidity support takes the form of non-subordinated, non-structured loans, with a maximum maturity and an entry window open until 30 June 2010.

The Commission has found that the liquidity loans are in line with its Banking Communication. In particular, the loans address the acute liquidity problems of Hungarian financial institutions. The liquidity measures were necessary, in the light of the exceptional turbulence experienced by the Hungarian economy and financial institutions, in order to avoid even greater disruption of the economy. In the context of the IMF-sponsored external financing package received by the Hungarian State, the remuneration — which covers the cost of funds of the State and the risk premium of the institutions — can be considered appropriate. In particular, the level of remuneration of the loans is consistent with the pricing of the Hungarian guarantee scheme.

NAMA

On 26 February 2010, the Commission approved [8] the establishment of the National Asset Manage-

[6] E 5/2005
[7] NN 68/2009
[8] NN 725/2009

ment Agency (NAMA), an impaired asset relief scheme for financial institutions in Ireland.

The purpose of NAMA is to restore stability to the Irish banking system by allowing participating financial institutions to sell to the agency assets whose declining and uncertain value is preventing the long-term shoring-up of the capital of the financial institutions and, therefore, the return to a normally functioning financial market.

The scheme was open to all systemically-important credit institutions established in Ireland, including subsidiaries of foreign banks, with a 60-day application window that expired on 19 February. Five institutions are due to take part: Anglo Irish Bank, Allied Irish Bank, Bank of Ireland, Irish Nationwide Building Society and Educational Building Society.

The assets targeted by the measure are all loans issued for the purchase, exploitation or development of land and associated loans. Following the bursting of the Irish real estate bubble, these constitute the riskiest parts of the participating institutions' asset portfolios. The Irish authorities anticipate that NAMA will purchase land and development loans as well as associated commercial loans with a nominal value of approximately €80 billion for an estimated purchase price of €54 billion.

NAMA's main objective is to manage the assets expeditiously with a view to maximising their value and recovery prospects in the interest of the State.

The Commission has found that the establishment of NAMA constitutes State aid to the participating institutions, but that this aid is compatible. The scheme and intended operations of NAMA are in compliance with the guidelines set out in the Commission's Communication on the treatment of impaired assets as regards disclosure and ex ante transparency, eligibility of institutions and assets and the alignment of banks' incentives with public policy objectives. In particular, the Commission has found that the scheme includes an adequate burden sharing mechanism through the payment of a transfer price which is no greater than the long-term economic value of the assets, and the inclusion of an adequate remuneration for the State in the rate used to discount the long term economic cash flow of the assets.

Finally, the Commission is relying on a number of commitments from the Irish authorities to ensure that NAMA, whilst it achieves its objective of maximising the recovery value of the purchased assets, does not lead to distortions of competition through the use of some of the specific powers, rights and exemptions granted in the NAMA Act. The Commission will also review individual restructuring plans to ensure that the participation of the financial institutions in this measure is followed up with appropriate restructuring measures to promote the return of those institutions to long term viability.

This is the second asset-relief scheme approved by the Commission after that submitted by Germany in May 2009 and cleared at end July [9].

Ad hoc aid

Liquidation Bradford & Bingley

On 25 January 2010 the Commission approved [10] the measures taken by the UK Government for the liquidation of Bradford & Bingley.

Bradford and Bingley provided specialist mortgages and savings products. It operated 197 branches and 141 agencies spread across the UK. Its share of the market for net new mortgage lending at the end of the 2007 was 7.7 %.

By September 2008, the bank had fallen into difficulties due to its dependence on wholesale funding and its risky loan portfolio, which resulted in the withdrawal by the UK Financial Services Authority of the bank's licence to accept deposits. The UK authorities decided to nationalise and wind down the bank while it was still solvent, sell its retail deposit book and branches to Abbey National and provide the remaining part of the business with a working capital facility and guarantee arrangements. These measures were authorised by the Commission as rescue aid on 1 October 2008, under which the UK was obliged to submit a liquidation or restructuring plan for Bradford & Bingley.

The liquidation plan submitted by the UK provides for a prolongation of the previously authorised rescue measures, which are now extended for the liquidation of the bank, and a potential injection of capital.

The Commission concluded that the liquidation plan ensures an orderly winding down of Bradford & Bingley in a manner which maintains financial stability. The liquidation period covers more than 10 years. However, once the bank is no longer active in the market, competitive distortions are limited. The wind-down can be accelerated by a sale of the remaining assets when market conditions improve. The Commission accepted that, in order to facilitate the orderly wind-down of its portfolio, it will continue to offer limited services to its existing clients. In the same vein, Bradford & Bingley will relinquish or limit any regulatory permission that is not required for the orderly wind-down of the business. The Commission will strictly monitor the

(9) N 314/2009, approved on 31.7.2009.
(10) N 194/2009

progress of the wind-down process and its impact on competition.

Restructuring Dunfermline

On the same day, 25 January 2010, the Commission also approved [11] aid given by the UK authorities to facilitate restructuring of the Dunfermline Building Society of the United Kingdom.

The restructuring consisted of the immediate split-up of Dunfermline, after which the part containing the good assets and liabilities was sold in an auction to a competitor, with the UK State making a financial contribution of over £1.5 billion. The part containing the impaired assets was put into administration. The Commission found that the orderly break-up of Dunfermline resulted in the return to viability of the good part that was sold. The Commission furthermore concluded that there was sufficient burden-sharing, as subordinated debt-holders contributed to the restructuring as much as possible, and that the liquidation of a substantial part of Dunfermline limited the distortion of competition caused by the aid.

Real economy cases adopted under the Temporary Framework

Aid in the form of guarantees (N 541/2009)

The Commission has authorised plans notified by Sweden to provide a guarantee that will enable Saab Automobile AB to access a loan from the European Investment Bank (EIB).

The loan to be granted by the EIB will co-finance Saab's business plan in the light of its sale by the current owner, General Motors, to the Dutch carmaker Spyker Cars N.V. According to the business plan, Saab intends to use the EIB loan of €400 million for an investment project worth €1 billion related inter alia to fuel efficiency and car safety.

Saab will pay a premium for the guarantee and provide the Swedish Government with high-quality collateral covering the full guaranteed amount. This collateral could be called upon by the Swedish state if it were required to pay out any money under the guarantee. The level of the premiums paid during the lifetime of the loan will be in line with the provisions of the Commission's Temporary Framework. For a part of the guarantee, the Commission found that, in the current market situation and taking into account the other conditions of the transaction, a premium of 12.48 % per annum is the market price for the risk involved in issuing such a guarantee. The Commission therefore concluded that this part of the guarantee did not involve State aid.

[11] NN 19/2009

Short-term export credit insurance (N 14/2010, N 713/2009)

The Commission has authorised an amendment to a Dutch short-term export credit insurance scheme, which was initially approved on 2 October 2009. The amendments include a reduction in the level of premiums to be paid by exporters, and an expansion of risk categories eligible under the scheme. The compensation for the private insurers who are managing the scheme has also been modified to better reflect the actual costs.

The Commission also authorised a Slovenian measure to provide insurance cover via the State-owned agency, SID Banka, to exporters who are unable to obtain cover from the private market as a result of the current financial crisis. The Commission found the measure to be in line with its Temporary Framework for State aid measures to support access to finance in the current financial and economic crisis. In particular, the measures require market-oriented remuneration and are focused specifically on the problem of the current unavailability of short-term export credit insurance cover in the private market. The Commission authorised the measure until 31 December 2010.

Other measures (NN 4/2010)

The Commission has authorised a Danish scheme providing export loans to Danish exporters and/or their clients who are experiencing difficulties in accessing funding in the current financial crisis. The Commission found the scheme to be in line with its Communication on Reference Rates, in particular because it provides funding on market terms and therefore does not constitute State aid.

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

Regional aid & regeneration

On 29 January 2010, the Commission decided [12] that Sovello AG (formerly EverQ GmbH), a German manufacturer of solar panels, was not entitled to receive public support in the form of a bonus for small and medium-sized enterprises (SMEs) because the company did not meet the relevant criteria of the applicable EU framework for aid to SMEs (Commission Recommendation 2003/361/EC).

Sovello was established as a joint venture at end-2004 by Q-Cells SE – which owns 24.9 % of the shares - and the US firm Evergreen Solar Inc. – which owns the remaining 75.1 %. When the Renewable Energy Corporation ASA (REC) joined, in September 2005, both of the initial sharehold-

[12] C 27/2008

ers reduced their participation in order to give 15 % of the shares to REC. Since September 2006, each of the three joint venture partners has had an equal share (33.3 %) in Sovello.

Sovello benefited from regional investment aid, including an SME bonus in 2006 (Sovello1, Commission Decision N 426/2005) for the setting up of a site for the integrated production of photovoltaic modules on the basis of so-called String-Ribbon technology. It requested a second tranche of regional aid for its second solar modules plant (Sovello2), which was authorised by the Commission in June 2009 [13].

During its investigation into Sovello2, the Commission uncovered indications that Sovello's corporate architecture had been artificially designed to meet the formal criteria of the SME definition. An SME is defined on the basis of the number of employees and turnover and balance sheet data. Data from partner companies or linked companies are also taken into account. These formal criteria were only met by artificially keeping the participation of Q-Cells in Sovello below 25 %, with the essential purpose to obtain an SME bonus, while the actual influence of Q-Cells in Sovello was considerably higher than the level normally corresponding to a share of 25 %.

If the Commission had been aware of this additional information, which was only submitted to it during the notification for Sovello2 but not when it took its decision on 7 June 2006, this would have influenced its assessment.

In addition, the Commission's investigation revealed that, through its joint venture partners who were active in the same industrial sector, Sovello potentially had access to funds and assistance that were not available to competitors of equal size which were not supported by linked or partner enterprises. The Commission therefore concluded that the SME bonus granted to Sovello was not necessary in order to ensure the financing of the investment.

R&D&I

GAYA

On 24 March 2010 the Commission authorised [14] French aid worth €18.9 million for the GAYA research programme, a programme aimed at developing production technologies for second-generation motor biofuels.

GAYA's objective is to develop a decentralised biomethane production industry based on biomass gasification using a second-generation thermochemical process. It includes the development of a pre-industrial demonstration plant open to all specialists in the field, which will operate over a period of seven years.

The eligible expenditure for calculating the aid is €42.5 million. The main beneficiary of the public support of €18.9 million will be the GDF SUEZ group, the project leader (€15.5 million in aid). However, the research work will be carried out jointly with the Union des Coopératives Forestières de France (UCFF), public research bodies (CEA, CIRAD, CTP, FCBA, ENSTIMAC-RAPSODEE, LSGC, ENSIACET-LGC, and UCCS) and the Austrian company REPOTEC. The aid forms part of the French Environment and Energy Management Agency's aid scheme (N397/2007), which was authorised by the Commission on 31 January 2008.

Thanks to the GAYA project, GDF SUEZ and its partners will develop a pre-industrial R&D demonstration plant to test biomass gasification/methanation processes throughout the production chain. This tool will be used as part of a collaborative R&D programme intended to develop processes that will be forerunners of a future move to an industrial stage. The main focus will be on removing the technical, economic and environmental barriers and responding to the main problems of the industry from an integrated perspective.

After conducting an in-depth examination, the Commission took the view that the project met the criteria of the State aid framework for research, development and innovation. The GAYA project should generate substantial benefits in terms of dissemination of scientific knowledge and environmental protection, land use planning, and reduction of Europe's energy dependency. However, because the potential commercial benefits of the GAYA project are not expected before 2020-2030, the project launch requires public funding. The Commission is particularly concerned that the granting of future intellectual property rights among GDF Suez and its partner research bodies should not distort competitive conditions in the biomethane market in future. In particular, GDF Suez has undertaken to forego the exclusive rights that could be granted to it by its partners over their technologies. The distortions of competition caused by public support will therefore remain limited, in particular because the future demonstration plant will be open to other stakeholders in the sector. Finally, the presence of major European competitors and the fact that the project is different from other expected technologies will make it possible to maintain competitive pressure in energy markets in general, and in the biofuels market in particular.

(13) C 21/2008, OJ L 237, 9.9.2009, p. 15.
(14) N 493/2009

Daher-Socata & Sogerma

The Commission has authorised [15] France to grant repayable advances of €35.14 million to Daher-Socata (€12.34 million) and Sogerma (€22.8 million) for the development of the next-generation Main Landing Gear Doors (MLGD) and Main Landing Gear Bay (MLGB) of the future Airbus A 350 XWB. Funding will be granted under an existing State aid scheme approved by the Commission in March 2006 (case N 51/2006).

The purpose of both projects is to develop the utilisation of composite materials for the fabrication of specific components of aero-structures. The MLGD project (undertaken by Daher-Socata) involves industrial research and experimental development activities for a total eligible cost of €30.85 million, whereas the MLGB project (undertaken by Sogerma) involves exclusively experimental development activities for a total eligible cost of €57 million.

Both advances will be repaid in full when a predefined sales target has been reached. Each additional delivery beyond this target will trigger the payment of a royalty fee.

The Commission found that the financial sector was reluctant to provide sufficient risk-sharing capital for long-term R&D projects of this kind. The Commission therefore concluded that the aid would address a genuine market failure. Moreover, the Commission identified that the aid granted to both companies is limited to the amount necessary for enabling R&D projects of this magnitude. The Commission therefore concluded that the aid was appropriate and proportionate.

Given the particular structure of the aeronautical market, and the small market shares held by the two beneficiaries, the impact on competition will be limited.

Energy and environment

ArcelorMittal Eisenhuettenstadt

The Commission has authorised [16] the granting of investment aid of €30.18 million by Germany to ArcelorMittal Eisenhuettenstadt GmbH's 'Top Gas Recycling' (TGR) project. TGR is an innovative process that enables the separation of CO_2 from other emission gases as they come out of the furnace and recycles the CO_2-free emissions to produce steel. The use of TGR will reduce CO_2 emissions by 16 % as compared to existing state-of-the-art technology, as steel makers use less coke. This is the first ever application of TGR technology on an industrial scale.

The Commission assessed the measure under its Guidelines on State aid for environmental protection. The Commission's investigation found that the aid is necessary, as — without the aid — ArcelorMittal Eisenhüttenstadt would not translate the technology into an industrial-scale application. The assessment took account of the fact that even if the CO_2 price, currently around €14/t, were to double, it would still be too low to trigger an investment in TGR technology.

It is envisaged that companies participating in a ULCOS consortium, representing approximately 90 % of total steel production within the EU, will share among themselves the technological know-how from the TGR project for free. Therefore, the know-how of the project can be seen as a public good which benefits the ULCOS partners collectively.

Given the risks involved in the project, its character as a public good, the alternative investment options of the company and the process that resulted in the selection of the TGR project as documented by Germany, the Commission considered that the aid was proportionate.

Verbund-Austrian Thermal Power

The Commission has authorised [17] Austria to grant €16 million towards an energy-saving project run by Verbund-Austrian Thermal Power GmbH & Co. KG (a subsidiary of the Verbund group) for the combined production of electricity and heat.

The newly-built combined heat and power plant, located in Mellach, near Graz, will achieve substantial savings of primary energy, as electricity and heat will be produced from the same production cycle (cogeneration) rather than being produced separately by two distinct installations.

The Commission's examination under the environmental aid guidelines found that the aid was a necessary incentive to develop the project and that the positive environmental effects would outweigh the potentially negative effects on competition. The latter are in any case limited, as the aid amount accounts for only a small share of the beneficiary's production costs.

Power plant in Latvia

The Commission has authorised [18] aid that Latvia intends to grant by way of tender for the construction and operation of a 400 MW thermal power

(15) N 525/2009 and N 527/2009
(16) N 450/2009
(17) N 295/2008
(18) N 675/2009

plant between 2015 and 2025. The aim of the measure is to ensure that future electricity demands are met by available supplies and to reduce the dependency on gas as the dominant fuel source.

On 2 December 2009, Latvia notified its project to subsidise the construction and operation of a new power plant. In order to diversify Latvia's energy mix, the plant is due to use either LNG regasified in Latvia or solid fuel such as coal, lignite or peat, mixed with at least 10 % biomass. The aid would be granted in the form of a direct grant by means of a competitive tender, and the successful tenderer would be obliged to operate the plant at least 6 000 hours a year.

Although market forces should, in principle, provide the incentives for the construction of conventional plants, the Commission found that, in view of the effective isolation of the Latvian energy market, security of electricity supply could constitute an objective of common interest, in accordance with Article 107(3)(c) of the TFEU. The Commission also took into account Latvia's increasing dependence on gas as a dominant fuel source following the closure of the Ignalina nuclear power plant in Lithuania at the end of 2009. Moreover, the Commission's investigation found that the competitive selection process would minimise the aid and limit distortions of competition. The Commission therefore concluded that, in the specific circumstances of the Latvian electricity market, the aid for the construction and operation of a conventional power plant is an appropriate and proportionate step towards ensuring the security of electricity supply in Latvia for the coming years.

Salzgitter

The Commission has authorised ([19]) Germany to grant €19.1 million for an energy-saving steel production project run by Salzgitter Flachstahl GmbH, a subsidiary of the Salzgitter AG group. The aid will allow Salzgitter to produce steel using an innovative production process, Direct Strip Casting (DSC), which consumes less energy than alternative processes.

Under the project, Salzgitter will produce steel with a higher proportion of aluminium and silicon, resulting in high strength (HSD) steel, used mainly for car manufacturing.

The Commission found that the aid was necessary and proportionate to develop the project and that the positive effects would outweigh the potentially negative effects on competition. In particular, in order to achieve the energy savings, the innovative process involves higher upfront investments than the alternative process. The Commission found that the HSD production would account for less than 1 % of Salzgitter's current sales and that the effect on competition would therefore be very limited. Moreover, the success of the new product has yet to be confirmed in the years to come.

Stranded costs in Hungary

The Commission has authorised ([20]) an aid scheme to compensate power generators for certain costs resulting from the termination of long-term power purchase agreements (PPAs) in Hungary.

The aim of the Hungarian scheme is to compensate three power generators for the costs incurred as a result of the termination of their power purchase agreements (PPAs) and which they cannot recoup (so-called 'stranded costs'). The three beneficiaries are Budapesti, a subsidiary of EDF; Dunamenti, a subsidiary of GDF Suez; and Pannon, a subsidiary of Dalkia. The compensation authorised today will be deducted from the amounts of aid to be recovered from them pursuant to the Commission Decision of 4 June 2008, which found that the PPAs involved illegal State aid incompatible with the EU internal market.

The Commission concluded that the compensation scheme was in line with its Communication relating to the methodology for analysing State aid linked to stranded costs ([21]). The Commission found that the costs taken into account for the calculation of the compensation were eligible for aid, in particular because they concern investments in assets that have become uneconomic as a result of the liberalisation of the Hungarian electricity sector. Moreover, all revenues generated by the investments and aid previously received have been deducted from the cost amount taken into account to calculate the compensation. This ensures that there is no over-compensation.

Transport

The Commission has approved a proposal by the Cyprus Government to impose a special reduced tax on companies engaged in international maritime transport; this tax would replace the corporate tax ([22]).

([19]) N 451/2009

([20]) N 691/2009

([21]) The Commission agreed in 2001 to the principle of allowing Member States to compensate companies for long-term investments or commitments made when the electricity market was not open and which have become uneconomical as a result of the liberalisation of the sector. The Commission took a decision based on the stranded cost methodology with respect to Austria, Belgium, Greece, The Netherlands, Spain, Portugal and Poland.

([22]) N 37/2010

The Cyprus government has notified a tonnage tax measure for companies engaged in international maritime transport and liable to corporate tax in Cyprus. The scheme allows companies to opt for a tax calculated on the net tonnage of the fleet that they operate (tonnage tax) instead of being taxed on the actual profits of their maritime transport activities. The tonnage tax scheme would also be applicable under certain conditions to tugboats, dredgers and cable-layers.

The Commission considers that the scheme is in line with the European Union's Guidelines on State aid to maritime transport. It also found that strict ring-fencing measures will avoid any risks of tax evasion or spill-over of the benefits of the scheme to non-shipping activities. Lastly, the scheme complies with the aid ceiling set out in the Guidelines. The government has estimated the annual cost of the measure at €1.5 million.

The Commission authorised the scheme until 31 December 2019. The aim of the scheme is to support the shipping sector in Cyprus; other EU countries with a strong maritime sector have a similar scheme.

Other

Insurance against terrorist acts

The Commission has authorised [23] a measure adopted by Denmark which provides a State guarantee on non-life insurance against damage arising from nuclear, biological, chemical or radioactive (NBCR) terrorist attacks that exceeds a certain threshold. The Commission found that the measure was an appropriate means of ensuring that insurance coverage against NBCR risks would be available in Denmark.

Denmark considers it an important goal of public policy that Danish citizens and enterprises should have access to insurance against NBCR risks. However, the global reinsurance market for low probability but high impact events, such as a NBCR attack, is underdeveloped and consequently there is insufficient reinsurance capacity for Danish insurers who wish to provide this cover in Denmark.

In order to ensure that NBCR coverage is available, Denmark plans to introduce a state guarantee. Under the scheme, insurers that provide NBCR insurance in Denmark will be liable for non-life damages up to a certain pre-determined threshold. The risk retained by the insurance industry is based on their capital base and the availability of NBCR reinsurance on the global market. This threshold will be reviewed every year and currently stands at DKK 5 billion. The Danish State then provides a guarantee for the next DKK 15 billion of losses over and above this threshold.

Insurers will pay a fee for this guarantee, which is currently set at 0.15 % of the guarantee amount (although this percentage may vary according to the level of the threshold). Furthermore, in the event of a payout on the guarantee, Denmark will recover this payout over time from all policyholders through a levy.

The Commission has concluded that the measure complies with the conditions laid down in Article 107(3)(c) TFEU. The scheme favours the provision of insurance cover in an area where no cover would otherwise be available or any such cover might be insufficient. The aid is appropriate, necessary and proportional to alleviate the market failure in the area of NBCR coverage. The scheme also has a limited impact on competition. The scheme is open to all Danish and foreign non-life insurance companies. Lastly, the own risk retained by the insurance industry is recalculated on an annual basis. If the market for NBCR coverage develops in future, and greater reinsurance capacity becomes available on international markets, the insurers' own risk retention will increase and the threshold above which the State would have to compensate losses will rise. At some point this threshold might become so high that it could be uneconomical for insurers to avail of the State reinsurance, for which there is a minimum fee. In this way the scheme has an inbuilt review mechanism which ensures that the State is not replacing private market operators. This will ensure that the distortions of competition are kept to a minimum.

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

Spanish film support

The Commission has approved [24] €576 million for a Spanish film support scheme until 31 December 2015. The scheme covers Spain's national film support measures, including film production and distribution. The scheme is in line with the rules of the Commission's 'Cinema Communication'.

The scheme is a package of complementary, selective and automatic measures which the Spanish authorities believe are necessary to achieve their objective of preserving linguistic and cultural diversity among the films available to Spanish and European audiences. The selective support is intended to sustain arthouse films, while the automatic, audience-based support is aimed at encouraging independent

(23) N 637/2010

(24) N 587/2009

producers to make better-financed films, rooted in Spanish/European culture.

Decisions under Article 108 TFEU

Hotel industry in Italy

The Commission has decided to refer Italy to the European Court of Justice for failing to comply with a Commission decision of July 2008.

On 12 November 1998, the Commission approved an aid measure in favour of the hotel industry in the Region of Sardinia [25]. One of the conditions for approval was that, in order to be eligible for aid under this scheme, companies had to apply for aid before starting to implement the project to be subsidised.

On 21 February 2003, the Commission received a complaint regarding alleged violations of the above condition. On 2 July 2008, the Commission concluded that some of the aid had been granted in violation of the conditions set out in its decision of 12 November 1998, and it ordered Italy to recover the illegally claimed aid.

Subsequently, Italy issued recovery orders to the beneficiaries concerned, some of whom appealed against them before Italian courts, which in many cases suspended the execution of the recovery orders. However, such suspension decisions are clearly contrary to EU law, which requires the effective, timely and full recovery of incompatible aid from the beneficiaries. This appears to be a regular occurrence in the Italian judicial practice, and similar suspension orders have already given rise to a series of Court actions against Italy under Article 108(2) TFEU, which are currently pending before the ECJ.

Hellenic Shipyards

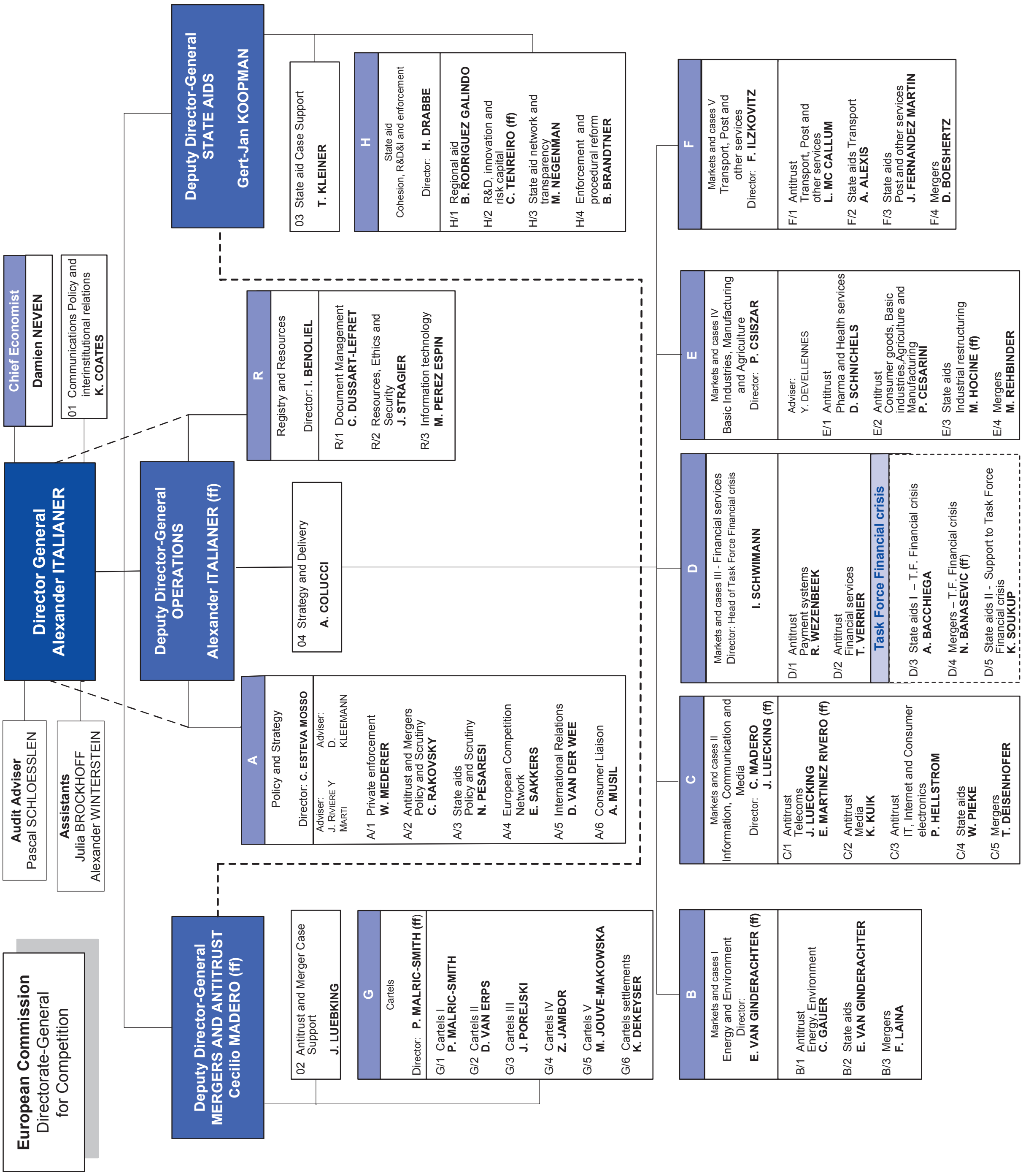
The Commission has decided to refer Greece to the European Court of Justice for failing to comply with a Commission decision of 8 July 2008 which found that State aid had been unlawfully granted to Hellenic Shipyards (HSY) and should, therefore, have been recovered.

On 2 July 2008, the Commission decided that subsidies granted by Greece to Hellenic Shipyards S.A. were incompatible with the common market because they distort competition. This is because Greece failed to abide by the conditions attached to the restructuring and closure aid approved by the Commission in its previous decisions of 1997 and 2002. Moreover, various loans and guarantees provided to Hellenic Shipyards by the Greek State and the then State-owned bank ETVA constituted incompatible aid, as they were provided either below market price or at a time when the financial situation of Hellenic Shipyards had become so difficult that it could not find bank financing.

All of these measures benefited the civil activities of HSY, conferring on it an unfair advantage over its competitors. In fact, Hellenic Shipyards is involved in both civil and military activities, but in this decision the Commission only examined aid which had exclusively benefited its civil activities, because the subsidies received by Hellenic Shipyards for its military activities are exempted from EU State aid rules under Article 346 TFEU. Therefore, HSY must reimburse around €230 million of aid, plus interest, from its civil activities.

[25] N 272/98

Organigram of the Competition Directorate-General (1 December 2010)



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Documents

Speeches

From 1 January 2010 to 30 April 2010

This section lists recent speeches by the Commissioner for Competition and Commission officials.

Full texts can be found on http://ec.europa.eu/competition/speeches.

Documents marked with the reference 'SPEECH/10/…' can also be found on http://europa.eu/rapid

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

SPEECH/10/193 – 29 April 2010

Postal services: state aid aspects. Valencia

SPEECH/10/183 - 27 April 2010

Cooperation and convergence: competition policy in the 21st century. Istanbul

SPEECH/10/172 - 20 April 2010

Commission adopts revised competition rules for distribution of goods and services. Strasbourg

SPEECH/10/165 - 16 April 2010

Europe 2020: for competitive and sustainable industries. Bonn

SPEECH/10/149 – 9 April 2010

Competition, competitiveness, growth: a new impetus for the European Union Address. Parma

SPEECH/10/121 – 23 March 2010

Center on Regulation in Europe (CERRE). Brussels

SPEECH/10/95 – 15 March 2010

Los nuevos retos de la política de competencia de la UE. Madrid.

SPEECH/10/81 – 9 March 2010

EU Antitrust policy: the road ahead. Brussels

SPEECH/10/29 – 18 February 2010

Competition, State aid and Subsidies in the European Union. Paris

SPEECH/10/25 – 15 February 2010

La politique de la Concurrence de l'UE en 2010 et au-delà 'New Frontiers of Antitrust'. Paris

By the Competition Directorate-General staff

29 April 2010

Alexander Italianer: Trends in Cartel Enforcement and Policy. ICN Annual Conference 2010, Istanbul, Turkey

9 March 2010

Alexander Italianer: Challenges for European Competition Policy. International Forum Competition Law of the Studienvereinigung Kartellrecht, Brussels

4 February 2010

Neelie Kroes: Commission welcomes ENI's structural remedies proposal to increase competition in the Italian gas market. Brussels

24 January 2010

Eva Valle: International Agreeements regarding Cooperation in the field of Competition: The New Strategy of the European Commission. Journal of European Competition Law & Practice

Press releases and memos

From 1 January 2010 to 30 April 2010

All texts are available from the Commission's press release database RAPID http://europa.eu/rapid

Enter the code (e.g. IP/10/14) in the 'reference' input box on the research form to retrieve the text of a press release. Languages available vary for different press releases.

Antitrust

IP/10/462 - 26 April 2010

Vice President Almunia welcomes Visa Europe's proposal to cut interbank fees for debit cards

IP/10/445 - 20 April 2010

Commission adopts revised competition rules for distribution of goods and services

MEMO/10/138 - 20 April 2010

Commission adopts revised competition rules for vertical agreements: frequently asked questions

MEMO/10/134 - 16 April 2010

La Commission confirme avoir mené des inspections en France auprès de plusieurs entreprises actives dans le secteur de l'eau et de l'assainissement

IP/10/425 - 14 April 2010

Commission increases electricity trading capacity on the Swedish borders

IP/10/374 - 26 March 2010

Commission closes investigation into 'Baltic Max Feeder' scheme

IP/10/359 - 24 March 2010

Commission adopts new Block Exemption Regulation for insurance sector

IP/10/290 - 17 March 2010

EDF commitments to open French electricity market to competition made legally binding

IP/10/256 - 10 March 2010

Commission market tests commitments proposed by BA, AA and Iberia concerning transatlantic cooperation

IP/10/213 - 1 March 2010

Commission sends Statement of Objections to Telekomunikacja Polska S.A.

MEMO/10/49 - 25 February 2010

Commission confirms investigation into suspected cartel in the sector of automotive electrical and electronic components suppliers

IP/10/149 - 10 February 2010

Commission confirms sending Statement of Objections to alleged participants in freight forwarding cartel

MEMO/10/29 - 4 February 2010

Commission welcomes ENI's structural remedies proposal to increase competition in the Italian gas market

MEMO/10/28 - 3 February 2010

Commission confirms inspections in electrical equipment industry

MEMO/10/25 - 1 February 2010

Commission confirms assessment of proposed commitments from Oneworld airline alliance

IP/10/45 - 25 January 2010

Commission opens formal proceedings concerning iron ore production joint venture between BHP Billiton and Rio Tinto

IP/10/21 - 15 January 2010

Commission opens formal investigation into the 'Baltic Max Feeder' scheme for European feeder vessel owners

IP/10/12 - 12 January 2010

Commission launches monitoring of patent settlements concluded between pharmaceutical companies

IP/10/8 - 7 January 2010

Commission opens formal proceedings against pharmaceutical company Lundbeck

IP/10/2 - 6 January 2010

Improved transparency and predictability of proceedings

Merger control

IP/10/471 - 27 April 2010

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

IP/10/467 - 26 April 2010

Commission approves State Street Corp acquisition of two subsidiaries of Intesa Sanpaolo

IP/10/457 - 21 April 2010

Commission approves acquisition of Rohm and Haas powder coating business by AkzoNobel

IP/10/408 - 7 April 2010

Commission approves proposed creation of joint venture by Bosch, Deutz and Eberspächer

IP/10/395 - 31 March 2010

Commission accepts referral of proposed acquisition of Sara Lee's air care unit by Procter & Gamble

IP/10/389 - 30 March 2010

Commission approves proposed acquisition of Samsung Digital Imaging by Samsung Electronics

IP/10/377 - 29 March 2010

Commission clears Cisco's proposed acquisition of Tandberg subject to conditions

IP/10/375 - 29 March 2010

Commission approves Dassault Systèmes's purchase of IBM Dassault Systèmes PLM software business

IP/10/376 - 26 March 2010

Commission approves acquisition of Areva's power transmission and distribution business by Alstom and Schneider

IP/10/372 - 26 March 2010

Commission authorises proposed acquisition of Cégélec by the Vinci Group.

IP/10/358 - 24 March 2010

Commission approves proposed acquisition of Plastal Germany by Faurecia

IP/10/329 - 19 March 2010

Commission approves proposed acquisition of Artenius UK Limited by KP Chemical

IP/10/328 - 19 March 2010

Commission approves acquisition of Edscha by Gestamp Automoción

IP/10/324 - 18 March 2010

The Commission approves the acquisition of several water collection, treatment and supply companies by Lyonnaise des Eaux

IP/10/281 - 15 March 2010

Commission refers review of acquisition of Shell's Greek fuel and bitumen business by Motor Oil to Greek competition authority

IP/10/270 - 12 March 2010

Commission approves acquisition of Black & Decker by Stanley Works

IP/10/208 - 1 March 2010

Commission approves proposed merger between UK subsidiaries of France Telecom and Deutsche Telekom, subject to conditions

IP/10/196 - 25 February 2010

Commission approves proposed acquisition of Mitsubishi Rayon by Mitsubishi Chemical Holdings Corporation

IP/10/195 - 25 February 2010

Commission clears proposed merger of InnoLux, Chi Mei Optoelectronics and TPO

IP/10/194 - 25 February 2010

Commission approves acquisition of DSI International by Bank of America and Barclays Bank

IP/10/171 - 22 February 2010

Commission clears proposed acquisition of General Electric's security business by United Technologies Corporation

IP/10/167 - 18 February 2010

Commission clears Microsoft's proposed acquisition of the Yahoo search business

IP/10/162 - 16 February 2010

Commission approves proposed acquisition of the Quelle trademark and other assets by Otto, subject to conditions

IP/10/161 - 15 February 2010

Commission approves proposed acquisition of CIMPOR by CSN

IP/10/157 - 12 February 2010

Commission clears proposed acquisition of 3Com by Hewlett-Packard

IP/10/155 - 11 February 2010

Commission clears planned acquisition of Solvay Pharma by Abbott, subject to conditions

IP/10/127 - 5 February 2010

Commission approves proposed acquisition of E.ON's Transmission System Operator by TenneT

IP/10/124 - 4 February 2010

Commission approves proposed acquisition of metal scrap company Kovosrot by Scholz AG and voestalpine

IP/10/120 - 3 February 2010

Commission approves acquisition of IMS Health by TPG

IP/10/109 - 29 January 2010

Commission clears proposed acquisition of German internet provider Hansenet by Telefónica O2

IP/10/108 - 29 January 2010

Commission approves proposed acquisition of Sal. Oppenheim by Deutsche Bank

IP/10/50 - 26 January 2010

Commission refers proposed acquisition of Super de Boer Assets by Schuitema to Dutch Competition Authority

IP/10/49 - 25 January 2010

Commission clears proposed acquisition of Unitymedia by LGE

IP/10/44 - 22 January 2010

Commission approves proposed acquisition of Ermewa by TLP (SNCF group), subject to conditions

IP/10/42 - 22 January 2010

Commission approves proposed joint venture between SevenOne Media , G + J Electronic Media Service, Tomorrow Focus Portal and IP Deutschland

IP/10/40 - 21 January 2010

Commission clears Oracle's proposed acquisition of Sun Microsystems

IP/10/39 - 21 January 2010

Commission clears proposed acquisition of Varian by Agilent, subject to conditions

IP/10/35 - 19 January 2010

Commission clears proposed acquisition of Affiliated Computer Services by Xerox

IP/10/18 - 13 January 2010

Commission approves proposed acquisition of Alstom Hydro by Alstom Holdings

IP/10/4 - 6 January 2010

Commission approves proposed acquisition of Emcon by Faurecia

IP/10/3 - 6 January 2010

Commission clears proposed acquisition of Cadbury by Kraft Foods, subject to conditions

State aid control

IP/10/470 - 27 April 2010

Commission approves compensation to electricity producers for stranded costs incurred after liberalisation of the market in Hungary

IP/10/429 - 14 April 2010

Commission clears public R&D funding for Daher-Socata and Sogerma

IP/10/428 - 14 April 2010

Commission takes Greece to Court for failure to recover illegal aid from Hellenic Shipyards

IP/10/427 - 14 April 2010

Commission opens in-depth investigation into €9.8 million debt rescheduling for Bulgarian company Ruse Industry

IP/10/426 - 14 April 2010

Commission approves €19 million German support to Salzgitter AG for energy-saving steel production

IP/10/400 - 31 March 2010

Commission temporarily clears support for Anglo Irish Bank and INBS and opens in-depth investigation on Anglo Irish Bank

IP/10/356 - 24 March 2010

Commission authorises a €12 million support scheme for dubbing and subtitling films in Catalan

IP/10/352 - 24 March 2010

Commission clears special tax regime for international maritime transport companies in Cyprus

IP/10/350 - 24 March 2010

Commission approves €16 million Austrian support to environmental-friendly project by Verbund-Austrian Thermal Power

IP/10/349 - 24 March 2010

Commission clears French aid worth €18.9 million for the GAYA motor biofuels research programme

IP/10/282 - 16 March 2010

Commission approves Slovenian short-term export credit insurance scheme

IP/10/261 - 10 March 2010

The European Commission approves the aid granted to Farm Dairy Flevoland in the Netherlands

IP/10/254 - 9 March 2010

Commission approves €30 million German support for ArcelorMittal Eisenhuettenstadt's 'Top Gas Recycling' project

IP/10/234 - 4 March 2010

Commission authorises temporary Slovak scheme to grant limited amounts of aid of up to €15,000 to farmers

IP/10/198 - 26 February 2010

Commission approves Irish impaired asset relief scheme

MEMO/10/52 - 26 February 2010

Overview of national measures adopted as a response to the financial/economic crisis

IP/10/160 15 - February 2010

Commission authorises temporary Belgian scheme to grant limited amounts of aid of up to €15,000 to farmers

IP/10/143 - 9 February 2010

Commission authorises Danish export loan scheme

IP/10/139 - 8 February 2010

Commission approves Swedish State guarantee for Saab

IP/10/138 - 8 February 2010

Commission temporarily approves additional recapitalisation package in favour of ABN AMRO and Fortis Bank Nederland

MEMO/10/31 - 8 February 2010

Commission processes record number of broadband projects following new Broadband Guidelines

IP/10/131 - 5 February 2010

Commission approves modifications to Dutch short-term export-credit insurance scheme

IP/10/121 - 3 February 2010

Commission temporarily authorises Hungary to grant limited amounts of aid of up to €15,000 to farmers

IP/10/119 - 3 February 2010

Commission temporarily authorises Italy to grant limited amounts of aid up to €15,000 to farmers

IP/10/118 - 3 February 2010

Commission temporarily authorises Lithuania to grant limited amounts of aid of up to €15,000 to farmers

IP/10/104 - 29 January 2010

Commission orders recovery of aid granted to Sovello AG (formerly EverQ GmbH)

IP/10/103 - 29 January 2010

Commission takes Italy to Court for failure to recover illegal aid from hotels in Sardinia

IP/10/100 - 29 January 2010

Commission opens in-depth inquiry into €55 million investment into French car component supplier Trèves

IP/10/86 - 28 January 2010

Commission approves aid for new 400 MW thermal power plant in Latvia

IP/10/58 - 27 January 2010

Commission opens in-depth inquiry into preferential electricity tariffs for Aluminium of Greece

IP/10/57 - 27 January 2010

Commission authorises €576 million Spanish film support scheme

IP/10/55 - 27 January 2010

Commission authorises state aid to a Franco-Spanish Motorways of the Sea project and includes it among the twenty-two selected projects for Marco Polo financing

IP/10/52 - 26 January 2010

Commission clears annual financing regime for Dutch public service broadcasters after amendments

IP/10/51 - 26 January 2010

Commission completes its investigation into the unlimited guarantee for the French Post Office

IP/10/48 - 25 January 2010

Commission approves aid for restructuring of Dunfermline Building Society

IP/10/47 - 25 January 2010

Commission approves liquidation of Bradford & Bingley

IP/10/19 - 14 January 2010

Commission approves Hungarian liquidity support scheme

IP/10/17 - 13 January 2010

Commission approves Danish Terror Insurance Scheme

IP/10/15 - 13 January 2010

Commission opens in-depth investigation into Belgian aid for the costs of removal and destruction of fallen stock in the Walloon region

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