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**Information section**

# State Aid Policy in the context of the financial crisis

Philip Lowe ([1])

## Introduction

The recent financial crisis, and the wider recession in the real economy, has fundamentally challenged current models of regulation and oversight in the financial sector, and raised questions about the role of the state in economic life. This article outlines the Commission's response to the crisis, in implementing State aid policy, over the past year.

In times of severe economic crisis, there is always a risk that competition policy will not come top of the political agenda. In the context of this crisis, Governments' immediate focus was on measures to keep banks afloat or maintain employment, and they sometimes believed that these measures could be divorced from competition policy. However, the past year has shown that the EU competition and state aid rules are a crucial component to any recovery plan. In the short term they have maintained a level playing field and preserved the achievements of the Single Market, while in the longer term they are also helping pave the way for economic restructuring and recovery.

What have we done to assist Member States in their efforts to resolve the crisis? The Commission's initial objectives – in line with those of the Member States – were to preserve financial stability, deal with the risk of bank insolvencies and restore lending, in particular in order to avoid unnecessary bankruptcies and redundancies in the wider economy.

Since the situation became critical in September 2008, we have assessed over 100 national schemes or measures to support financial institutions, under the State aid rules. In doing so, we have taken account of the need to:

- **ensure fair competition between Member States:** measures taken by one Member State with respect to its own banks should not give them an undue competitive advantage compared to banks in other Member States;
- **ensure fair competition between banks:** measures must differentiate between beneficiary banks according to their risk profiles, to avoid giving an undue advantage to distressed or less-performing banks;
- **ensure a return to normal market functioning:** measures must address how to return the financial sector to long-term viability, where banks operate without state support.

In December 2008, the Commission adopted the Temporary Framework for State aid. The idea behind this scheme is to allow Member States – on a temporary basis until the end of 2010 – to grant certain types of aid to the "real economy" in order to reduce the negative effects of the crisis. Specifically governments needed to be able to facilitate companies' access to finance. Sufficient and affordable access to finance is a pre-condition for investment, growth and job creation by the private sector. In the short term the economic crisis affects the viability of European companies – and in the long term it could delay investments in sustainable growth and other Lisbon Strategy (EU 2020) objectives. To date over 70 aid schemes have been approved under the Temporary Framework ([2]).

## Background to the crisis

Traditionally, banks were institutions that took deposits and loaned money to finance business ventures, obeying strict ratios between the amount of deposits they held and the amount of money they could lend out. But in recent years, banks have hugely diversified their activities. They sell insurance, consumer finance products and mortgages to individuals. They started to lend more aggressively and trade in complex products such as derivatives, swaps and other risk management products.

In simple terms that means that banks grew their businesses partly by grouping loans and selling packages of loans (securitised products) to third parties – often other banks – who then received the income relating to those loans. This gave the lending banks more leeway because the loans were taken off their balance sheets, so that the deposit to lending ratios laid down by regulators were satisfied.

In parallel, the trend in recent years has been for banks to relax their lending criteria. The availability

([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]) We publish an overview of national measures adopted as a response to the financial/economic crisis, which is regularly updated. It can be found on the Rapid press releases database.

of credit influenced property prices, which seemed to be on an unstoppable rise in many advanced economies. Problems started to surface when – particularly in the US – overstretched borrowers started to default on their loans, triggering the so-called US sub-prime crisis. As a result, the prices of asset-backed securities plummeted and banks who had invested directly in asset-backed securities or whose commercial strategies were reliant on aggressive growth in sales started to encounter difficulties in accessing sufficient liquidity to meet their commitments.

In 2007 a first wave of measures were brought to our attention under the State aid rules. They involved two German Landesbanken: Sachsen LB ([3]) and IKB ([4]), who had both invested in US sub-prime securities. In the UK, Northern Rock ([5]), a bank and mortgage lender that had a growth rate of five times industry average, hit problems. For the first time in years, depositors queued outside a UK bank to attempt to recover their deposits because they feared the bank was about to fail. The UK government had no choice but to guarantee deposits and, ultimately, put Northern Rock under government control.

We assessed the state support these banks received under Article 87(3)(c) – as aid to companies in difficulty – in conjunction with the Guidelines on rescue and restructuring aid. An important issue we identified was that bailing out banks which are facing difficulties as a result of their own decisions could increase "moral hazard" – i.e. it may have the effect of encouraging risk-taking. It was also immediately apparent that, when markets are hit by a wide-spread crisis of confidence, a bank in difficulty is unlike any other business in difficulty – if one financial institution fails, confidence in the whole system is shaken. A bank can be "too big to fail", because the impact of its failure, on consumer confidence and on the viability of other banks would just be too great, so that a government could not risk allowing it to fail.

Essentially, this is where the much-discussed "systemic" effects of the banking crisis come into play. First, banks are to a significant extent interdependent because they trade with each other and lend to each other. When Lehman Brothers failed in September 2008, banks around the world scrambled to assess the extent of their exposure. Secondly, the banking system is based on confidence. If there are fears that a bank may collapse other banks will be reluctant to lend to it, and depositors may be afraid to entrust it with their savings, which means that in turn it will not be in a position to access sufficient liquidity to lend to businesses and consumers.

## Stabilising the banking sector to tackle recessions

In autumn 2008 a series of summits between European leaders took place. The first national bank support schemes were devised, mostly providing state-backed guarantees to the financial sector. ([6]) A number of banks that were relatively unaffected by the crisis opted not to benefit from these schemes – including the Santander group, Barclays and Deutsche Bank.

In order to assist Member States to take urgent and effective measures to preserve financial stability and to provide legal certainty, the Commission adopted four Communications between October 2008 and July 2009, setting out how we would apply State aid rules to government measures to support the banking sector in the context of the economic crisis.

On 13 October 2008 the Commission adopted its first guidance paper – the Banking Communication ([7]). Essentially the conditions we insisted on are:

- **Non-discriminatory access to the schemes** in order to protect the functioning of the Single Market by making sure that eligibility for a support scheme is not based on nationality;
- State commitments to be **limited in time** – and reviewed at least every six months – so that support can be provided as long as necessary to cope with the current turmoil in financial markets but that it will be reviewed and adjusted or terminated as soon as improved market conditions permit;
- State support to be **clearly defined and limited in scope** to what is necessary to address the acute crisis in financial markets while excluding unjustified benefits for shareholders of financial institutions at the taxpayer's expense;
- An **appropriate contribution by the private sector** by way of an adequate remuneration for the introduction of general support schemes (such as a guarantee scheme) and the coverage by the private sector of at least a significant part

([3]) Restructuring aid to Sachsen LB, Case C9/2008.
([4]) Restructuring aid to IKB, Case C10/2008.
([5]) Northern Rock, Case NN70/2007; Restructuring aid to Northern Rock, Case C14/2008.

([6]) Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty, [2004] OJEC C 244/2; Prolongation of the Community guidelines on State aid for rescuing and restructuring firms in difficulty, [2009] OJEC C 156/2.
([7]) Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, [2008] OJEC C 270/8 (the Banking Communication).

of the cost of assistance granted, so as to ensure that there are incentives to return state money;

- Sufficient **behavioural rules for beneficiaries** that prevent an abuse of state support, like for example expansion and aggressive market strategies on the back of a state guarantee;
- An **appropriate follow-up in the form of structural adjustment measures** for the financial sector as a whole and/or by restructuring individual financial institutions that benefited from state intervention.

These principles are based on our pre-existing guidelines on rescue and restructuring aid, although the decision was taken to approve measures on the basis of Article 87(3)(b) authorizing aid in order to "remedy a serious disturbance to the economy of a Member State" in view of the severity of the crisis.

In the mean time the solutions being devised by Member States evolved from largely guarantee-based schemes to other measures such as recapitalisation of banks. Following extensive discussions with the European Central Bank and Member States, the Commission adopted detailed guidance on how it would assess these bank recapitalisation measures – the Recapitalisation Communication ([8]) – on 5 December 2008.

From a competition perspective, in the absence of an appropriate risk-based justification, access by banks in one Member State to capital at considerably lower rates than that available to competitors from other Member States could have a significant impact on their competitive position in the Single Market. Excessive aid in one Member State could also provoke a subsidy race and create difficulties in Member States that had not introduced recapitalisation measures. And equally, recapitalisation schemes that were open to all banks without differentiation of their terms could distort competition and incentives, and weaken overall competitiveness of European banks. Finally, recapitalisation or other measures should not have the effect of putting banks that do not have recourse to public funding in a significantly less competitive position. A public scheme which crowds out market-based operations would frustrate the return to normal market functioning.

The Recapitalisation Communication distinguishes between banks that are fundamentally sound and receive temporary support to enhance the stability of financial markets and restore lending to businesses and consumers, and distressed banks whose business model has brought about a risk of insolvency and which pose a greater risk of distortions to competition.

In particular, the Communication established principles for pricing the injections of capital made by States into banks. For fundamentally sound banks, the price of capital injections should be linked to base rates set by central banks to which a risk premium is added to reflect the risk profile of the beneficiary bank, the type of capital used and the nature of the safeguards against abuse of public funding that accompany the recapitalisation measure. This pricing mechanism needs to carry sufficient incentives to keep the duration of state involvement to a minimum, for instance by having a rate of remuneration that increases over time.

Banks in distress which are at risk of insolvency should in principle be required to pay more for state support and be subject to stricter safeguards. Injections of state capital into these banks are acceptable only on condition that they are followed by far-reaching restructuring to restore long-term viability, which may include changes to management and corporate governance.

By way of these two Communications, we made sector-specific adjustments and introduced some necessary flexibility into our handling of national financial sector rescue schemes and individual financial institution rescue measures, without losing sight of key state aid principles. By giving Member States clear guidelines on what would or would not be acceptable we also helped achieve a degree of consistency in Member State responses across Europe.

Flexibility in process has of course been very important. Support measures such as guarantees or re-capitalisation schemes and individual recapitalisations have been cleared by the Commission very quickly, where the schemes fulfil the conditions discussed above, which guarantee that they are well-targeted and proportionate and contain safeguards against unnecessary negative effects on competition.

## The banking sector: restoring confidence and returning to viability?

While it seems clear that the financial sector rescue packages adopted by Member States since October 2008 averted the risk of financial meltdown, in early 2009 it became apparent that further measures were needed in order to restore trust and to return the financial sector to normal functioning.

One reason why credit remained squeezed seemed to be uncertainty about the value and location of impaired assets held by banks. On 25 February 2009, after detailed discussions with the Member States, the Commission adopted the Impaired Assets

([8]) Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, [2009] OJEC C 10/2 (the Recapitalisation Communication).

Communication [9]. This Communication discusses the budgetary and regulatory implications of asset relief measures that could be adopted by Member States to remove impaired or toxic assets – that is to say assets that now have much-reduced or no value, ranging from US sub-prime mortgage backed securities to loans to previously healthy businesses that have gone under as a result of the economic crisis – from the balance sheets of banks, and provides guidance on the application of the State aid rules to such measures.

The Impaired Assets Communication stipulates that:

- Member States must make asset relief measures conditional on full transparency and disclosure of impaired assets and must ensure that the costs of the impaired assets are shared between the Member States, shareholders and creditors of the financial institutions.

- Member States should take a coordinated approach to identifying assets eligible for asset relief measures and to valuing assets. The primary task of carrying out asset valuation is at the national level, and validated by the appropriate supervisory authority. However, each individual case is checked by the Commission with the help of external experts.

- Finally, restructuring measures should follow, so as to ensure the return to viability of the banks in question, and the return to normal market conditions.

The measures in question could involve asset purchases (including "bad" bank scenarios), asset swaps, state guarantees, or hybrid systems – that is of course up to the Member States who are responsible for the methods and design of asset relief measures.

Finally, on 22 July 2009 the Commission published guidelines setting out its approach to assessing restructuring aid given by Member States to banks [10] (the Restructuring Communication). Essentially, those banks that have received large amounts of aid and that have unsustainable business models will have to restructure in order to return to long term viability without relying on State support.

The Restructuring Communication stipulates that banks in need of restructuring have to demonstrate strategies to achieve long term viability under adverse economic conditions: they involve rigorous stress testing of the businesses. In some cases, divestments will not be needed but in many cases they will be essential, either to ensure viability of core businesses or to reflect the negative competitive impact of aid on key market segments.

However, we need to be realistic about divestments, for example with respect to the likelihood of finding buyers and the time period for divestiture.

Additionally, banks that have received large amounts of aid and that have unsustainable business models, and their capital holders, should contribute to the cost of restructuring as much as possible with their own resources. This creates appropriate incentives for future behaviour. An appropriate price for State support ensures that the aid cannot be used to finance activities such as acquisitions which are not linked to the restructuring process. Similarly, aid should not be used to pay interest to holders of hybrid capital instruments when a bank in receipt of aid is making losses, unless this remuneration is essential to attract new capital.

A certain number of bank restructuring plans have already been adopted. For instance, on 18 November 2009 the Commission approved restructuring plans for the KBC group, ING, and Lloyds Banking Group [11].

## The "real" economy

Before the end of 2008, the effects of the crisis were being felt in the "real" economy, and Member States began to consider what measures they could take to tackle the knock-on effects of the financial crisis.

In recent years, in line with the State Aid Action Plan, EU State aid rules have been simplified and improved so that it is now easier for Member States to give the type of aid most likely to improve Europe's prosperity and competitiveness (e.g. research, development and innovation, risk capital, training, environmental aid, aid for SMEs), and so that the Commission can concentrate its scrutiny where there is most risk of distortions of competition. For example, the General Block Exemption Regulation adopted in July 2008 implemented a simplified procedure for the approval of aid [12]. Similarly, the De

(9) Communication from the Commission on the Treatment of impaired assets in the Community banking sector, OJEC [2009] C 72/1 (the Impaired Assets Communication).

(10) Communication from the Commission on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid OJEC [2009] C 195/9 (the "Restructuring Communication").

(11) See press releases IP/09/1730, IP/09/1729 and IP/09/1728.

(12) Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty, [2008] OJEC L 214/3 (General block exemption Regulation)

Minimis Regulation approved in 2006 allowed Member States to award support of under EUR 200 000 per company without the need to notify [13].

However, in the context of the crisis there was a need for additional measures targeted to the exceptional difficulties in obtaining finance.

The measures contained in the Temporary Framework are—like the crisis measures adopted in the banking sector—based on Article 87 (3) (b) of the Treaty. This is why the new measures are limited in time, until the end of 2010.

On the basis of the Temporary framework Member States may:

- Give EUR 500 000 per undertaking to cover investments and/or working capital over a period of two years.
- Offer State guarantees for loans at a reduced premium. The guarantee may relate to both investment and working capital loans and it may cover up to 90 percent of the loan.
- Offer aid in the form of subsidized interest rate applicable to all type of loans. This reduced interest rate can be applied for interest payments until the end of 2012.
- Offer subsidized loans for the production of green products involving the early adaptation to or going beyond future Community product standards.

The Commission considers that environmental goals should remain a priority despite the crisis—and, for this reason, it sought to give support to companies investing in environmental projects.

Furthermore, the Temporary Framework also allows for:

- A temporary derogation from the Community guidelines on Risk Capital guidelines in order to allow EUR 2.5 million of risk capital injection in SMEs per year (instead of EUR 1.5 million) and a reduction of the minimum level of private participation (from 50 percent to 30 percent).
- A simplification of the Communication on short-term export credit insurance. This makes it easier for Member States to demonstrate that certain risks are temporarily non-marketable and can thus be covered by the State.

Member States do need to notify all the measures contained in the Temporary Framework—but special procedures have been put in place to ensure that the Commission is in a position to very quickly adopt decisions allowing State aid under the Temporary Framework.

To give some examples of decisions under the Temporary Framework: on 30 December 2008 the European Commission approved two German measures to support the real economy, the first under the Temporary Framework. The first measure was intended to provide liquidity for companies affected by the credit squeeze, and allows interest rate reductions on loans to finance investments and working capital of up to EUR 50 million to be granted to companies with a turnover of less than EUR 500 million. The second measure is a framework scheme which allows federal, regional and local bodies to provide aid of up to EUR 500 000 to firms in need. It only applies to companies that were not in financial difficulties on 1 July 2008 [14].

On 12 June 2009 the European Commission authorised a Finnish guarantee scheme aimed at providing relief to companies encountering financing difficulties as a result of the credit squeeze. The scheme allows authorities to grant aid in the form of subsidised guarantees for investment and working capital loans concluded by 31 December 2010. The scheme meets the conditions laid down in the Temporary Framework because it is limited in time, respects the relevant thresholds and applies only to companies that were not in difficulty on 1 July 2008. [15]

In adopting the Temporary Framework, the Commission sought to react in a pragmatic and responsible way to the evolving market circumstances, so as to enable Member States to react to market circumstances, but without compromising the State aid rules and the EU Single Market.

The Commission is also thinking ahead and preparing for the review process – to this end we are closely monitoring the aid schemes put in place by Member States under the Temporary Framework.

As with financial sector measures, the Commission's aim has been to be flexible on process—by facilitating national umbrella schemes—but firm on the underlying principles. It is important the Commission responds to market conditions while at the same time resisting pressures to allow Member States to adopt protectionist measures and provide long term support to ailing national companies, contrary to the principles of fair competition among EU companies. EU State aid policy provides a framework for ensuring that restructuring is based on a feasible, coherent and far-reaching plan to restore long term

(13) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid [2006] OJEC L 379/5 (De Minimis Regulation).

(14) Case numbers N 661/2008 and N 668/2008 (the latter was amended on 5 June 2009 and 16 July 2009).

(15) Case number N82b/2009.

viability of companies, which also helps safeguard employment.

## Conclusion

After its critical phase, and largely due to public intervention, the financial sector has stabilised. We are now focussing more and more on how to achieve the long-term viability of financial institutions without state support, and how to prepare phasing out of the public support which the financial sector has received.

Going forward, banks must operate on the basis of sound business models in a regulatory framework in which they can compete on the merits with balanced incentives and without State aid. They must be able to exit the market or restructure when they are no longer competitive, without triggering the systemic consequences that have characterised the current crisis.

EU State aid policy can help achieve this goal, but we will of course need to work extremely closely with colleagues in other parts of the Commission, with the European Central Bank, national central banks and national ministries and financial sector regulators, as well as the banks themselves, in order to find constructive solutions.

Ultimately we believe that the way out of this crisis – for the financial sector and the wider economy – lies with competitive markets, not markets where inefficient and ailing companies are propped up by state support, illegal cartels or abuses of market power, nor with markets where consumers pay to support structures which are not sustainable.

# The Simplification Package in State Aid: Notice on Simplified Procedure and Best Practices Code

Elodie Clerc, Katarzyna Saryusz-Wolska, María Fernandez Molinero and Olivier Bergeau (1)

## 1. Introduction

In 2005, the Commission adopted the State Aid Action Plan ('the SAAP') (2). While not ruling out the possibility of a later revision of the Procedural Regulation, the SAAP announced that the Commission would improve procedures and thereby better administer State aid control, notably through "more predictable timelines; clear steps in the procedure; […] higher transparency; encouraging a higher quality of notifications and discouraging incomplete notifications…".

The *de minimis* Commission Regulation (EC) No 1998/2006 (3) of 15 December 2006 had already introduced a major simplification by exempting small subsidies from the obligation to notify them in advance for clearance by the Commission under EC Treaty State aid rules (4). A decisive simplification was also achieved with the entry into force of the General Block Exemption Regulation (5) (GBER) of 6 August 2008, which now exempts a wide range of aid measures from the notification obligation. The exempted aid measures are subject to *ex post* monitoring by the Commission. Equally, a whole series of horizontal Commission instruments, which all include safe harbour sections, have been reassessed since 2005 to bring them in line with evolving business reality (6).

The Simplification Package adopted in April 2009, which entered into force on 1 September 2009, should therefore be analysed in the context of this overall modernisation of State aid rules and procedures, as announced in the SAAP. It consists of two components: the Simplified Procedure Notice (7) and the Best Practices Code (8). The Simplified Procedure Notice applies to 'straightforward' cases, including cases falling within 'standard assessment' sections of existing frameworks and guidelines (but outside the scope of the GBER) and cases which are firmly in line with constant Commission decision-making practice. Such straightforward cases will then be decided upon within an accelerated timeframe of one month after notification. The Best Practices Code applies to all other notified State aid cases, whether they are novel, technically complex, or simply not immediately in conformity, at first sight, with State aid rules. It provides guidance on the day-to-day conduct of State aid proceedings and it aims to ensure speedier, more transparent and predictable handling of State aid cases. Currently, it takes six months, on average, for the Commission to adopt decisions based on a preliminary investigation of notified measures, and twenty months if the Commission opens a formal in-depth investigation. Such time-lines, and the lack of predictability regarding the likely timing of decisions on individual cases, are not sufficiently adapted to the needs of modern business. The Simplification Package therefore offers, within the existing legal framework of Regulation 659/1999, a joint commitment by the Commission and Member States to improve the transparency and predictability of State aid procedures and to shorten their duration.

Both Notices are based on an extensive analysis of decision-making practices over a number of years, which indicated that procedures are too lengthy. The lack of flexibility of the Commission's internal decision-making procedures and the lack of discipline on the part of both the Member States and the Commission, may explain some of the delays. Nevertheless, incomplete and poor quality notification is a major reason for the excessive duration of the procedures, because this leads to additional information requests being sent to the Member States, sometimes even for relatively simple, straightforward cases. Thus, complete notifications could generate significant time savings and pave the way for quicker decisions. The main idea of the Simplification Pack-

(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. Special thanks to the other members of the case-team: Barbara Brandtner, Harold Nyssens and Thierry Béranger.

(2) State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM (2005) 107 final.

(3) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5-10).

(4) Under this Regulation, State support of up to €200,000, granted over any period of three years will not be considered as State aid

(5) 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) (Text with EEA relevance) ( OJ L 214, 9.8.2008, p. 3-47).

(6) See http://ec.europa.eu/competition/state_aid/legislation/horizontal.html

(7) OJ C 136, 16.06.2009, p. 3-12.

(8) OJ C 136, 16.06.2009, p. 13-20.

age is therefore to exploit the better potential benefits of pre-notification contacts in order to avoid unnecessary shortcomings in notifications.

The Simplification Package is also based on the idea of a joint commitment by the Member States and the Commission. The Commission, for its part, will in particular streamline its current decision-making process and enhance discipline. Clearly, new practices will also only be fully effective if Member States have already taken account of any State aid aspects prior to the pre-notification phase, i.e. when designing the measure. It is here where the Best Practices Code and Simplified Procedure may require an extra effort from the Member States.

Measures notified to the Commission in the context of the financial crisis are not within the scope of the Simplification Package. Specific ad hoc arrangements have been put in place to deal swiftly with those cases.

## 2. The Simplified Procedure Notice

As already mentioned above, the Simplified Procedure Notice is applicable to *prima facie* straightforward cases, including certain aids for SMEs, environmental aid, innovation aid and rescue and restructuring aid ([9]). The purpose of the Notice is to substantially expand the scope of the relatively few cases currently being dealt with under the existing simplified procedure foreseen in Article 4 of Regulation 794/2004 ([10]) (Implementing Regulation). This existing simplified procedure has limited scope, as it relates only to certain alterations to existing aid ([11]).

Notwithstanding the substantial differences between State aid and merger control, this Notice was largely inspired in its operational aspects by the already well established Notice on Simplified Procedure for certain concentrations published in 2005 ([12]). The Merger Notice allows streamlined treatment of relatively simple cases that do not raise substantial competition concerns and therefore do not require complex analysis.

The application of the Notice is not obligatory: it can be applied by the Member States on a voluntary basis. Nevertheless, once a Member State opts for it, all the steps must be followed to allow the approval within an accelerated time-frame. Its main benefit for Member States is clear: if the Notice is found applicable, the Commission will use its best endeavours to adopt a decision within an accelerated timeframe of 20 working days from the date of the notification. This is important for Member States' planning and for the predictability of the procedure. However, this deadline can be only met if a Member State provides complete and adequate information as early as the pre-notification stage via the established Commission IT application (SANI). Submitting a pre-notification of a measure that has been well thought through and is based on existing State aid rules at an early design stage should indeed enable the services of the Commission to conduct a preliminary assessment more efficiently and speedily. Enhanced cooperation between the Member State concerned and the Commission in order to clarify any outstanding issues, primarily during the pre-notification phase, is also crucial.

### 2.1. Scope of the Notice

#### Categories of eligible measures

The Notice provides for three main categories of cases, including cases falling within the 'standard assessment' sections of the existing frameworks and guidelines or that are firmly in line with the consistent decision-making practice of the Commission.

- Category 1 groups those aid measures which fall within the 'standard assessment' sections of the existing frameworks and guidelines and which are not subject to the GBER, for instance section 5 of the R&D&I Framework ([13]). The list of cases provided under this category is illustrative and could develop further, depending on future amendments of existing instruments and future policy making, such as the recently adopted Broadband Communication ([14]).

- Category 2 is based on 'precedent decisions' and comprises aid measures which correspond to consistent Commission decision-making practice. 'Precedent decisions' should be understood as a Commission decision adopted within the last ten years preceding the date of pre-notification. Again, as with category 1, to facilitate the use of this procedure the Commission provides an

([9]) Please see point 5 of the Notice, including illustrative, non-exhaustive lists of subcategories.

([10]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [93] of the EC Treaty, (OJ L 140, 30.04.2004, p. 1).

([11]) Those alterations are listed in Article 4..2.: (a) increases in the budget of an authorised aid scheme exceeding 20 %; (b) prolongation of an existing authorised aid scheme by up to six years, with or without an increase in the budget; and (c) tightening of the criteria for the application of an authorised aid scheme, a reduction of aid intensity or a reduction of eligible expenses.

([12]) Commission notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89 (OJ C 217, 29.7.2000, p.32.).

([13]) Community framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1–26).

([14]) OJ C 235, 30.9.2009, p.7.

illustrative list of eligible measures, which might evolve in the future.

- Category 3 reiterates, in substance, the content of Article 4 of the Implementing Regulation, which already provides for a simplified notification procedure for certain alterations to existing aid (with a simplified notification form). The Notice cannot therefore affect the application of the existing simplified procedure. This means that the Member States may choose to notify a measure under Article 4 of Regulation 794/2004 and not under the Simplified Procedure Notice. However, for reasons of consistency, the Member States are invited by the Commission to follow the procedural practices of the Notice for this category of cases too. In practice, this would involve pre-notification of the measure and publication of a summary of the notification on the Commission website.

### 'No aid' measures

The Notice also applies to so-called 'no aid' measures, such as guarantee schemes for shipbuilding finance (point 5 (b) (vi)) or measures supporting the development of 'local infrastructure' (point 5 (b) (viii)) to the extent that they have no effect on intra-Community trade and therefore do not constitute State aid within the meaning of Article 87(1) of the EC Treaty. Both sub-categories are based on precedent decisions quoted in the Notice ([15]). As stated in point 4 of the Notice, the 'no aid' measures can be notified to the Commission, but they do not have to be. Nevertheless, Member States may notify such measures on a purely voluntary basis for reasons of legal certainty. In the 'no aid' scenario the Commission will issue a decision based on Article 4(2) of the Council Regulation (EC) No 659/1999 ([16]) (Procedural Regulation).

### Safeguards and exclusions

The Notice provides for some exclusions and safeguards for the Commission to revert to the normal procedure. These safeguards were designed to enable the services of the Commission to abandon the application of the Simplified Procedure when, owing to particular circumstances, the treatment of the pre-notified measure appears no longer to be straightforward, and therefore does not fit within an accelerated timeframe. If the Simplified Procedure is found inapplicable, the case will be dealt with under the normal procedure as laid down in the Procedural Regulation and as further detailed in the Best Practices Code.

Any unlawful aid and measures notified before the entry into force of the Notice are excluded from the application of the Simplified Procedure. Moreover, because of the specificities of these sectors, fishery and aquaculture, and activities in the primary production, processing or marketing of agricultural products, are outside the scope of the Notice ([17]). The safeguards are enumerated in points 6-12 of the Notice ([18]) and almost all of them can be applicable throughout the whole procedure. Obviously, the Member State will be informed if the Simplified Procedure has to be abandoned.

One of the safeguards concerns the Deggendorf scenario ([19]), where the potential beneficiary is subject to an outstanding recovery order as a result of a previous negative decision by the Commission. The Commission can also revert to the normal procedure where the information submitted by the Member State is incomplete, misleading or incorrect. This safeguard fits perfectly within the logic of the procedure, since without adequate information the Commission cannot assess the applicability of the Notice or the compatibility of the measure. Substantiated comments from third parties will also lead to the abandoning of the Simplified Procedure. In such circumstances, the Commission will normally be faced with new data that need to be analysed and could potentially influence its assessment of the measure. In such circumstances, the one-month deadline to adopt a decision would no longer be realistic.

## 2.2. Structure of the procedure

The procedure consists of two stages: a pre-notification phase, followed by the notification phase. The Member State is obliged to pre-notify the measure to the Commission via the established Commission IT application (SANI). ([20]) A pre-notification contact (which can be a phone call or email) will be initiated by the Commission within two weeks of that date. The main goal of this phase is to enable the Member State and the Commission to clarify all outstanding issues, including identification and *prima facie* applicability of relevant sections of guidelines or frameworks and precedent decisions. Three out-

([15]) Please see footnote 27 regarding 'local infrastructure' measures, which lists the four major conditions that have to me met by the measure in order not to have any effect on intra Community trade. Those conditions are based on the precedent decisions.

([16]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93] of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

([17]) See point 6 of the Notice.

([18]) Not all safeguards will be described in this Article.

([19]) See Case C-188/92, *TWD Textilwerke Deggendorf*, [1994] ECR I-833.

([20]) No specific notification forms are applicable to this procedure. The Member State can request already at the stage of the pre-notification for a waiver for completion of some of the sections of the notification form.

 

comes of the pre-notification phase are possible: the Commission may inform the Member State concerned that (1) the Notice is *prima facie* applicable, (2) the Notice is *prima facie* applicable provided that some additional information is submitted, or (3) the Notice is not applicable and shall remain subject to the normal procedure (as laid down in the Procedural Regulation and further detailed in the Best Practices Code).

Once the measure is notified, a summary of the notification is published on the website of the Commission for comments by interested third parties. If no such comments are received, the Commission shall use its best endeavours to adopt a short-form decision within one month ([21]).

## 2.3. Enhanced transparency

The Notice, for the first time in the history of State aid procedures, provides for the publication of summaries of the notifications on the Commission's (DG Competition) website coupled with the possibility for interested third parties to submit comments within 10 working days from the date of publication. ([22]) This is necessary in order to increase transparency and offer an additional safeguard for the Commission's accelerated assessment of measures under the Notice. Even if substantiated comments are received, this does not necessarily mean that the Commission will need to open a formal procedure pursuant to Article 4.4 of the Procedural Regulation. The Commission will, however, revert to the normal procedure in such cases. Publication is necessary for all measures treated under the Notice. However, as mentioned above, there is no obligation for the Member State to apply the Notice.

## 3. The Best Practices Code

The Best Practices Code is available for all State aid cases not subject to the GBER or the Simplified Procedure. The principal aim of this Code is to provide guidance on the day-to-day conduct of State aid proceedings at each stage of the investigation with a view to a speedier, more transparent and predictable handling of State aid cases, thereby fostering a spirit of better co-operation and mutual understanding between the Commission services, Member State authorities and the legal and business community. The Best Practices Code does not create or alter any rights or obligations as set out in the Treaty establishing the European Community, the Procedural Regulation and the Implementing Regulation, amended from time to time and interpreted by the case-law of the Community Courts. However, the specific features of an individual case may require an adaptation of, or deviation from the Best Practices Code. The main content of the Code is summarised below.

### 3.1. More systematic pre-notifications

One of the main novelties introduced by the Code is that pre-notification contacts should become more systematic. Pre-notifications are strongly recommended for cases where there are particular novelties or specific features which would justify informal prior discussions with the Commission services, but informal guidance will be provided whenever a Member State so requests.

The Commission's experience demonstrates the added value of pre-notification contacts, even in seemingly standard cases. Pre-notification contacts give the Commission services and the notifying Member State the possibility to discuss the legal and economic aspects of a proposed project informally and in confidence prior to notification, and thereby enhance the quality and completeness of notifications. In this context, the Member State and the Commission services can also jointly develop constructive proposals for amending problematic aspects of a planned measure. This phase thus paves the way for the speedier treatment of notifications, once they have been formally submitted to the Commission. Successful pre-notifications should effectively allow the Commission to adopt decisions pursuant to Article 4(2), (3) and (4) of the Procedural Regulation within two months from the date of notification.

In order to allow for a constructive and efficient pre-notification phase, the Member State should send to the Commission a draft notification form, at the latest two weeks before the expected date of the pre-notification contact. In order to facilitate swift treatment of the case, pre-notification contacts (E-mails, conference calls) will in principle be favoured rather than meetings. Except in particularly novel or complex cases, the Commission services will endeavour to provide the Member State concerned with an informal preliminary assessment of the project at the end of the pre-notification phase. This non-binding assessment will not be an official position of the Commission, but will constitute informal guidance from the Commission services on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the Common Market.

([21]) Such decision would be based either on Article 4(2) or Article 4(3) of the Procedural Regulation as explained in point 2 of the Notice.

([22]) At the moment of writing this article, summaries of notification of two cases were published on the Commission website. See http://ec.europa.eu/competition/elojade/isef/dsp_simple_notif.cfm

## 3.2. Mutually Agreed Planning

In cases which are particularly novel, technically complex or otherwise sensitive, or which have to be examined as a matter of absolute urgency, the Commission services propose to offer Mutually Agreed Planning to the notifying Member State as an instrument of structured cooperation to increase the transparency and predictability of the likely duration of a State aid investigation.

In this context, the Commission services and the notifying Member State could agree, in particular, at the end of the pre-notification phase or at the outset of the formal investigation procedure on:

- the priority treatment of the case concerned, in return for the Member State formally accepting the suspension of the examination of other notified cases originating from the same Member State, should this be necessary for planning or resource purposes;
- the information to be provided by the Member State and/or the beneficiary concerned, including studies or external expertise, or unilateral information-gathering by the Commission services; and
- the likely form and duration of the assessment of the case by the Commission services, once notified.

## 3.3. Enhanced discipline and more rigorous enforcement of the existing procedural rules during the preliminary and formal investigation

### Preliminary investigation of notified measures

In order to streamline the course of the investigation, the Commission services will endeavour to group their requests for information during the preliminary examination of notified cases into one comprehensive request, normally to be sent within 4-6 weeks after the date of notification. This is justified since, unless otherwise agreed in Mutually Agreed Planning, the pre-notification phase should indeed enable Member States to submit a complete notification, thereby reducing the need for additional requests for information.

Should the Member State fail to provide the requested information within the set deadline, the provision contained in Article 5.3 of the Procedural Regulation will normally be applied after one reminder, and the Member State will be informed that the notification is deemed to have been withdrawn. Formal investigation procedures will also normally be opened whenever the necessary conditions are met, and generally after two rounds of questions at most. Case suspensions (to allow the Member State to amend its project) will be formalised and timed. In particularly complex cases, the Member State concerned will be better informed via a "state of play" contact/meeting.

### The formal investigation procedure

This phase, provided for in Article 6 of the Procedural Regulation, will be streamlined and expedited, based on a strict enforcement by the Commission services of the procedural means already at their disposal to ensure the respect of set deadlines by Member States and third parties (swift publication of the opening decision, replying to the opening decision, transmitting or replying to third party comments etc.).

In order to improve the factual basis of the investigation of particularly complex cases, the Commission services may send a copy of the decision to open the formal investigation procedure to identified third parties, including trade or business associations, and invite them to comment on specific aspects of the case.

To ensure transmission of all third party comments to the Member State concerned in the most expedient manner, Member States will, as far as possible, be invited to accept transmission of third parties' comments in their original language.

## 3.4. Complaints

In response to a strong demand from Member States and other stakeholders, the Best Practices Code proposes a phased and predictable procedure for handling complaints. Alongside the more systematic use of pre-notification contacts and the streamlined conduct of the preliminary and formal investigation phases by the Commission services, this new complaint-handling procedure is the third main novelty introduced by the Code, for the particular benefit of the legal and business community.

The Commission services will systematically invite complainants to use the new complaints form [23], which will normally enable complainants to enhance the quality of their submissions.

In the interests of transparency, the Commission services will use their best endeavours to inform the complainant of the priority status of its submission and the planned follow-up, within two months from the date of receipt of the complaint. As regards clearly unsubstantiated complaints, and complaints referring to approved or existing aid, the Commis-

(23) See complaints form available on DG Competition's website http://ec.europa.eu/competition/forms/sa_complaint_en.html

sion will also endeavour to reply to the complainant normally within two months following receipt of the complaint.

The Commission will use its best endeavours to investigate a complaint within an indicative time frame of twelve months from its receipt. The Commission is entitled to give different degrees of priority to the complaints brought before it ([24]), depending on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned or the existence of similar complaints. In the light of its workload and its right to set priorities for its investigations ([25]), it can thus postpone dealing with a measure which is not a priority. Within twelve months, the Commission will therefore, in principle, endeavour to:

- adopt a decision for priority cases pursuant to Article 4 of the Procedural Regulation, with a copy addressed to the complainant; or
- send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. This administrative letter is not an official position of the Commission, but only a preliminary view of the Commission services, based on the information available and pending any additional comments the complainant may wish to make within one month from the date of this letter. If further comments are not provided within this deadline, the complaint shall be deemed to be withdrawn.

In the case of unlawful aid, complainants will be reminded of the possibility to initiate proceedings before national courts, which can order the suspension or recovery of such aid ([26]). When necessary, the non-confidential version of a complaint will be transmitted to the Member State concerned for comments. Member States and the complainants will systematically be kept informed of the closure or other processing of a complaint. Obviously, these arrangements will only apply to complaints registered after the entry into force of the Best Practices Code.

## 4. Conclusions

The Simplified Procedure Notice and the Best Practices Code fit well into the modern architecture of State aid procedures since, as explained earlier, they aim at achieving the goals set out in the SAAP.

Both instruments should enable the Commission to adopt decisions within time-frames that are more business relevant. This should be achieved through better notifications, enhanced discipline, speedier procedures and increased predictability. By granting third parties the opportunity to comment, the publication of summaries of the notifications in the Simplified Procedure will contribute to more transparent State aid procedures, as will the new staged complaints procedure under the Code. In parallel, the Commission will review its current internal legal framework to optimize its decision-making process, in order to contribute to an overall shortening of State aid procedures.

The proper implementation of these procedures by the Commission services, Member State authorities and other interested parties will then be decisive, if the successful streamlining and modernisation of State aid procedures which the Simplification Package seeks to achieve are actually to become reality. Only the shared and joint commitment of all stakeholders and the Commission to the procedural best practices set out in this Package can bring this about. If this first step of procedural reform is successful, a revision of the Procedural Regulation may then be contemplated as a next step.

([24]) Case C 119/97 Ufex and Others v Commission [1999] ECR I 1341, paragraph 88.

([25]) Case T-475/04, Bouygues SA v Commission [2007] ECR II-2097, paragraph 158 and 159.

([26]) See the recently adopted Commission Notice on the Enforcement of State Aid Law by National Courts, (OJ C 85, 9.4.2009, p.1). See also the separate article on this new Notice in this edition of the Competition Policy Newsletter.

# The Commission notice on the enforcement of State aid law by national courts

Christof Lessenich and Thierry Beranger (1)

## 1. Introduction

On 4 April 2009, the Commission adopted its new Notice on the enforcement of State aid law by national courts ('the new Notice') (2). The new Notice replaces the former cooperation Notice dating back to 1995 ('the 1995 Cooperation Notice') (3) and was preceded by extensive consultations with Member States, national courts and other stakeholders (law firms, business associations, etc.).

The main purpose of the new Notice is to inform national courts and third parties of the remedies available in the event of a breach of State aid rules and to provide them with guidance as to the practical application of those remedies. In addition, the Commission is seeking to develop its cooperation with national courts by introducing more practical tools to support national judges in their daily work. This consists of requests for the transmission of information in the possession of the Commission and/or requests for Commission opinions on the application of State aid rules.

## 2. Background of the new Notice

In its road map for State aid reform, known as the 2005 State Aid Action Plan ('the SAAP') (4), the Commission already highlighted the need for better targeted enforcement and monitoring of State aid granted by Member States. The SAAP stressed that private litigation before national courts can contribute to this aim by ensuring increased discipline in the area of State aid.

In 2006, the Commission then published a study on the enforcement of State aid law at national level ("the Enforcement Study") (5), which concluded that State aid litigation at Member State level had increased significantly during the period between 1999 and 2006. However, the Enforcement Study also revealed that a large number of these legal proceedings were not aimed at genuine private enforcement. This was because almost two thirds of the judgments analysed for the Study concerned actions brought by taxpayers who were seeking relief from the allegedly discriminatory imposition of a (tax) burden and actions brought by beneficiaries to challenge the recovery of unlawful and incompatible State aid.

In addition to this issue, the Commission took the view that the content of the 1995 Cooperation Notice was no longer up to date.

On the one hand, since the publication of the 1995 Cooperation Notice the EU courts have defined the role of national courts in the State aid field much more precisely. This recent case-law had to be taken into account.

On the other hand, the role of national Courts has been affected by significant legislative developments. These include not only the introduction of the Procedural Regulation (6) but also the introduction of the block exemption system (most recently extended through the adoption of the General Block Exemption Regulation (7)), which has given national courts an even more prominent role.

Finally, the content of the 1995 Notice was predominantly focussed on cooperation between the Commission and national courts (e.g. through the exchange of information). Whilst the new Notice also naturally addresses this issue, the Commission considered that a much broader Notice was needed to address the different aspects of private State aid enforcement. The need for such a broader Notice had also been highlighted in the conclusions of the Enforcement Study.

(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) OJ C 85, 9.4.2009, p. 1.
(3) Notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8.).
(4) State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM (2005) 107 final.
(5) Study on the Enforcement of State Aid Law at National Level, March 2006, Jones Day, Lovells, Allen & Overy (http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html).
(6) Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty (OJ L 83/1, 27.03.1999, p. 1-9).
(7) 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) (Text with EEA relevance) (OJ L 214, 9.8.2008, p. 3–47).

## 3. Role of national courts in dealing with illegal aid

One of the most important novelties of the new Notice is that, compared to its predecessor, it contains much more detailed guidance on the role of national courts in dealing with unlawful State aid (i.e. aid which, contrary to Article 88 (3) EC, has not been notified and approved by the Commission prior to its implementation). This guidance is based on the detailed jurisprudence of the Community courts on the division of roles between the Commission and national courts in the State aid field. This jurisprudence, and thus also the new Notice ([8]), addresses the role of national courts in different scenarios, namely:

- actions aimed at preventing the payment of unlawful aid
- actions aimed at the recovery of unlawful aid already granted
- actions for the compensation of damage suffered as a result of the unlawful aid
- actions aimed at interim measures against unlawful aid

The recovery action, the action for damages and the possibility to obtain interim measures are of particular practical importance for claimants and national judges. The position of the new Notice on these topics is therefore briefly summarised below.

### 3.1. Recovery of unlawful State aid by national courts

The far-reaching competences of national courts in relation to unlawful aid should be seen in comparison with the relatively limited competences of the Commission in this respect. The EC courts have repeatedly stated that the Commission cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 88(3) EC. A full compatibility assessment thus has to be conducted, whether the standstill obligation has been respected or not ([9]).

The ECJ has made it clear that these restrictions do not apply in relation to national courts. National courts are able, and usually also obliged, to order the recovery of unlawful State aid solely because of the violation of the notification obligation ([10]). The new Notice explains the practical application of this recovery obligation.

That being said, the ECJ has also recognised that there can be unusual circumstances in which the recovery of unlawful aid by the national court is not mandatory under Community law. Although there is as yet no precise ECJ case law on the requirements in this respect ([11]), the new Notice applies a similar standard to the one which applies under Articles 14 and 15 of the Procedural Regulation. Circumstances which would not stand in the way of a recovery order by the Commission can therefore normally not justify a national court to refrain from ordering recovery ([12]).

The recovery obligation of the national court is not limited to the nominal amount of aid; it also includes interest. This is because the beneficiary in any event obtains a financial advantage resulting from the premature implementation of the aid, whether the aid is ultimately approved by the Commission or not. The new Notice provides practical guidance on the calculation of this illegality interest and time period for which it is to be applied ([13]).

### 3.2. Damages actions

The role of national courts in the application of the State aid rules is not limited to the recovery of aid granted unlawfully, but also includes compensation where the illegal aid has created damages (e.g. for competitors of the beneficiary). The ECJ has made it clear that such damages actions can often be brought under national law ([14]). In addition, the new Notice underlines that the granting of illegal State aid can also give rise to a damages claim directly under Community law as a result of the 'Francovich' ([15]) jurisprudence of the ECJ ([16]).

From a practical perspective, one of the most important issues in connection with damages actions is how to demonstrate and calculate the actual damage suffered. The new Notice addresses this point and gives detailed guidance to national courts and to

([8]) See paragraphs 24 to 62 of the new Notice.

([9]) See only Case C-301/87, *France v Commission*, ('Boussac'), [1990], ECR I-307, paragraphs 17 to 23.

([10]) See only Case C-39/94, *SFEI and Others*, [1996] ECR I-3547, paragraphs 40 and 68; and Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France*, [1991] ECR I-5505, paragraph 12.

([11]) A request for a preliminary ruling on this issue in the CELF case is currently pending before the ECJ, Case C-1/09.

([12]) See paragraph 32 of the new Notice.

([13]) See paragraph 41 of the new Notice.

([14]) See only Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, [2008] ECR I-469, paragraphs 53 and 55.

([15]) Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, [1991] ECR I-5357.

([16]) The fact that violations of the State aid rules can give rise to Member State liability directly on the basis of Community law has been confirmed in Case C-173/03 *Traghetti del Mediterraneo v Italy*, [2006] ECR I-5177, paragraph 41.

potential claimants on the calculation of damages in different scenarios ([17]).

Whilst a direct damages action against the recipient of the aid may be a viable option under national law, the Notice clarifies that, based on the current ECJ jurisprudence, such damages claims do not have a sufficient legal basis directly under Community law.

### 3.3. Interim measures

National courts are also well placed to deal with cases where urgent action is required in order to protect the rights of competitors and other parties. As part of their role under Article 88(3) EC, national courts are required to take interim measures where this is appropriate to safeguard the rights of individuals and the effectiveness of the standstill obligation ([18]).

The primary obligation of the national court when faced with unlawful aid is, of course, to order its recovery (including illegality interest). Where the final judgment of the national court in this regard is delayed, the court must at least use the interim measures available to it under national law to terminate provisionally the anti-competitive effects of the aid ('interim recovery') ([19]).

The most practical way to achieve such an interim recovery will, in the author's view, be to order the unlawful aid to be placed in a blocked account for the duration of the national court proceedings. Depending on the outcome of the case, the national court can then order the funds either to be returned to the State or to be released to the beneficiary.

The new Notice contains detailed guidance on the conditions under which such interim measures are necessary and the detailed rules/procedures for their implementation ([20]).

## 4. Role of national courts in dealing with negative Commission decisions

The new Notice also addresses the role of national courts in scenarios where the Commission has already adopted a negative decision obliging the Member State to recover the aid from the beneficiary. In such circumstances, beneficiaries frequently ask national courts to review the legality of recovery orders issued by the national authorities or to suspend their implementation. As regards such legal actions, the new Notice in essence repeats the main principles already set out in the Commission's 2007 Recovery Notice ([21]).

Most importantly, the new Notice recalls the general principle that an action at national level cannot be used to question the validity of the Commission's negative decision where this decision could have been challenged before the Community courts ([22]).

The new Notice also recalls that, where a challenge at Community level would have been possible, the national Court may not suspend the implementation of the national recovery order for reasons related to the validity of the underlying Commission decision ([23]).

## 5. Cooperation between the Commission and national courts

The new Notice introduces two distinct mechanisms for the Commission's cooperation with national courts. National courts can either ask the Commission to provide information in its possession ([24]) or ask for a Commission opinion on the application of the State aid rules ([25]). Both types of support are largely based on the established practice in the antitrust area, and similar rules apply ([26]).

### 5.1. Transmission of information to national courts

The Commission's duty to assist national courts in the application of State aid rules involves the transmission of relevant information in its possession to national courts upon request.

In order to ensure efficiency in its cooperation with national courts, such requests for information will be processed as quickly as possible. An indicative deadline of one month ([27]) applies. The new Notice also defines the strict conditions under which information protected by the obligation of professional secrecy can be transmitted to a national court.

([17]) See paragraph 49 of the new Notice.
([18]) See paragraphs 57 to 60 of the new Notice.
([19]) See paragraph 60 of the new Notice.
([20]) See paragraphs 57 to 62 of the new Notice.

([21]) Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ C 272, 15.11.2007, p. 4), paragraphs 55 to 59.
([22]) See paragraphs 64 to 68 of the new Notice.
([23]) See paragraph 66 of the new Notice.
([24]) See paragraphs 82 to 88 of the new Notice.
([25]) See paragraphs 89 to 96 of the new Notice.
([26]) Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.04.2004, p. 54-64).
([27]) Where the Commission needs to ask the national court for further clarifications, this one-month period starts to run from the moment the clarification is received. Where the Commission has to consult third parties who are directly affected by the transmission of the information, the one-month period starts from the conclusion of this consultation.

## 5.2. Opinions on questions concerning the application of State aid rules

In addition, the new Notice introduces the possibility for national courts to request the Commission's opinion on relevant issues concerning the application of State aid rules. Such Commission opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings. The possibility to ask for such an opinion is, of course, without prejudice to the courts' right/obligation [28] to request a preliminary ruling under Article 234 EC.

In the interest of making the Commission's cooperation with national courts as effective as possible, requests for Commission opinions will also be processed as quickly as possible. The applicable indicative deadline for the Commission's response is four months [29].

## 6. Conclusion

The key aim of the new Notice is to increase the awareness of national judges and potential claimants with regard to private State aid enforcement. The Commission's intention is to follow up on the introduction of the new Notice with a series of advocacy measures, including dedicated State aid training for national judges.

(28) Under Article 234 EC, the highest ranking courts are obliged to ask for such a preliminary ruling.
(29) Where the Commission needs to ask the national court for further clarifications concerning its request, this four-month period starts to run from the moment when the clarification is received.

# EC Merger Regulation contributes to more efficient merger control in EU

Claude Rakovsky, Manuel Godhino de Matos, Alexander Kopke, Peter Ohrlander and Paul Shiels (1)

According to a recent Commission report (2) Regulation 139/2004 (the 'EC Merger Regulation') has contributed to more efficient merger control within the EU since it came into force on 1 May 2004. Its turnover thresholds have, in most cases, been effective in distinguishing merger cases of EU relevance from those with a primarily national focus. Also, the improved system of case re-allocation (introduced in 2004) has allowed businesses to have their cases reviewed by the more appropriate authority: either a Member State's National Competition Authority or the Commission's 'one-stop-shop' facility. The report nevertheless identifies certain areas where further reflection may be useful.

## 1. Background — Objective of the report

On 18 June 2009, the Commission adopted a report on the application of the EC Merger Regulation after five years of operation since its entry into force in May 2004. The report is a stock-taking exercise, the main aim of which is to examine the operation of the notification thresholds provided for by Article 1 of the Regulation. The thresholds are a mechanism for allocating merger cases between Community level and national level. The report also evaluated the operation of the referral instruments provided for by Articles 4, 9 and 22. (3) In a number of areas, the report highlights aspects that merit further discussion, but leaves open the question of whether any amendment to the existing rules or practice is appropriate. The report will serve as a basis for the Commission to assess, at some further stage, whether or not it is appropriate to take further policy initiatives. The report was preceded by consultations with the Member States' national competition authorities ('NCAs') and stakeholders.

(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) Communication from the Commission to the Council (COM(2009) 281 final). This report can be found on the Commission's competition website: http://ec.europa.eu/competition/mergers/studies_reports/studies_reports.html.

(3) The Commission has an obligation to report on these issues under Articles 1(4) and 4(6) of the Merger Regulation.

## 2. A system of mutually exclusive competences, jurisdictional thresholds and corrective mechanisms

One important feature of the EC Merger Regulation is the exclusive jurisdiction of the Commission to review concentrations that have a Community dimension. The concept that the Commission should have sole competence to deal with such mergers follows from the principle of subsidiarity. From the viewpoint of the European business community, the Commission's exclusive jurisdiction also provides the advantage of a 'one-stop-shop', which is regarded as essential in keeping the regulatory costs associated with cross-border transactions at a reasonable level. In addition, the Commission's exclusive jurisdiction to vet such mergers is an important factor in providing a 'level playing field' for mergers that result naturally from the completion of the internal market. This is widely accepted as the most efficient way of ensuring that all mergers with a significant cross-border impact are subject to a uniform set of rules.

The division of competence between the Commission and the NCAs is based on the application of the turnover thresholds as set out in Article 1. (4) It is also supplemented by three corrective mechanisms. The first corrective mechanism is the so-called 'two-thirds

(4) Article 1(2) of the EC Merger Regulation stipulates that: 'A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.' Article 1(3) stipulates that: 'A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.'

rule'. The objective of this rule is to exclude cases which contain a clear national nexus to one Member State (5) from the Commission's jurisdiction.

The second corrective mechanism is the pre-notification referral system introduced in 2004. This mechanism allows for the re-allocation of jurisdiction to the Member States under Article 4(4) or to the Commission under Article 4(5) when certain conditions are fulfilled. (6) The initiative is in the hands of the parties prior to notification. Such referrals are subject to approval by both the Member States and the Commission under Article 4(4) and solely by the Member States under Article 4(5).

The third corrective mechanism is the post-notification referral system whereby one or more Member States can request that the Commission assesses mergers even though they fall below the thresholds of the EC Merger Regulation (Article 22). (7) Conversely, a Member State may, in cases that have been notified under the EC Merger Regulation, request the transfer of competence to the NCA under certain conditions (Article 9). (8)

## 3. Jurisdictional thresholds

The report concludes that the threshold criteria in Article 1(2) and (3), considered in conjunction with the available corrective mechanisms, operate in a satisfactory way in allocating jurisdiction. (9) Nevertheless, the Commission's analysis of the merger case data collected by the NCAs in 2007 indicates that there are still a number of transactions which need to be notified in parallel in more than one Member State. In fact, the report identifies at least 100 concentrations which were notifiable in three or more Member States that year. (10) These concentrations together required more than 360 parallel investigations by the NCAs.

A large majority of these cases involved markets which were wider than national or which involved several national (or even narrower) markets. There are, therefore, a number of transactions with significant cross-border effects which remained outside of the scope of the EC Merger Regulation. The report therefore concludes that there is further scope for 'one-stop-shop' review.

Available data also suggests that around 6 % of the cases notified in parallel in at least three Member States gave rise to competition concerns. This is a good indication that a number of additional concentrations may be appropriate candidates for review by the Commission when applying the principle of the 'more appropriate authority': The negative consequences of parallel proceedings and the potential for contradictory outcomes are particularly important for those cases which raise substantive competition issues.

## 4. The 'two-thirds' rule

As noted, there are three main corrective mechanisms established by the EC Merger Regulation, the first one being the so called 'two-thirds' rule. This rule provides that mergers where each of the parties concerned achieve more than two thirds of their EU-wide turnover in one and the same Member State are not reviewable under the EC Merger Regulation. Between 2001 and 2007 there were at least 126 cases where this rule applied. There were thus few concentrations that met this threshold compared to the overall case load at the Member State level. (11) Unsurprisingly, this rule has mostly been applied in relation to concentrations within large Member States. (12) This is a result of the design of this threshold. It is generally unlikely that two of the parties to the transaction would meet the

(5) The threshold is construed in such a way that even if the general thresholds under Articles 1(2) and 1(3) are met, notification under the EC Merger Regulation is not required if each of the parties concerned achieve more than two thirds of their EU-wide turnover in one and the same Member State.

(6) Under Article 4(4), unless the Member State expresses its disagreement, the Commission, when it considers that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law. Under Article 4(5) concentrations which do not have a Community dimension and which are capable of being reviewed under the national competition laws of at least three Member States can be referred to the Commission unless any Member State competent to examine the concentration under its national competition law expresses its disagreement.

(7) For a referral to the Commission to be available under Article 22 the concentration must: (i) affect trade between Member States and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request.

(8) Under Article 9, a Member State may request that a case be referred to it in either of the following circumstances: (i) the concentration must 'threaten to affect significantly competition in a market' and the market in question must be within the requesting Member State and present all the characteristics of a distinct market, or (ii) the concentration must affect competition in a market and the market in question must be within the requesting Member State and present all the characteristics of a distinct market and does not constitute a substantial part of the common market.

(9) It should be noted that only 43 pre-notification referral requests and 25 post-notification referral requests were made between 2004 and 2008 compared to the total number of about 1 530 own-jurisdiction cases dealt with by the Commission over the same reference period.

(10) At least 240 cases were reviewable in two Member States.

(11) For the same reference period, more than 26 000 cases were reported at Member State level.

(12) Most of the cases were reported in France, Germany, Italy, Spain and the UK.

general turnover thresholds globally and within the EU while still having two thirds of their turnover in a single small Member State.

As regards the substance of these cases, the two-thirds rule has in most cases appropriately distinguished between concentrations having a cross-border impact and those that do not. However, there are a small number of cases with potential cross-border effects in the Community which nevertheless fell under the competence of the NCAs as a result of this rule. The report also gives account of how, in a substantive respect, public interest considerations other than competition policy have been applied in a number of these cases. While the exercise of public interest considerations is a feature in many merger control systems which may well be justified, the report highlights the need for a pan-European merger control regime spanning the EU which ensures the protection of undistorted competition, irrespective of which authority is the reviewing agency.

## 5. Referral mechanisms

The adoption of the recast EC Merger Regulation in 2004 introduced the option for the parties to request the referral of certain concentrations prior to notification to the Commission or the Member States as the case may be. [13] The Commission's own experience as well as the comments received from the NCAs and stakeholders clearly support the view that this mechanism has considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU. It has substantially improved the allocation of cases between the Commission and the Member States, taking into account the principles of 'one-stop-shop' and review by the 'more appropriate' authority.

Available information clearly supports the view that these mechanisms have allowed the appropriate authority to handle cases while also avoiding unnecessary parallel proceedings and inconsistent enforcement efforts. It is estimated that this mechanism has allowed the number of proceedings to be reduced to around 150 from almost a thousand potential parallel proceedings during the period between 2004 and 2008. Furthermore, it has facilitated the re-allocation of 40 cases from the Commission to the Member States. Referrals from the Member States to the Commission were vetoed in only four cases and from the Commission to a Member State only once.

Nevertheless, some problems were highlighted, in particular from a procedural standpoint. Stakeholders have expressed concerns with regard to the time taken and cumbersomeness of the referral process. In a large number of cases, these factors are regarded as the main disincentives to requesting referral. In this respect, having regard to the number of multiple filings and stakeholder comments, there appears to be further scope for referrals to the Commission, thereby increasing the use of the 'one-stop-shop' facility. [14] Conversely, there may be scope for more referrals in the direction of the Member States.

The report also concludes that the post-notification mechanisms provided by the EC Merger Regulation have operated satisfactorily. These mechanisms also existed under the previous Merger Regulation and have continued to be a useful corrective mechanism following the introduction of pre-notification referrals. This reflects the complementary nature of the two mechanisms. The former allows for flexible re-allocation of cases at the initiative of the Member States or the Commission at any stage of the proceedings.

## 6. Convergence

When consulted on the experience gained with regard to multiple filings, a large number of stakeholder-respondents pointed out that they often meet with difficulties and incur additional cost as a result of diverging national merger control rules. Differences exist not only in determining where jurisdiction should lie but also between the various procedures of the Member States. Prime examples are the duration of the jurisdictional thresholds in some Member States and their interpretation of the standstill obligations. Sometimes substantive rules have also been a source of concern. Many stakeholders therefore suggest that, independently of the allocation of cases between the Community and national level, in order to fully achieve the objective of a level playing field in the common market, efforts towards further convergence of the various national rules governing merger control should be pursued to alleviate difficulties encountered when multiple filings are necessary.

## 7. Concluding remarks

The report concludes that, overall, the jurisdictional thresholds and the set of corrective mechanisms established by the EC Merger Regulation have provided an appropriate legal framework for allocating cases between Community and Member State level. It finds that this framework has in most cases been

(13) See conditions in footnote 5.

(14) Furthermore, it must be stressed that the Member States' refusal powers under Article 4(5) have been rarely used. Many stakeholders therefore consider, on the basis of the experience they have acquired over the past years, that there should be a re-examination of the possibilities for shifting to a system of automatic notification under the EC Merger Regulation when the three Member State criterion is met (or other intermediate solutions) as was initially proposed in the process leading up to the current system. This would in their view significantly increase transparency while lowering the cost and time for the review.

effective in distinguishing cases that have a Community dimension from those with a primarily national nexus. Notwithstanding this, it concludes that there is scope for further improvement in the current system of case allocation in a number of respects. In particular, there are still a relatively large number of mergers that are notified in two or more Member States. There was also a small number of cases dealt with by the Member States under the two-thirds rule, which nevertheless had a potential cross-border impact. Finally, stakeholders have suggested that case allocation between the Commission and the Member States could be improved through more efficient referral mechanisms or by moving towards automatic re-allocation of jurisdiction to the Commission in cases with a cross-border impact. In addition, increased convergence between the national merger control regimes would in their view be beneficial to businesses as it would reduce the costs incurred and the time needed for cross-border mergers. The report is now with the Council.

# Regulation 1/2003: How has this landmark reform worked in practice?

Ailsa Sinclair, Vita Jukneviciute and Ingrid Breit (1)

## Introduction

The entry into force of Council Regulation (EC) No 1/2003 on 1 May 2004 ushered in the most comprehensive reform of procedures to enforce Articles 81 and 82 of the EC Treaty since 1962. Regulation 1/2003 modernised the rules which govern the enforcement of Articles 81 and 82, empowering national competition authorities and national courts to apply these provisions in full.

Regulation 1/2003 specifically requires the Commission to prepare a report to the Parliament and Council on its functioning five years after entry into force. The Report was duly adopted by the Commission on 29 April 2009 (2), accompanied by a Staff Working Paper which sets out its findings in more detail. (3)

The preparation of the Report involved a public consultation to obtain input from stakeholders about their experience in practice. The Commission received 45 responses from businesses and business associations, law firms, lawyers' associations and academia. (4) National competition authorities were closely involved in preparing the Report.

## Nature of the Report and main conclusions

The Report takes stock of how modernisation of EU antitrust enforcement rules has worked since 1 May 2004. It reports on experience in all major areas covered by Regulation 1/2003 and evaluates the progress made by introducing new instruments and working methods.

The Report concludes that Regulation (EC) No 1/2003 brought about a landmark change in the way European competition law is enforced. The Regulation has significantly improved the Commission's enforcement of Articles 81 and 82 of the EC Treaty. The Commission has been able to become more proactive, tackling weaknesses in the competitiveness of key sectors of the economy in a focused way. EU competition rules have to a large extent become the '*law of the land*' for the whole of the EU. Cooperation in the European Competition Network (ECN) has helped ensure the rules are applied coherently. The network is an innovative model of governance for the Commission and Member State authorities to implement Community law.

In some areas, the Report highlights aspects that merit further evaluation, without taking a position on the need to amend existing rules or practice. It will serve as a basis for the Commission to decide whether to propose any further policy initiatives.

## Key findings on major aspects of the Regulation

### Direct application of Article 81(3) of the EC Treaty

Regulation 1/2003 replaced the centralised notification and authorisation system under Regulation 17 by an enforcement system based on the direct application of Articles 81 and 82 of the EC Treaty in full. Agreements covered by Article 81(1) of the EC Treaty that meet the conditions of Article 81(3) are now directly valid and enforceable, with no prior decision to that effect being required.

The Report finds that the change from a system of notification and administrative authorisation to one of direct application took place remarkably smoothly. Overall, the experience of the Commission, national enforcers, the business and legal community indicated no major difficulties with the direct application of Article 81(3), which has been widely welcomed by stakeholders.

This change reflects a shift in priorities of the Commission, enabling it to focus its resources on areas where it can make a significant contribution to the enforcement of Articles 81 and 82, such as cartels and other serious infringements of the law.

The Report further notes that modernising the antitrust rules entailed a shift in emphasis from individual agreements to general guidance to help numerous undertakings and other enforcers. Notwithstanding new and unresolved issues, the Report underlines that the Commission remains firmly committed to

(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) COM(2009)206 final, available, together with the accompanying Staff Working Paper, at http://ec.europa.eu/competition/antitrust/legislation/regulations.html.

(3) For ease of reading, both documents are together referred to as the 'Report'.

(4) The (non-confidential) replies are available at http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/index.html.

providing individual guidance to companies in accordance with the Notice on informal guidance. (5)

## The Commission's investigative and decision-making powers

Regulation (EC) No 1/2003 clarified and reinforced the Commission's investigative powers and introduced a new set of decisions, with the aim of improving enforcement.

The Report highlights how sector inquiries have become a key investigative tool and have enabled the Commission to identify shortcomings in the competitive process of the gas and electricity, retail banking, business insurance and pharmaceutical sectors. Its new or revised powers of investigation (the power to seal, ask questions about facts or documents during inspections in business premises and to inspect non-business premises) have generally been used to the extent necessary in the cases investigated.

The Report also sets out the Commission's practice regarding the types of decisions available. During the reporting period, it adopted numerous prohibition decisions in accordance with Article 7 of the Regulation. In this context, the Commission has accepted structural changes as commitments (6) but has not so far used the explicit power to impose structural remedies. The Report underscores the use of Article 9, which for the first time empowered the Commission to make commitments offered by undertakings binding and enforceable upon them. 13 commitment decisions were adopted during the reporting period. Such decisions bring about rapid change in the marketplace.

## Fines

Fines with a sufficient deterrent effect, coupled with an effective leniency programme, constitute a crucially important means for the Commission to combat cartels and other serious infringements. The legal basis for the Commission's power to impose fines for breaches of substantive competition law under Regulation (EC) No 1/2003 was essentially taken over from Regulation 17. The Report sets out the major developments of the last five years, during which the Commission further honed its fining policy by issuing the 2006 Fining Guidelines. In response to an issue raised during the public consultation, the Report also sets out the case law of the Community Courts concerning the legal basis for fines. (7)

The Regulation introduced more effective penalties for non-compliance with obligations incumbent on undertakings in the context of investigations. The Commission made use of this provision for the first time and imposed a fine of €38 million for breach of a seal. (8)

## Application of EC competition law by all enforcers in the EU

Article 3 of Regulation (EC) No 1/2003 regulated the relationship between national competition law and EU competition rules for the first time. It obliges national competition authorities and courts to apply Articles 81 and 82 of the EC Treaty to agreements or conduct that could affect trade between Member States and provides for a single standard of assessment for agreements, concerted practices and decisions by associations of undertakings. Conversely, Member States remain free to enact and maintain stricter national competition laws than Article 82 to prohibit or sanction unilateral conduct. Overall, the Report concludes that Article 3 has led to a very significant increase in the application of Articles 81 and 82, making a single legal standard a reality on a very large scale.

## The European Competition Network

Regulation (EC) No 1/2003 gave national competition authorities the key role of ensuring that EU competition rules are applied effectively and consistently, in conjunction with the Commission. The Report concludes that after five years, it is clear that the challenge of boosting enforcement of EU competition rules, while ensuring consistent and coherent application, has been largely met:

- Enforcement of EU competition rules has vastly increased since the entry into force of Regulation (EC) No 1/2003. By the end of March 2009, more than 1000 cases have been pursued by the national competition authorities and the Commission on the basis of the EU competition rules in a wide variety of sectors.
- Work sharing between the enforcers in the network has generally been unproblematic. Five years of experience have confirmed that the flexible and pragmatic arrangements introduced by Regulation (EC) No 1/2003 and the Network Notice work well. Discussions on case allocation have arisen rarely and have been resolved swiftly.

(5) Commission Notice on Informal Guidance relating to Novel Questions concerning Articles 81 and 82 of the EC Treaty that arise in Individual Cases (Guidance Letters) (OJ C 101, 27.4.2004, p.78).

(6) E.ON German electricity market, OJ C 36, 13.02.2009, p.8 and the RWE Gas Foreclosure case, see Commission Press Release IP/09/410 of 18.03.2009.

(7) See part 3.5.1. of the Staff Working Paper, referred to in footnote 1 above.

(8) E.ON, OJ C 240, 19.09.2008, p.6.

- By the end of the reporting period, the Commission had been informed of more than 300 decisions planned by national competition authorities on the basis of Article 11(4). None of these cases resulted in the Commission initiating proceedings pursuant to Article 11(6) to relieve a national competition authority of its competence for reasons of coherent application. Experience indicates that national competition authorities are generally highly committed to ensuring consistency and efforts undertaken in the ECN have successfully contributed to this aim. Stakeholders are largely satisfied with the results of applying EU competition rules within the ECN.

- The ECN has proven to be a successful forum to discuss general policy issues. The ECN Model Leniency Programme ([9]) illustrates how the ECN is able to jointly develop a new strategy to address real and perceived deficits in the existing system.

## Interaction with national courts

Since the entry into force of Regulation (EC) No 1/2003, national courts have the power to apply both Articles 81 and 82 EC in full. Regulation (EC) No 1/2003 provides national courts with a number of ways to promote coherent application of competition rules. The Report notes that during the reporting period the Commission issued 18 opinions to national courts on questions concerning the application of Articles 81 and 82 of the EC Treaty. Moreover, both the Commission and the national competition authorities have used the power to make observations as *amicus curiae* under Article 15(3). The Commission decided to submit *amicus* observations on two occasions during the reporting period when it considered that there was an imminent threat to the coherent application of the EC competition rules.

## Areas for further examination

As mentioned, the Report highlights a certain number of aspects which merit further examination without taking a position on the need to amend the existing rules or practice.

### Commission's investigation and enforcement powers

In relation to the Commission's enforcement powers, the Report identifies certain specific issues for further examination:

- The absence of penalties for misleading or false replies in the context of interviewing legal and natural persons with their consent. Experience has shown that this may be a disincentive to providing correct and complete statements;

- The power to request national competition authorities to carry out inspections on its behalf, as provided for in Article 22(2). This power has been rarely used by the Commission, partly due to a perceived lack of clarity in the legal basis;

- Handling complaints that do not give rise to priority cases remains cumbersome. The Report recommends further work to streamline procedures, in accordance with the case law of the Community Courts;

- Experience with the provision for imposing penalty payments has highlighted that the existing procedure is relatively lengthy and cumbersome and there may be scope for further improvement.

### Substantive divergence in the area of unilateral conduct

Under Regulation (EC) No 1/2003, Member States remain free to enact and maintain stricter national competition laws than Article 82 to prohibit or sanction unilateral conduct. The Report finds that a number of Member States have similar provisions, including: national provisions regulating the abuse of economic dependence, 'superior bargaining power' or 'significant influence'; legal provisions concerning resale below cost or at loss; national laws providing for different standards for assessing dominance and stricter national provisions governing the conduct of dominant undertakings. ([10]) This divergence of standards regarding unilateral conduct was criticised by the business and legal communities, which consider that diverging standards fragment business strategies that are typically formulated on a pan-European or global basis. The Report highlights the issue for further examination.

### Procedural divergence

The Report recalls that Regulation (EC) No 1/2003 accommodates a degree of diversity of Member States' procedures. It also triggered a significant degree of voluntary convergence. Nonetheless, divergences persist in Member States' enforcement systems on important issues such as fines, criminal penalties, liability in groups of undertakings, liability of associations of undertakings, succession of undertakings, prescription periods and the standard of

([9]) Available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

([10]) See part 4.4. of the Staff Working Paper, referred to in footnote 1 above.

proof, the power to impose structural remedies, and the ability of Member State competition authorities to formally set enforcement priorities. This may merit further examination with a view to identifying ways to boost effective enforcement and cooperation.

A specific discussion has arisen as to whether the ban on using information by a national competition authority for imposing custodial sanctions which has received the information from a jurisdiction which does not have such sanctions, as provided for by Article 12(3), is too far-reaching and is an obstacle to efficient enforcement. The Report calls for an examination of other options, while fully preserving parties' rights of defence.

## Leniency in the Network

The Report states that, under the ECN Model Leniency Programme, the ECN will evaluate the state of convergence of the leniency programmes achieved by the end of 2008. To that end, on 13 October 2009, the ECN issued a report reviewing the level of convergence of the leniency programmes of the ECN members with the provisions of the ECN Model Leniency Programme. It concludes that the work within the ECN was a major catalyst in encouraging Member States to introduce leniency programmes and in promoting convergence between them. ([11]) This assessment will form the basis for subsequent reflection on whether further action is needed in this field.

## Interaction with national courts

Stakeholders have called on the Commission to have greater recourse to its power to intervene as *amicus curiae*. The Report calls for a reflection on how this practice should further develop. In addition, it suggests exploring options for ensuring efficient and effective access to national court judgments, as the mechanism by which Member States send the Commission a copy of written judgments on the application of Articles 81 and 82 EC has not functioned optimally.

## Interface with third country enforcement

During the reporting period, issues arose concerning the disclosure of information from the Commission's file in third jurisdictions. Such issues were encountered in the context of private litigation in third country jurisdictions and, on a more limited scale, with respect to the exchange of information with third country public authorities. The Report concludes that the legal framework could be clarified and reinforced to enhance existing levels of protection against disclosure.

## Next steps

As noted above, the Report was a stock-taking exercise, the aim of which was to assess how the modernisation of EC antitrust enforcement during the first five years has worked. The Commission will use it as a basis to assess the need to propose further policy initiatives.

([11]) The report covers developments up to 1 October 2009. It is available at http://ec.europa.eu/competition/ecn/documents.html

# Improving the effectiveness of competition agencies around the world – a summary of recent developments in the context of the International Competition Network

András G. Inotai, Stephen Ryan [1],[2]

## 1. Introduction

There is growing interest among competition authorities around the world in better understanding the factors determining the authorities' ability to achieve their objectives in an efficient and effective manner. This interest is evidenced by the increasing number of internal studies, surveys and conferences in this area at both national and international levels.

For example, in 2006, DG Competition set up an internal working group to — inter alia — take stock of where the DG's organisation and resources stand now, where they should go until 2010 and what improvements may be necessary to get there. The report of the working group provided a snapshot of current work and output, identified relevant trends for the years ahead, determined the likely impact of those trends on work and output and discussed options as to how challenges can be addressed, including proposals for measures improving efficiency and effectiveness.

Similarly, the US Federal Trade Commission (FTC) conducted, in 2008, a self-assessment exploring ways to strengthen the agency. The report [3] summarising the findings of the exercise argues that the inquiry helped the FTC identify its resource needs, suggested improvements to its prioritisation process, identified ways to strengthen its processes for implementing its programmes and pointed to how it can improve links with other government bodies and non-government organisations.

In the international context, the Competition Policy Implementation Working Group of the International Competition Network (ICN) launched, in 2007, a project on agency effectiveness. As part of this project, a survey was first conducted among 20 ICN member agencies identifying and examining operational and organisational characteristics of competition agencies that may be important for successful competition policy implementation. [4] Another exercise in the framework of the same project assessed competition authorities' abilities to obtain compliance with remedies and sanctions as an important element of agency effectiveness. [5]

In discussions between heads of competition agencies at the 2008 ICN annual conference it was decided that a high-level face-to-face event dedicated entirely to competition agency effectiveness would be useful. DG Competition offered to host such an event and the 'seminar on competition agency effectiveness' took place on 22-23 January 2009 in Brussels with the participation of around 100 agency heads and senior staff.

Part II of this article will summarise the discussions at the seminar based on the summary report, [6] which was submitted to the 2009 ICN annual conference. Part III will set out the direction of future work within the ICN in the area of agency effectiveness that is expected to follow in the years ahead.

## 2. The results of the Brussels seminar on competition agency effectiveness

Agency effectiveness is determined by a wide range of institutional and organisational factors. The seminar focused on four such factors: (i) strategic planning and prioritisation, (ii) effective project delivery, (iii) evaluation and (iv) accountability and communication.

### 2.1. Strategic planning and prioritisation

There was general agreement that the setting of a clear *strategy* is an important factor in being an effective competition agency. A strategy should set

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(2) The views expressed by the authors are purely personal and do not necessarily reflect the official position of the institution to which the authors are affiliated.

(3) The Federal Trade Commission at 100: Into Our 2nd Century, available at: http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.

(4) See 'Agency Effectiveness Project' report, submitted to the 2008 ICN annual conference, available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc367.pdf

(5) See 'Report on the Agency Effectiveness Project, Second Phase — Effectiveness of Decisions', submitted to the 2009 ICN annual conference, available at: http://www.icn-zurich.org/Downloads/Materials/ICN_CPIWG_Report_on_the_Agency_Effectiveness_Project.pdf.

(6) Available at: http://ec.europa.eu/competition/information/icn_seminar_2009/report_final_version.pdf. The interpretation given to and the emphasis placed on certain parts of the report by this article reflects the views of the authors and does not necessarily correspond to any official opinion of the ICN or of any member of the ICN.

out what the agency aims to achieve in broad terms over a period of a few years. A good strategy should (i) focus on policy and qualitative goals, (ii) be sufficiently clear to provide a basis for prioritisation of activities and (iii) motivate and inspire management and staff.

Agencies should have some kind of a *plan for implementing their strategy*. For example, a work programme defining deliverables over a shorter period (e.g. one year) and containing a broad allocation of resources between the main activities of the agency could facilitate effective implementation of the strategy. Challenges include linking the strategy and the implementation plan, ensuring flexibility of work programmes to allow the agency to react to unforeseen changes in the economic environment and ensuring buy-in from management and staff.

There was also agreement that an agency needs to *prioritise* its tasks. The agency's limited resources should be focused on high-impact or high-significance projects and sectors, although both impact and significance can be interpreted through various proxies (e.g. direct economic impact on consumers, indirect deterrence effect, precedent-setting value). It was also suggested that an agency should not completely neglect the sectors or areas that are not high priority for the moment.

The ability to carry out strategic planning and prioritisation depends on *the degree of autonomy* of competition agencies and their *mandatory activities*. For example, agencies that are more closely integrated into government often have to align their strategies with government strategy, or their strategy may be part of a government strategy. Certain sectors may be 'under the spotlight' to such an extent that there is great external pressure to consider them as priorities. Finally, an obligation to deal with certain merger notifications or complaints limits the agency's discretion in choosing priorities, although there may be some flexibility, such as dealing with obligatory matters which pose no competition issues in a more cursory way.

The need for *adequate information* as a basis for strategic planning and prioritisation was emphasised. This can include information on markets (including data provided by sectoral regulators) and information on past agency actions and their outcomes.

## 2.2. Effective project delivery

There were three main issues discussed under this topic: *management of cases and other projects, agency structure* and *human resources*.

### 2.2.1. Management of cases and other projects

Most agencies will have a number of projects in the pipeline at any given time, with some projects at the stage of preliminary ideas of evaluation, others at an early investigation phase and others more advanced.

Effective management of projects (whether enforcement cases, market studies, advocacy activities, information campaigns or other policy initiatives) requires *regular re-assessments* of whether the project should continue to be taken forward. For example, unpromising cases should be terminated as early as possible as otherwise they can be very costly in terms of resources. Such reviews commonly take place at a preliminary stage, at an intermediate stage following preliminary investigation and an advanced stage immediately prior to the preparation of a final decision or prosecution.

The internal reviews can be carried out either by staff members not involved in the case (for example by a peer review group assessing the evidence and theory of harm) or by management (for example, a meeting of senior management deciding on the priority status of a project).

It was generally agreed that *deadlines* help in focusing resources and even in the absence of legal deadlines it can be helpful to set internal milestones (i.e. targets with fixed dates) for the project team to reach specific stages of the project.

It was also considered that *software applications* allowing management to review the project portfolio at any time can be useful, although they should not be overly burdensome or used in a formalistic bureaucratic way. More sophisticated tools allowing recording of time spent on different tasks can make for better planning of work.

### 2.2.2. Agency structure

The *internal organisation* of a competition agency will also influence the effectiveness of project delivery. The basic options are a sectoral-based organisation (allowing the pooling of sectoral knowledge), an instrument-based organisation (allowing the concentration of specific skills for a particular instrument, such as cartels) and a hybrid structure. In any event, flexibility in re-allocation of resources internally — i.e. a *project-based allocation of resources* — is essential.

### 2.2.3. Human resources

There was agreement that even the best project management techniques cannot succeed without *competent and motivated staff*. High-quality training, opportunity to engage in academic work, work-life balance and career development advice have been mentioned as competitive advantages that agencies can offer to motivate and retain staff for whom they cannot compete in terms of salary with private sector employers.

*Rewards* for individual staff members, such as bonuses or promotions, should be based on the effective delivery of their personal objectives that should flow naturally from the objectives of the organisation and should consist of clear deadlines and targets.

It was also considered that a certain level of staff turnover (including to and from the private sector) is healthy. *Knowledge management systems* — or some mechanism for preserving institutional memory — are necessary in case of high staff turnover.

## 2.3. Evaluation

Evaluating the effectiveness of agency activities may be useful in setting future priorities and informing agencies on necessary internal changes. At the same time, provided the results of the evaluation are made public, they can improve accountability to stakeholders.

Experience shows that agencies engage in four basic types of evaluation (the first focusing on output measurement, while the others focus on outcome measurement):

- Evaluation of the efficiency of agency procedures, based on — among other things — activity indicators (e.g. numbers of cases within a given timeframe, average duration of cases) and informal internal evaluations;

- Evaluation of the impact of cases on the directly affected markets (looking at compliance, price levels, strength of competition a certain time after the decision);

- Evaluation of the impact of cases on markets other than the directly affected market (e.g. deterrence effect);

- Evaluation which goes beyond cases and takes into account other activities of the agency, such as advocacy and communication.

Possible challenges in evaluating effectiveness include the difficulty of isolating the impact of agency intervention from other factors that may have influenced market developments, measuring deterrence value and precedent value of agency action and allowing sufficient time for agency action to produce effects.

Evaluations can be carried out either internally (for example, a case team conducting a detailed assessment of what went wrong in a lost case or a small team in charge of evaluating consumer harm resulting from previous cartel cases) or externally (for example, general evaluations by national parliaments, audit offices, the OECD).

## 2.4. Accountability and communication

### 2.4.1. Accountability

Accountability can be understood in a narrow sense, referring to formal accountability to a political body exercising some kind of oversight (e.g. parliament, government), or in a broader sense, including general accountability to all stakeholders, in particular consumers. There was general agreement that a transparent decision-making process is an important way of expressing accountability, but approaches differed as to the degree of transparency to be ensured during investigations.

Accountability is closely linked to independence. It was agreed that accountability was necessary to maintain independence in the longer term. And although there was general consensus that competition agencies should be independent (i.e. that their actions should be based on facts and the law), there was less agreement on how independence should be accomplished, especially when it comes to organisational formats and funding. A wide variety of models exist, from agencies that are stand-alone institutions to those that are integrated into government or from agencies that are funded through the national budget to those that have own sources of funding, such as filing fees.

### 2.4.2. Communication

Communication is closely linked to accountability: there can be no accountability without communication. The importance attached to communication was highlighted by the general consensus that communication considerations should be part of strategic planning and that adequate resources should be allocated to communication. Whereas the existence of a stand-alone communication team may depend on the size of the agency, there was general agreement that the communication staff should not be isolated from the rest of the agency.

Communication should be adapted to the target group. Typical target groups include policy makers (government, parliament), media, business entities/firms, consumers and their organisations, academia, judiciary, lawyers and educational institutions. Communication with these stakeholders should be a two-way street: feedback from them should be received and digested within the agency. Many agencies considered staff as one of the constituencies of stakeholders and emphasised the importance of two-way internal communication.

Challenges involved in external communication include (i) the conflict between the long-term welfare benefits and the adverse short-term effects of particular competition agency interventions, (ii) the difficulty in identifying and explaining the impact of agency intervention, (iii) managing excessive expectations of stakeholders and (iv) the need to avoid being doctrinaire or patronising, especially with regard to consumers. It was felt that a patient pedagogical approach to the benefits of competition was necessary, particularly in times of economic recession.

There was broad agreement that the indispensable premises of communication are an effective and comprehensive competition law and active enforcement of that law. In other words, good enforcement comes first: there must be something to communicate.

### 2.5. Some conclusions

Participants in the seminar agreed that although there is no 'one size fits all' solution, some universal characteristics of a 'good' competition agency can be discerned, such as:

- it has a clearly articulated long-term strategy, and a plan for implementing that strategy;
- it understands that it has a range of policy tools at its disposal, including case investigations and different forms of advocacy and communication, and it has a problem-solving approach that tries to fit the right solution to each problem;
- it adapts its internal structure and processes to its environment and objectives, and keeps its internal organisation flexible;
- it uses clear criteria to select which projects to undertake, among the many (discretionary) actions it could launch;
- it keeps ongoing activities and projects under review and terminates projects that are not meeting their objectives;
- it understands that its main resource is its staff, and tries to provide them with a stimulating, pleasant and rewarding working environment, to compensate for the lower salaries than in the private sector;
- it is constantly reviewing and evaluating its activity, and feeding the results back into the planning process;
- it understands that communication is an essential part of its task, and devotes adequate resources to communication, adapted to different stakeholders;
- it understands that it cannot work alone and forms alliances with other public and non-public bodies (regulators, NGOs, academia, etc.);
- it benchmarks itself against other agencies worldwide, and exchanges best practice with them.

## 3. Next steps

The Brussels seminar highlighted several areas of common interest for the international competition community in the area of agency effectiveness that should be further examined. The topic of agency effectiveness promises to be one of the most important areas of future research and discussion among competition authorities.

The Steering Group of the ICN decided at its meeting during the 2009 ICN annual conference in Zurich to refine the mandate of its Competition Policy Implementation Working Group, focusing on agency effectiveness. Accordingly, the name of the Working Group has been changed to '*Agency Effectiveness Working Group*'.

The work programme of the Working Group comprises the development of a comprehensive '*Competition Agency Practice Manual*' by 2012. The Manual would cover six themes that have been identified on the basis of work carried out so far as containing the main institutional and organisational factors that determine agency effectiveness. These are:

- *Strategic planning and prioritisation* (including internal planning mechanisms and priority setting);
- *Effective project delivery* (including the use of performance indicators in the management of a competition agency, tools and procedures used for optimal case management, quality control, enforcement and monitoring of compliance with agency decisions);
- *Effective knowledge management* (how agencies should invest in knowledge, what kind of research activity they should undertake, how to ensure that knowledge is retained);
- *Ex-post evaluation* (including project-specific and macro-evaluation, estimating the impact of agency action);
- *Human resource management* (what HR strategy agencies should develop, including the recruitment, retention and motivation of agency staff); and
- *Communication and accountability* (including the role of communication in ensuring effectiveness).

The Manual is intended to serve as a *set of guiding principles* for all ICN members. Where possible, it will set out good practices. It will be a 'living document' in the sense that it will be revised and updated on a regular basis.

This project is only one of the increasing number of initiatives by competition agencies around the world that are aimed at better understanding the drivers of agency effectiveness. It is an indication that in addition to regularly reviewing substantive competition rules and assessing the ways these should be applied, *competition agencies are investing in becoming modern public institutions* that deliver services to their constituencies in an effective and efficient manner.

# The RWE gas foreclosure case: Another energy network divestiture to address foreclosure concerns

Oliver Koch, Károly Nagy, Ingrida Pucinskaite-Kubik and Walter Tretton (1)

## Introduction

On 18 March 2009 the Commission adopted a commitment decision against RWE AG for suspected infringement of EU competition law. The commitments were offered by RWE to address the Commission's concerns about an abuse of RWE's dominant position in the German gas transmission markets. The concerns related to a possible foreclosure of RWE's competitors from access to its gas network and a possible margin squeeze to the detriment of RWE's competitors. In order to resolve the identified concerns, RWE offered to divest its entire German gas transmission network.

The RWE decision was only the second case (2) in which a structural divestiture remedy has been offered in an antitrust case under Article 9 of Regulation 1/2003. Once implemented, the divestiture will result in a structural change in the German gas sector, facilitating competition in this sector, not least to the benefit of gas consumers.

The procedure (as in the previous E.ON electricity case), coincided with the discussions on the 3rd Energy Package. The decision, however, exclusively addressed the individual concerns of the competition case and was not related to these discussions.

## The abuse under Article 82

The RWE case was based on the results of a surprise inspection at RWE's premises in May 2006 (3) and on further investigations carried out between 2006 and 2008. In the course of its investigation, the Commission came to the preliminary view that RWE may have abused its dominant position on its gas transmission network — a natural monopoly — by way of a *refusal to supply transportation capacity* and a *margin squeeze*.

(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 also case *E.ON Electricity/Wholesale* (COMP/B-1/39.388 and 39.389, cf. article "The E.ON electricity cases: an antitrust decision with structural remedies", Competition policy newsletter 2009-1, available at http://ec.europa.eu/competition/publications/cpn/2009_1_13.pdf. In the meantime, the Italian company ENI has also offered structural remedies to address competition concerns (see MEMO/10/29)

(3) See MEMO/06/205.

## Refusal to supply

RWE operates the second largest high-pressure gas transmission network in Germany (4). The Commission concluded that RWE's gas transmission network can be considered an *essential facility*, since access to it is objectively necessary in order to supply gas to customers within RWE's grid area.

The Commission gathered evidence that RWE may have pursued a strategy of systematically keeping transport capacities — especially on important bottlenecks — for itself. Indeed, RWE has booked almost the entire transport capacity on its own network on a long term basis. This situation contrasts with a steady and significant demand for transmission capacities on RWE's network by third party transport customers who seek to compete with RWE in the downstream gas distribution markets. The Commission's investigation showed that demand by third parties largely exceeded the offered capacities, which led to *numerous rejections* of third parties' transmission requests by RWE.

According to the Commission's Preliminary Assessment, these rejections may have been unjustified. The Commission has gathered evidence that RWE may have understated its technically available capacity and managed the scarce transport capacities on its network in a manner that prevented many competitors from gaining access to it.

As a result, new entrants accounted for only a fraction of the transports on RWE's transmission grid and were unable to compete in an effective manner on the downstream supply market.

## Margin squeeze

The Commission also identified concerns as to a possible abuse of a dominant position by way of a margin squeeze. A margin squeeze may occur if a vertically integrated firm which is dominant on an upstream market charges a price for a downstream product or service that prevents even equally efficient competitors from achieving a margin which allows them to compete effectively on the down-

(4) Gas *transmission networks* are high-pressure network that distribute gas over long-distance pipelines mainly to wholesalers and some large customers. The gas is then transported to other end-customers via short-distance/local *distribution networks*.

stream market (5). There is evidence that RWE may have intentionally set its transmission tariffs at an artificially high level in order to squeeze its competitors' margin. Such behaviour has the effect of preventing even an equally efficient competitor from competing effectively on the downstream gas supply markets by limiting the ability of competitors or potential entrants to remain in or enter the market, thereby ultimately harming the final consumers.

It appears that, in the period under investigation, RWE had negative profit margins in its downstream gas supply business. RWE's negative results in the downstream gas business contrast with its overall profitable German gas business, including its network business where, according to the available evidence, RWE made considerable annual profits (6).

The Commission has gathered evidence that the margin squeeze may have been reinforced by RWE deliberately creating an asymmetry in the cost structure between RWE and its competitors. Indeed, important parts of RWE's network tariffs applied only to third party users. RWE's *rebate policy*, for instance, granted significant rebates for transmission contracts with a long duration. Although, in theory, these high rebates were also available to competitors, in practice RWE benefited from its rebate scheme almost exclusively, not least because it was almost impossible for new competitors to obtain the necessary long-term capacities. Also, RWE's policy with regard to its fees for *balancing services* (7) had an asymmetrical effect. While RWE was itself exempted from paying balancing costs, other transport customers faced the risk of high penalty fees within RWE's transmission network. There is evidence that these balancing fees had a highly deterrent effect on downstream competitors.

## The remedy: Proportionality of network divestiture; energy policy through the back door?

To address the Commission's competition concerns, RWE offered a *structural remedy*, namely to sell its existing German high-pressure gas transmission network with a total length of approx. 4 000 km, including the necessary personnel and ancillary assets and services necessary for a viable gas transport business, to a purchaser who is *independent* of RWE and who does not give rise to *prima facie* competition concerns. The market test of the commitments confirmed that they were necessary and proportionate to remedy the abovementioned competition concerns. Accordingly, the Commission was able to make the commitments binding by its decision of 18 March 2009 (8). The sale of RWE's network will take place under the supervision of a trustee, and the buyer is subject to the Commission's approval (9).

### Proportionality of the network divestiture

As regards the *proportionality of the remedies* (10), the RWE case provides a particularly comprehensive illustration of the necessity of the structural remedy that was eventually accepted: All the concerns in the Commission's investigation were related to practices by which RWE potentially abused its network dominance to fend off competition in the downstream supply market (where RWE ultimately succeeded in safeguarding its traditional dominant position). Concrete evidence substantiated the Commission's concern that the incentives of RWE as a vertically integrated company had actually led RWE to favour its own supply business to the detriment of downstream competition and, ultimately, consumers.

In such a scenario, it appears difficult to argue that the Commission should not be entitled to accept remedies which were voluntarily offered by RWE and which are

- an *appropriate* means to remove the competition concerns, as the divestiture makes it virtually impossible for RWE to abuse its network; (11)
- the *least burdensome* means to remove the concerns, since it is clear that other, behavioural solutions (such as a promise not to engage in such practices any longer) would not be as effective

(5) See e.g. Commission Decision of 4 July 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*, paragraph 282).

(6) Despite the potentially inflated prices paid by RWE TSO to another RWE subsidiary (RWE Energy) for internal services.

(7) Balancing services are intended to bridge the differences between forecasted and actual transport volumes, i.e. the balancing service provider buys gas from shippers if these have unexpected excess capacities and sells gas to shippers if they need more gas than expected. In order to avoid that transport customers abuse the balancing services of network operators, network operators usually charge a certain "penalty" to their transport customers in imbalance.

(8) If commitments given in the context of the Article 9 Regulation 1/2003 decision are not complied with within a given timeframe, the Commission may impose on the committing party (here: RWE) a fine of up to 10% of total worldwide turnover without having to reach a final decision as to whether the antitrust rules have been infringed.

(9) In order not to negatively affect the commercial interest of RWE the date by which the divestiture has to be concluded cannot be disclosed.

(10) See in this respect notably recital 12 of Regulation 1/2003; see also the findings of the CFI in its "Alrosa" judgement of 22 July 2007 (Case T-170/06, ECR II- II-2601). The judgment is, however, being challenged by the Commission before the ECJ, see case C-441/07 P.

(11) The Commission also ensured that the purchaser of the network will have no incentives to negatively or positively discriminate against any of its customers.

and might be difficult (or even impossible) to monitor in practice; and

- *proportionate* to the identified competition concerns, not least with an eye to the large number of customers who are accessible only through RWE's gas transmission network, and the substantial potential harm for these customers ([12]).

## Independence from the political negotiations on the 3rd Energy Package

The offer of remedies during the negotiations on the 3rd Internal Energy Market Legislative Package ([13]) ("3rd Energy Package") and the adoption of the decision a few weeks before the completion of the negotiations on the new regulatory framework have been widely commented on. Some authors have cast doubts on whether the Commission's decision to accept *structural remedies* was proportionate ([14]) in view of the Community legislator's decision to accept alternative models for energy companies, such as ownership unbundling ([15]).

It is contended that the negotiations on the 3rd Energy Package and their outcome were not directly relevant in terms of the remedies that the Commission can accept or impose in an individual competition case. The Commission's obligation to act against infringements of competition law does not stem from changing secondary legislation, but *follows directly from the EC Treaty*.

The fact that the 3rd Energy Package has ultimately not imposed ownership unbundling on the main European energy companies does not mean that ownership unbundling cannot be the necessary remedy in individual antitrust cases. Indeed, the solutions for individual cases of suspected or proven antitrust infringements may well differ from general regulatory solutions for a sector.

The commitment decision in the RWE case exclusively addressed the individual concerns of the competition case at issue.

## Link to Sector Inquiry

While the RWE case was conducted independently of the parallel discussions on the 3rd Energy Package, it is true that the case provides a particularly good *illustration of competition* problems that can arise in the case of vertical integration between network operators and dominant supply companies, as identified in the Commission's Energy Sector Inquiry. The Sector Inquiry ([16]) highlighted a number of structural problems in the energy markets, inherited from the pre-liberalisation period, and characterised national energy monopolists. In particular the vertical integration of production, transmission and distribution activities was found to preserve an incentive for the owners of the transport networks to favour their own supply business and to keep entry barriers for newcomers high ([17]). The RWE case is, in this respect, a valuable case-study ([18]) on the practical difficulties for energy companies to reconcile the diverging obligations to offer non-discriminatory access to competitors and to comply with unbundling rules on the one hand, and to maximise profits for the vertically integrated company on the other hand.

## Conclusion

The Commission's competition law enforcement activities in the energy sector show that European energy markets are still lagging behind in terms of achieving a "level playing field". ([19]) In that respect, the RWE case, concluded with a network divestment remedy, is a significant step forward for competition in that sector, both in its own right and because of its value as a precedent.

([12]) See on the proportionality analysis also *von Rosenberg*, ECLR 2009, 237 et seq.

([13]) On the final shape of the 3rd Energy Package see e.g. http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/108740.pdf

([14]) See e.g. *Klees*, WuW 2009, 374 ("*Sündenfall [fall of man] for competition policy*") et seq.; *Ehricke*, WuW 2008, 411 ("*Energy policy with competition instruments*"); *Hauschild*, Handelsblatt of 2.3.2009 ("*Unbundle Neelie Kroes!*", http://www.handelsblatt.com/politik/handelsblatt-kommentar/entflechtet-kroes;1398305).

([15]) See *Ehricke*, WuW 2008, 411.

([16]) See *Final Report on the Sector Inquiry*, Communication from the Commission (COM(2006) 851 final), available at: http://ec.europa.eu/competition/sectors/energy/inquiry/full_report_part1.pdf

([17]) *Final Report on the Sector Inquiry*, page 47 et seq.

([18]) See also *Manoussakis*, World Competition 2009, 227.

([19]) See *inter alia* the ongoing investigations against EdF (see MEMO/08/809), Suez (see MEMO/08/809), GdF (MEMO/08/328), ENI (MEMO/09/120), E.ON/GdF (MEMO/08/394) and Svenska Kraftnät (MEMO/09/191).

# Predatory pricing in the telecoms sector: the ECJ rules on the issue of recouping losses

Iratxe Gurpegui Ballesteros and Agnes Szarka (1)

On 2 April 2009 the Court of Justice of the European Communities ('ECJ') delivered a judgment (2) in the France Télécom case, dismissing its appeal. France Télécom sought to annul the judgment of the Court of First Instance of the European Communities ('CFI') which upheld the Commission's decision of 16 July 2003 concerning Wanadoo Interactive. (3)

Since the liberalisation of the telecommunications sector, the Commission's antitrust enforcement policy has focused on penalising incumbent operators for pricing abuses in the broadband market. In May 2003, the Commission first penalised Deutsche Telekom for having engaged in a margin squeeze. (4) Two months later, the Commission adopted the decision against Wanadoo and in July 2007 it took forceful action against Telefónica for having engaged in a margin squeeze abuse in the Spanish broadband market. (5) The Commission continues to consider broadband as key to developing the global economy and information society. This is the reason why it is currently investigating potential abuses in the Polish and Slovak broadband markets. The ECJ judgment confirms the Commission's antitrust enforcement policy in such a strategic sector.

## 1. The Commission decision

On 16 July 2003, the Commission found that Wanadoo had infringed Article 82 of the EC Treaty by charging predatory prices for its ADSL services. (6) According to EC case law, two tests can be used to ascertain abuse in the form of predatory pricing: prices below average variable cost are always to be considered abusive; prices below average total cost but above average variable cost are only to be considered abusive if they form part of a plan to eliminate competitors.

The Commission found that, from the end of 1999 to October 2002, Wanadoo marketed its ADSL services, known as Wanadoo ADSL and eXtense, at prices which were below cost. The prices charged by Wanadoo were well below variable cost until August 2001 and in the subsequent period they were approximately equivalent to variable cost, but significantly below total cost. Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considered that the abuse started on that date.

As a result of this practice, Wanadoo sacrificed profits in the form of substantial losses up to the end of 2002. The practice coincided with a company plan to pre empt the strategic market for high speed Internet access. While Wanadoo suffered large scale losses on the relevant service, France Télécom (which at that time held almost 100 % of the market for wholesale ADSL services for Internet service providers (including Wanadoo)) was anticipating considerable profits in the near future on its wholesale ADSL products.

## 2. The CFI judgment: test of predation and the rate of cost recovery

France Télécom challenged the Commission decision by applying for an annulment to the CFI. (7) In its case for annulment, France Télécom submitted two main lines of arguments: one related to the Commission's application of the *rate of cost recovery* to fixed costs and the other related to the Commission's application of the *test of predation*.

Concerning the recovery of costs, the CFI held that, as the choice of the method to calculate the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion. (8) Therefore the CFI's power is limited to verifying whether the Commission complied with the procedural rules,

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

(2) Case C-202/07, see also MEMO/09/147.

(3) At the time of the Commission decision, Wanadoo Interactive was a part of the France Télécom group. In 2004, Wanadoo Interactive merged into France Télécom.

(4) A margin squeeze is an insufficient margin between the price of an 'upstream' product A and the price of a 'downstream' product A+B, of which A is a component. An abusive margin squeeze can be deemed to exist if a vertically integrated company which is dominant in the upstream market sets the upstream price it charges to its downstream competitors and the downstream price it charges to end users at such a level that downstream competition is likely to be restricted.

(5) Case COMP/38.784 *Telefonica S.A.*

(6) Case COMP/38.233 *Wanadoo Interactive*, see also press release IP/03/1025.

(7) Case T-340/03 *France Télécom v Commission* [2007] ECR II-107.

(8) See paragraph 129 of the judgment. See also Case C-7/95 P *Deere v Commission* [1998] ECR II-3111.

whether the facts were accurately stated and whether there has been any manifest error of appraisal or misuse of powers. The CFI rejected France Télécom's allegations that the method chosen by the Commission was static. To take into account the fact that, for subscriptions, the costs and revenues generated by subscribers are spread over a long period of time, the Commission decided to spread the costs of acquiring clients over 48 months. Moreover, the CFI held that, although France Télécom was in favour of the discounted cash flow methodology rather than the method used by the Commission for this case (i.e. the adjusted costs methodology), the applicant did not demonstrate the unlawfulness of using the latter methodology.

Regarding the test of predation, the CFI confirmed the two-fold AKZO test, (9) applied by the Commission in its decision against Wanadoo, i.e. that prices below variable cost must always be considered abusive and that prices below average total costs must be considered abusive if they form part of a predation strategy. The CFI also found that the Commission furnished solid and consistent evidence of the existence of a plan of predation for the entire infringement period.

The CFI rejected the 'meeting competition' line of defence put forward by France Télécom. The CFI held that '*[e]ven if alignment of prices by a dominant undertaking on those of its competitors is not in itself abusive or objectionable, it might become so where it is aimed not only at protecting its interests but also at strengthening and abusing its dominant position.*' The CFI seemed to follow the Commission's argument in the Wanadoo decision that the dominant undertaking could not rely on an absolute right to align its prices because its prices were below cost.

The Wanadoo case also raised the recurrent question in antitrust law of whether it was appropriate for the Commission to intervene on a market in an allegedly nascent or 'emerging' state. However, the Commission stated that nothing in Article 82 provides for an exception to the application of competition rules to sectors which are not yet fully mature or which are considered to be emerging markets. In particular, in liberalised industries, it is important to ensure that former monopolies cannot extend their dominance into newly created markets, thus perpetuating their market power. In these situations, it must be possible to condemn predatory pricing whenever there is a risk that competition is hampered. Commission intervention was all the more necessary since Wanadoo was benefiting from a significant and clear first-mover advantage. (10) The CFI confirmed the applicability of competition rules to fast-developing markets in its judgment. (11)

## 3. The ECJ judgment: recoupment of losses

France Télécom challenged the CFI judgment before the ECJ. The main points raised by France Télécom in the appeal were the undertaking's right to align its prices on those of its competitors, the existence of a plan of predation and the need to prove the possibility to recoup losses. The ECJ confirmed that France Télécom cannot rely on any absolute right to align its prices on those of its competitors in order to justify its conduct where such conduct constitutes an abuse of its dominant position. On the existence of a plan of predation, the ECJ rejected France Télécom's allegation that the Commission relied on subjective factors to establish the existence of such a plan. The ECJ held that the CFI deduced the strategy to pre-empt the market from objective factors, such as the undertaking's internal documents.

The question of whether it is necessary to prove recoupment of losses in predatory pricing abuses has sparked much debate, and also arose during this case. A 'dangerous probability of recoupment' is a pre-requisite to prove predatory pricing under US antitrust law. However, the CFI and ECJ have adopted a different approach to this issue. In the Wanadoo case, both the Commission and the CFI rejected the idea of requiring evidence of the possibility to recoup losses in order to prove predation. However, Advocate General Mazák proposed in his opinion to change the approach adopted until now by EU case-law and urged the ECJ to conclude that proof of likely recoupment of losses was required in order to ascertain predation. (12)

AG Mazák stated that the CFI's interpretation of *Tetra Pak II* (13) was wrong. The CFI had relied on this judgment to conclude the Commission was right to take the view that proof of recoupment of losses was not necessary in predatory pricing cases. According to AG Mazák, in *Tetra Pak II*, the Court held that under the 'specific circumstances of the case' it was not necessary to prove that the undertaking in question had a reasonable possibility to recoup losses. AG Mazák considered that the Court

(9) See case C-62/86 *Akzo v Commission* [1991] ECR I-3359.

(10) For a more detailed overview of the Commission decision see Robert KLOTZ and Jérôme FEHRENBACH, 'Two Commission decisions on price abuse in the telecommunications sector', Competition Policy Newsletter, 2003 — number 3, p.33-36.

(11) See paragraph 107 of the judgment.

(12) Opinion of AG Mazák of 25 September 2008 in Case C-202/07 P *France Télécom v. Commission*.

(13) Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951.

clearly intended to avoid making a general statement and left a door open for requiring proof of recoupment of losses. ([14])

The ECJ did not follow AG Mazák's opinion and confirmed the test applied in previous case-law (*AKZO, Tetra Pak*), according to which proof of the possibility of recouping losses suffered by the dominant undertaking due to the application of prices lower than a certain level of costs does not constitute a necessary precondition to concluding abusive pricing.

However, the ECJ stated that such case law does not preclude the Commission from concluding that the possibility of recouping losses may be a relevant factor in assessing whether or not the practice concerned is abusive. This is indeed what the Commission proposes in its Guidance paper on Enforcement Priorities under Article 82, where it establishes that certain conduct may foreclose competitors and harm consumers if the dominant undertaking's market power increases after the predatory conduct comes to an end, i.e. if the dominant undertaking is likely to be in a position to benefit from the sacrifice.

## 4. Conclusion

The ECJ judgment confirms the Commission's finding that the abusive practices of Wanadoo restricted market entry by competing internet providers, and thus harmed consumers. The Commission welcomed the ECJ judgment, which supports its antitrust enforcement policy in the telecommunications sector.

Moreover, the ECJ sheds light on the question of whether proof of the possibility to recoup losses constitutes a precondition to conclude that a predatory pricing strategy is abusive. Advocate General Mazák urged the ECJ to follow the direction taken by the US and to conclude, in line with the US Supreme Court's case-law, that proof of likely recoupment of losses was required to find predation. However, the ECJ did not follow Advocate General Mazák and ruled that proof of likely recoupment of losses was not required in predatory pricing cases, whilst adding that EU case-law did not preclude the Commission from taking it into account when analysing the abusive nature of the conduct.

([14]) Moreover, AG Mazák rejected the Commission's line of argument that in Europe and under Article 82 of the EC Treaty, recoupment of losses is implied by the assessment and establishment of dominance (which means that entry barriers are sufficiently high and therefore the possibility to recoup losses is very likely). AG Mazák considered that the establishment of dominance is often based on historical market conditions while proof of the possibility to recoup losses is an *ex-ante* and forward-looking assessment of future market conditions.

# EC competition policy in the payments area: new developments in MIFs for cards and SEPA direct debit

Dominique Forest and Dovile Vaigauskaite ([1])

## An efficient MIF level? MasterCard's undertakings announced on 1 April 2009

### The 2007 MasterCard decision and its aftermath

The Commission's Decision ('Decision') of 19 December 2007 prohibited MasterCard's multilateral intra-EEA fallback interchange fees for cross-border payment card transactions made with MasterCard and Maestro branded debit and consumer credit cards.

Interchange fees are charged by a cardholder's bank (the 'issuing bank') to a merchant's bank (the 'acquiring bank') for each sales transaction made at a merchant outlet with a payment card. Interchange fees are either agreed bilaterally, between issuing and acquiring banks, or multilaterally, by means of a decision binding all banks participating in a payment card scheme. The industry refers to these multilateral interchange fees as "MIFs". A MIF can be a percentage, a flat fee or a combined fee (percentage and flat fee).

When a cardholder uses a payment card to buy from a merchant, the merchant receives from the acquiring bank the retail price less a merchant service charge (MSC), a large part of which is determined by the interchange fee. This merchant service charge is the price a merchant must pay to its bank for accepting cards as means of payment. The issuing bank, in turn, pays the acquiring bank the retail price minus the MIF. The retail price is deducted from the bank account of its customer.

The Decision found that the MIFs set by MasterCard prior to the Decision were in breach of EC Treaty rules on restrictive agreements (Article 81), as they inflate the base on which acquiring banks set charges to merchants by creating an important cost element common to acquirers. This has an effect of appreciably restricting and distorting competition in the acquiring markets. Furthermore, the MIFs were not objectively necessary for the proper functioning of the MasterCard scheme and it did not fulfil the exemption criteria. In particular, MasterCard failed to prove to the requisite standard that its MIF brought claimed efficiencies, a fair share of which would be passed on to consumers. At the same time, the Decision was entirely without prejudice to the possibility that a MIF could satisfy the conditions of Article 81 (3) EC (see recitals 666 and 729 of the Decision). The Commission had never excluded that a MIF might be indispensable to create efficiencies, the benefits of which may outweigh the restriction of competition.

The Decision ordered MasterCard to cease applying its actual intra-EEA fallback interchange fees for consumer credit and debit cards and to refrain from adopting measures having a similar object or effect. MasterCard had six months to comply in full (which inherently included the possibility to demonstrate efficiencies of a new MIF that MasterCard would introduce even during the 6 months).

In March 2008, MasterCard challenged the Decision before the Court of First Instance (Case T-111/08), and on 12 June 2008 it provisionally reduced to zero its cross-border MIF whilst continuing to work with the Commission to arrive at a MIF that would meet the exemption criteria of Article 81(3), benefits of which would be supported by evidence and data ([2]).

On 1 October 2008, MasterCard revised its acquirer pricing, i.e. certain scheme fees that are charged by MasterCard to the issuing and acquiring member banks of the scheme which are different from the MIFs, structure in the EEA, which involved, among others, dramatically increasing certain existing acquirer fees (specifically for cross-border transactions where the intra-EEA MIF had been temporarily reduced to zero), introducing a new fee on acquirers, and repealing certain acquirer fee waivers. Merchants voiced concerns that the uniform increased fees on acquirers were automatically passed on to merchants and constituted a floor for the merchant service charges like the MIF beforehand. This raised the question of whether MasterCard was in effect circumventing the prohibition decision. Against this background and given MasterCard's wish to reintroduce a MIF that complied with competition rules, MasterCard and the Commission engaged in extensive talks concerning MasterCard's compliance with the antitrust rules following the 2007 Decision. As a result, on 1 April 2009 MasterCard announced a number of undertakings ([3]).

([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 MEMO/08/397, 12.6.2008.

([3]) See MEMO/09/143 and IP/07/1959.

## MasterCard's undertakings announced on 1 April 2009

Broadly speaking, MasterCard announced three undertakings to take effect as of the beginning of July 2009.

First, as of July 2009, MasterCard will calculate the cross-border MIF according to a methodology which ensures that MIFs reflect the transactional benefits to merchants accepting payment cards as opposed to cash. The use of this so-called 'tourist test' methodology will lead to substantially lower levels of cross-border MIFs for credit and debit cards (as compared to the level until June 2008). In particular, the new cross-border MIFs weighted average for credit cards will be 0.30% and for debit cards 0.20%. This is a considerable reduction from a MIF level of 0.80% to 1.90% applied to MasterCard credit cards, and 0.40% to 0.75% applied to its debit cards before June 2008. This will help reduce costs for final consumers, including the costs they currently bear through retail prices, as retailers pass on the merchant service charges, including MIFs, to them. Consumers paying in cash are also suffering from these costs as they have to pay exactly the same retail prices, without any price differentiation at merchants' outlets.

Secondly, the scheme fee increases of October 2008 will be repealed for the future. This will allow the lowering of the cross-border MIF, bringing in real cost savings for acquirers – which are expected to be passed on to merchants and ultimately to consumers.

Thirdly, MasterCard will adopt certain measures enhancing the transparency of its MIF scheme. This will allow consumers and merchants to make better informed choices about the means of payment they use and accept. These transparency measures are without prejudice to the provisions on specification of fees and charges of the Payment Services Directive (2007/64/EC) and its implementing legislation in the Member States.

In particular, merchants will be offered and charged different rates according to the type of card that is used, *i.e.* they will be offered 'unblended' rates (4). This will enable merchants to identify more efficient cards, to apply differentiated surcharges if appropriate, and to negotiate more effectively with acquiring banks.

Moreover, MasterCard will require the acquirers to inform the merchants that they will still be allowed to accept either MasterCard *and* Maestro branded cards, or to accept only one of these two brands (i.e. only MasterCard or Maestro branded cards) (absence of Honour All Cards Rule (5) with regard to MasterCard and Maestro branded cards).

Commercial cards will become visibly and technically identifiable by merchants by end-2010. In addition to continuing to permit merchants to surcharge the transactions with MasterCard and Maestro cards, MasterCard will explicitly permit merchants to impose different surcharges for MasterCard consumer credit and debit, MasterCard commercial and/or Maestro cards transactions.

MasterCard will continue to publish its intra-EEA cross-border interchange fees on its website, extending it to all MasterCard-set MasterCard and Maestro interchange rates, cross-border and domestic, and will make it easier for merchants to find this information on its website.

On the basis of these undertakings and following the assessment of DG Competition, the Commissioner for Competition, Neelie Kroes, informed MasterCard that she does not intend to propose to or support before the College the opening or pursuit of proceedings against MasterCard for non-compliance with or circumvention of the Decision of 19 December 2007 or for infringing the antitrust rules, provided that the entirety of MasterCard's undertakings are implemented and remain in force.

In fact, the Commission services believe that the efficiency and transparency of the scheme will be enhanced and that a fair share of the benefits will accrue to consumers and merchants. Besides, the new methodology (the tourist test) for calculating the MIFs will not only lead to a sharp decrease in MasterCard's MIFs; it will also bring clarity to banks and retailers.

## The Tourist Test

The tourist test provides a reasonable benchmark for assessing a MIF level that generates benefits to merchants and final consumers. It determines a MIF that allows the promotion of efficient payment instruments, while at the same time preventing the MIF from exploiting business-stealing effects to the detriment of the merchants and their subsequent customers, which would lead to an inefficient promotion of payment instruments that impose invisible costs on consumers.

(4) Until now, the merchants have been offered 'blended' rates by their acquiring banks, that is they would receive an invoice with one single price for all card transactions, including those done with MasterCard debit and credit cards, Visa debit and credit cards, American Express etc. In such a way, the merchants could not distinguish the real price of card acceptance per card brand and scheme.

(5) The '**Honour All Cards Rule**' (HACR) is a scheme rule that obliges all merchants to accept all valid cards issued under a certain scheme equally and without discrimination.

Put simply, the tourist test indicates the level of the MIF for which merchants are perfectly willing to accept cash or cards. Without letting other aspects such as relationships with 'usual' clients enter into play, the typical case of a 'tourist' is considered, and cash as legal tender; the closest equivalent to the payment card at the point-of-sale is taken as the benchmark. Typically, the MIF that is determined through the tourist test may generate benefits to merchants and final consumers, as it may allow the promotion of efficient payment instruments. At the same time, its level is such that retailers are not faced with disproportionate fees to achieve these benefits.

In principle, payment systems may be characterised by the externalities of their use. Hence interchange fees — if set appropriately — may help to optimise the utility of a card network to merchants and also to final consumers. The 'balancing' fee which meets this test ensures that merchants do not pay higher charges than the value of the (transactional) benefits which card use gives them through lower costs than using cash. Through this fee being passed on to them, cardholders make efficient choices with respect to payment instruments. The balancing fee also prevents disproportionate merchant fees which might otherwise arise, as merchants are reluctant to turn down payment instruments that are costly to them (and ultimately to consumers) for fear of losing business – the 'business stealing' effect.

General applicability of the 'tourist test' for the purposes of Article 81 (3) EC depends on the specifics of the markets at hand. Some (non-exhaustive) cautionary examples are listed below:

1. While a MIF at appropriate levels makes the use of efficient payment instruments more attractive to consumers, other (less-restrictive) mechanisms may do so as well in some markets. For instance, this is the case if merchants themselves can be expected to efficiently incentivize the use of less costly payment instruments by applying rebates to those means of payment. In this case a MIF may not be indispensible, as direct incentives given by merchants may internalize network externalities between merchants and users of payment instruments more directly.

2. When a payment card would reach universal usage in a market even without MIF, the need to promote the issuing of such a card in terms of network effects would vanish.

3. More generally, there must be a reasonable channel through which interchange fees can promote the use of cards. With respect to debit cards, the reward programs for such cards (which directly incentivise usage) typically do not exist and that cardholding across Member States is already widespread (but not complete). Therefore, the DG Competition does not consider that possible future increases of the 'tourist test' estimation for debit cards would necessarily justify an increase in the debit card MIF, unless payment card associations can ensure that the banks receiving such a higher MIF have installed appropriate cash-back programs for debit cards that could directly incentivise a wider use of debit cards on a per-transaction basis.

4. Conversely, circumstances may in principle arise under which justifications for higher MIFs could be demonstrated by payment card associations. However, significant objective evidence would be needed to establish that this is the case.

MasterCard used the tourist test to calculate the amount of the revised temporary MIFs by comparing the merchants' costs of accepting payments in cash to those of accepting payments made by a payment card on the basis of currently available studies by some central banks (Belgian, Dutch and Swedish).

It has to be underlined that the undertakings are temporary because MasterCard's application before the Court of First Instance is still pending. Besides, the undertakings are without prejudice to an assessment by the Commission, in particular if new information should come to light. In particular, the European Commission has commissioned a study with a view to collecting data in order to verify the solidity of the available information for assessing what level of MIF would be in accordance with the *tourist test*. In any event, the assessment in the study follows from the conclusions of the Decision in response to new submissions from MasterCard after the Decision. These submissions are unrelated to the efficiency argument brought forward by MasterCard prior to the Decision (the maximization of output) and they are based on publicly available data, which the Commission merely seeks to verify through the study.

## VISA

As regards VISA, the Commission is continuing its antitrust investigation: formal antitrust proceedings in relation to multilateral interchange fees (MIF) for cross-border point of sale transactions were opened against legal entities in the Visa Europe, Visa Inc and Visa International on 26 March 2008. ([6]) A Statement of Objections was sent to Visa Europe, Visa Inc and Visa International on 6 April 2009 ([7]). The Statement of Objections also concerns other system rules and practices, such as the "honour all cards rule", the "no surcharge rule" and blending

([6]) MEMO/08/170
([7]) MEMO/09/151

of merchants fees, in their capacity of hindering merchants' ability to manage their payment costs and thereby increasing the restrictive effects of the MIFs.

## MIFs for SEPA Direct Debit (SDD): same logic or completely different story?

Even though SEPA is strongly supported by the ECB and the Commission, it is based on co-operation between – potential - competitors. This is why the national competition authorities together with DG Competition carefully scrutinized the SEPA arrangements and identified a number of potential competition concerns. As a result, informal discussions with the European Payments Council (EPC) have been taking place since October 2007.

The most prominent topic of discussion recently has been the MIF envisaged for SEPA Direct Debit – on which a joint statement was recently issued by the European Commission and the ECB. The assessment of the MIF for Direct Debit is not necessarily leading to the same analytical outcome as for card payments although it stems from the same logic. Indeed, the Commission had been raising doubts about the rationale of a MIF per transaction for SEPA Direct Debit since 2006. After an extensive dialogue between the Commission services and the EPC, with the ECB (as an observer), about the justification for and methodology underlying the proposed MIF, the Commission and the ECB expressed the preliminary view in the joint statement that 'there appears to be no clear and convincing reason for *per transaction* MIFs to exist after 31.10.2012', the deadline proposed by the amendment to the Regulation 2560/2001 (see below) ([8]).

The context of this statement is important. The proposed collective permanent – *per transaction* – charging mechanism for SEPA Direct Debit had been discussed as part of the aforementioned dialogue. In these discussions the Commission services had identified the likely restrictive effects of the arrangement proposed by the EPC – which are similar to those of multilateral interchange fees for payment cards identified in the MasterCard decision ([9]) – and asked the EPC why the arrangement would be justified for efficiency reasons. However, the EPC did not succeed in convincing the Commission services that the per transaction MIF was justified on the basis of Article 81(3) EC.

The lack of certainty about the compatibility of the proposed financing mechanism with the competition rules meant that some banking communities were reluctant to sign up to the SEPA Direct Debit system. However, if SEPA Direct Debit were not to be launched, this would deprive European companies and consumers of a new pan-European system which is likely to generate substantial savings and benefits for them. In order for SEPA Direct Debit to take off, the right incentives should be in place. For this reason, Commissioners Kroes and McCreevy gave a positive reception to proposals for a transitional regime made by the European Central Bank in September and November 2008 which tried to find a solution for the imminent deadlock ([10]). Under this solution, during a transition period of three years national MIFs could be maintained at their existing level (without prejudice to National Competition Authorities opening proceedings in this respect) and a cross border MIFof 8.8 cents could be applied.

These suggestions were also taken on board by the French Presidency and suggested as amendments to the proposal for reviewing Regulation 2560/2001 on cross-border payment in euro, which was already under discussion. This new Regulation replacing 2560/2001 was finally adopted by the European Parliament and the Council.

Article 6 of the new Regulation granted a three-year transition period for maintaining MIFs for national direct debits, until 1 November 2012. It also allowed a default cross border MIF of 8.8 cents to be applied during this period, and MIFs for national direct debit systems to be maintained during this period in those countries where MIFs were applied at the moment of adoption – unless these MIFs were to be prohibited or decreased through interventions by the national competition authorities. In addition to the above, the principle of mandatory 'reachability' was introduced. Under this principle, banks accepting national direct debits would also have to accept cross border direct debits from 1 November 2010 onwards. This provision was intended to help ensure that all bank customers within the 31 SEPA countries can actually be reached via SEPA Direct Debit.

As to the business model to be applied after October 2012, the new Regulation stated that '*industry can make use of the legal security provided during this transitional period to develop and agree a common, long-term business model for the operation of the SEPA direct debit*'.

By the end of March, when the EPC had to decide whether or not to launch SEPA Direct Debit on 1 November 2009, it was already quite likely that the new Regulation repealing Regulation 2560/2001 would be adopted by Council and Parliament. Given

([8]) http://ec.europa.eu/competition/sectors/financial_services/sepa_direct_debit.pdf

([9]) See Press Release IP/07/1959, 19.12.2007 and Provisional version of the decision http://ec.europa.eu/competition/antitrust/cases/decisions/34579/en.pdf

([10]) See press release IP/08/1290, 4.9.2008.

the legal certainty to be provided by the Regulation during the interim period, it was primarily the long-term 'business model' which would apply after the transitional period that was seen as the key element that would determine the EPC's decision on the launch of the system.

In the period preceding the EPC's decision, banks requested additional clarification regarding this long-term business model. The joint Commission and ECB statement sought to provide this clarity. It starts by defining as the overall objective the achievement of an efficient use of the SEPA Direct Debit, which is expected to provide many benefits to European companies and consumers. It goes on to explain that the direct debit market is a two-sided market in which creditors have a clear interest in attracting debtors to engage in a direct debit relationship, and that creditor companies have effective means to directly encourage customers to make use of direct debit, in particular by granting rebates. It therefore appears neither necessary nor efficient for banks to apply a collective, indirect mechanism to encourage customers to make use of direct debit. The statement then unequivocally states the preliminary view that '*there appears to be no clear and convincing reason for per transaction MIFs to exist after 31.10.2012*'. However, the principles outlined in the statement do not affect the possibility of demonstrating the claimed efficiencies of the MIF or the existing possibilities of individual banks to charge their own customers for services provided to them, e.g. via account fees or direct charges. In order to promote economic efficiency, payments services should be priced transparently. The Commission will closely monitor the evolution of consumer pricing in this respect.

The EPC plenary of 31 of March 2009 decided in favour of the launch of the SEPA Direct Debit system. In a press release announcing its decision, the EPC referred to the joint Commission/ ECB statement as clarifying the authorities' position and acknowledged the need for some banking communities to adapt their current direct debit business model significantly after November 2012 ([11]).

As mentioned before, the MasterCard Decision was the (common) starting point for the analysis. MIFs, both for cards and for direct debits, are collectively determined by banks. As regards SEPA Direct Debit, the MIF equally represents a common cost element, it acts as a minimum recommended price and establishes a floor on top of which creditor banks set their charges to corporate clients for executing direct debit payments. Hence, MIFs per transaction with respect to SEPA Direct Debit may have similar restrictive effects on competition to those of MIFs with respect to cards that were the subject of the MasterCard Decision. Also, both cards and direct debit markets are 'two-sided markets', in which arguably there is merit in balancing the 'incentives' of the two legs. In this context, although restrictive of competition, a MIF might be considered necessary under Article 81 (3) EC to create incentives for the use of (efficient) means of payment.

All the same, direct debits and card payments are different. Card payments are typically one-off transactions. Retailers in practice do not refuse cards or apply rebates and surcharges, for fear of losing customers to other retailers (known as 'business stealing'). With regard to cards, there can be no direct incentivisation for the use of the *efficient* payment instrument.

On the other hand, direct debit payments are different from payment cards as they are typically made on a regular basis as part of long-term agreements for the supply of services. Like card markets, direct debit markets are two-sided, but direct incentivisation is possible and in fact is already in place. Many corporate customers now grant rebates if their customers choose direct debit, and these in turn decrease the price for the final consumer in a transparent and efficient way. Some of the Member States without a MIF per transaction operate very successful direct debit schemes, at least to the same extent as those in Member States where a MIF is applied.

In addition, some of the Member States without a MIF per transaction operate very successful direct debit schemes, at least as much as in Member States where a MIF is applied. In contrast to the payment card world, where MIFs are widespread, MIFs for direct debit transactions exist in some Member States only. For more than two thirds of direct debit transactions in the EU ([12]), no MIF per transaction is applied. Only six countries have a 'per transaction' MIF, with a clear trend towards a decreasing or zero MIF ([13]).

As the statement notes, the fact that MIFs per transaction do not seem to comply with competition rules does not mean that individual banks cannot (continue to) charge fees to their customers, as they already do today for the provision of banking services including direct debit, either through direct charges or via account fees or packages.

The Commission has also indicated that it could provide further guidance by November 2009, as long as the necessary contributions from the relevant mar-

([11]) http://www.europeanpaymentscouncil.eu/knowledge_bank_detail.cfm?documents_id=194

([12]) ECB Blue Book figures 2000-2007 as retrieved at http://sdw.ecb.europa.eu/browse.do?node=2746

([13]) The only countries where MIFs per transaction apply are Portugal, Italy, France, Sweden, Belgium and Spain with very low MIFs of 2 and 3 cents respectively for the last two.

ket actors are received. In particular, a multilateral charging arrangement for error transactions could be envisaged in order to create incentives to reduce mistakes and efficiently allocate the costs that errors generate. It would have to be demonstrated that the arrangement is economically justified, enhances efficiency and benefits users.

## Conclusions and way forward

A number of competition issues remain to be addressed in the field of payments: MasterCard's undertakings are temporary (pending the outcome of the Court application and the Commission study) and Visa's proceedings are ongoing. Besides, as far as SEPA is concerned - although the EPC was able to provide satisfactory clarifications or improvements to its practices on a number of issues - the discussion is ongoing, and a number of concerns remain in relation to governance or standardisation, for instance.

The tourist test seems a sensible way to assess the compatibility of MIFs in the area of card payments. However, as demonstrated by the discussion on the MIF for SEPA Direct Debit, the benchmark of the MasterCard case and the 'tourist test' approach would have to be applied in a sensible manner to ongoing and future cases.

First, the general applicability of the tourist test depends on the specificities of the market. If merchants can provide a direct incentive for the use of less costly payment instruments by applying rebates, a MIF would not be essential. The same would apply if a specific means of payment is universally used in a market. High(er) interchange fees for debit cards which are already widely used would be difficult to justify, unless credible reward programs directly incentivising their wider use are set up. In any event, significant objective evidence would need to be provided.

Transparency is also key to allowing consumers and merchants to make better informed choices about the means of payment they use and accept. This is why the Commission strongly advocates 'unblending' (merchants must be offered and charged different rates according to the type of card that is used). Also, the 'Honour All Cards Rule' has to be considered, as it forces merchants to accept all types of cards of a given brand. In addition, merchants must be allowed to surcharge their customers or to provide them with rebates depending on the payment instrument they use. The possibility to surcharge and/or rebate is also stipulated in the Payment Services Directive (PSD) ([14]).

Finally, the Commission will continue to co-ordinate its policy and competition law enforcement with that of national competition authorities through the European Competition Network. In several Member States, national competition authorities are carrying out investigations on domestic interchange fees. Since MasterCard's undertakings relate to cross-border MIFs only, the rights of third parties or the powers of national competition authorities and national courts in the application of EC Treaty competition rules are not affected by the MasterCard (temporary) undertakings.

([14]) Article 52 § 3, 'The payment service provider shall not prevent the payee from requesting from the payer a charge or from offering him a reduction for the use of a given payment instrument. However, Member States may forbid or limit the right to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments.', Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market.

# The Velux case – an in-depth look at rebates and more

Svend Albaek and Adina Claici [1]

## 1. Introduction

"*The Polish window manufacturer, Fakro, which claims to be the world's second largest producer of roof windows, alleges it has been squeezed out of certain European markets by Danish rival Velux. The Polish group claims its Danish rival used rebates and other commercial tactics to stop retailers stocking its products. It maintains that it has been unable to build a viable distribution system in some of the main European markets as a result – including the likes of France, Germany, the UK and the Netherlands. This, it says, has kept its market share in Western Europe at about 5 per cent, compared with around 17 per cent globally.*" (Financial Times, 6 July 2008)

In April 2007, the Commission opened an ex-officio case [2] to investigate alleged infringements by Velux in the roof windows market. Following one year and a half of analysis and inspections carried out at Velux premises in various Member States and at the premises of various distributors, the Commission could not confirm the allegations raised by the competitor and decided to close the case.

## 2. The product and the company investigated

Roof windows are specific products which in important aspects differ from vertical windows. The two types of windows cannot be considered as substitutes. The European Commission's investigation focused on roof windows and accessories such as blinds (sunscreening), flashings, shutters and decoration devices.

Manufacturers concentrate production in certain plants and distribute all over Europe from central distribution locations. Such production organization is motivated by economies of scale which can be achieved through centralized manufacturing facilities. Although production is organized on a European level, Velux' distribution system is organized on a national basis with often quite different rebate systems and promotion campaigns varying from country to country. Demand conditions are different across countries due to, for example, weather, density of housing, real estate and construction regulations. Furthermore, Velux' smaller competitors have quite different positions in different Member States. There are therefore elements that could point towards a national geographic market definition.

The company investigated is the Velux Group (hereinafter referred to as "Velux"), with head office based in Copenhagen. It is owned by VKR Holding, a limited company present in five business areas: roof windows and skylights, vertical windows, decoration and sunscreening, thermal solar energy and natural ventilation. Velux enjoys wide brand recognition and has a very strong position in the sales of roof windows and accessories in the EEA in general and in particular in each national market under investigation.

Velux also comprises RoofLITE, a company that serves the low-price and private label segments of roof windows.

## 3. Behaviour subject to investigation

The Commission decided to investigate whether certain of Velux' practices result in anticompetitive foreclosure of its competitors. The Commission has explained its approach to assessing such practices in its "Guidance on the Commission's enforcement priorities in applying Article 82 to abusive exclusionary conduct by dominant undertakings" (hereinafter referred as the Article 82 Guidance paper). [3] In the following we explain how the approach described in the Guidance paper was applied to the Velux case.

### Rebates and other benefits for distributors

Velux' rebate schemes and other benefits provided to its distributors might give disincentives for the distributors to switch, at least partially, to other roof windows manufacturers. Fakro stated that it had encountered difficulties in entering the markets in France, the UK and Germany as the building supply merchants are highly concentrated in these countries and Velux' well established relationships with building suppliers impede Fakro's access to the distribution networks.

Velux uses a system of numerous discounts and bonuses that vary from country to country. However, it does not seem that the schemes are individualised according to the needs and capacity of a giv-

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

[2] Case COMP/39.451 — Velux

[3] OJ C 45, 24.2.2009, p. 7.

en distributor within a given country, as the same trade conditions are offered to all distributors in that country. The analysis of the rebate systems was performed on the basis of documents provided by Velux and its distributors.

The Commission also decided to investigate whether Velux had offered other individualised benefits to distributors, beyond the official rebate schemes. The Commission took the view that the best way to uncover possible evidence of such behaviour would be through conducting inspections on the premises of Velux in Denmark and several other European countries, as well as on the premises of some of Velux' large distributors.

### RoofLITE — A fighting brand?

Besides its main brand Velux produces lower quality brands, RoofLITE for roof windows and Contrio for accessories. The Commission decided to investigate whether these were launched in order to exclude competitors (so-called fighting brands). The investigation focused on RoofLITE which is the more important of the two brands. The theory of harm would be that Velux might have deliberately incurred losses in the sales of RoofLITE beyond what is normal for a newly launched product, that is, that RoofLITE might have been used as a predation tool. Also for this theory of harm the Commission considered that conducting inspections searching for documents explaining the strategy behind the launch of the secondary brands and data concerning their profitability would be the best investigative strategy.

## 4. Results of the investigation

Having reviewed all the documents in its possession after conducting inspections, the Commission concluded as follows.

### Rebates and other benefits for distributors

Velux' discounts, bonuses and reimbursements are either included in the general trade conditions and offered to all distributors on the same terms or are stipulated in some special contracts for additional services rendered by distributors. The Commission's assessment indicates that neither Velux' current rebate scheme nor the individualised benefits lead to anticompetitive foreclosure of Velux' rivals.

Velux' uses a certain type of conditional rebates. Paragraph 37 of the Article 82 Guidance paper provides a definition for conditional rebates and explains the difference between retroactive and incremental rebates: "Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour. The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). Conditional rebates are not an uncommon practice. Undertakings may offer such rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers. However, such rebates – when granted by a dominant undertaking – can also have actual or potential foreclosure effects similar to exclusive purchasing obligations."

Velux uses incremental rebates which are described in the general trade conditions. They vary somehow from country to country but the general principles are similar. Bonuses are applied to total turnover over a period of time, normally six months. The maximum turnover bonus is around 5%. There are up to 20 steps in a discount function. The increments are quite small, of the order 0.2-0.5%. If the turnover is above the threshold of a given step, the discount increases marginally and the higher discount is applied only to the part of turnover exceeding the previous step.

It is fairly easy to see that it is unlikely that Velux' incremental rebate schemes could be anticompetitive. As Velux' exact trading conditions are confidential, we instead provide a simple example. In this hypothetical rebate scheme there are ten steps where each step gives an extra 0.5% rebate so that the maximum rebate that can be reached is 5%. The first rebate is given if the distributor sells more than 99 windows, and an extra 0.5% is given for each extra 100 units sold. The maximal discount of 5% is given if a distributor sells more than 1000 units. To illustrate, assume that the standard price without rebate paid by distributor (which equals the price paid for the first 99 units) is EUR 100.

With such an incremental rebate scheme the first thing to look at is the highest discount given. In our example this is 5%, implying that distributors pay EUR 95 for all (extra) windows once they have bought more than 1000 windows. It seems quite likely that a price of 95 would cover Velux' incremental costs if the "headline price" of 100 does so. For price-based practices such as rebates the Guidance states that "the Commission will normally only intervene where the conducts concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking." ([4]) In this case an equally efficient entrant or a small competitor competing on the margin for the last 100 windows sold would likely be able to match the discounted

([4]) Guidance, paragraph 23.

price of EUR 95. The conclusion is therefore that is seems unlikely that such a rebate scheme would be exclusionary.

It is important to compare the discount with the correct benchmark. A variation of the above scheme could be that the discount is given on the turnover of the distributor and the EUR 100 in reality is a kind of recommended list price. Assume further that to incentivize greater effort on the part of the distributor each distributor gets a standard 20% rebate on the list price, which would be her basic margin. In such a scenario, the incremental rebate should be compared to the price net of the 20% general rebate. The top 5% discount will then in reality amount to a 6.25% discount on the normal purchasing price for a distributor of EUR 80 per window. In our example, the conclusion would again be that it is unlikely that such a system would be exclusionary.

Finally, elements containing individual targets amount to a very small proportion of the total turnover and cannot be considered to have exclusionary effects, especially when taking into account the scale of operation of distributors.

### A digression on retroactive rebate schemes

Although Velux' rebate scheme is based on incremental rebates it is interesting to consider how to analyse a similar retroactive rebate scheme, where the discount corresponding to the last step reached is applied to all units purchased. The following paragraphs explain how to examine this particular type of conditional rebate system using the principles set out in the Commission's Article 82 Guidance. (5)

Paragraph 40 of the Guidance states that "[i]n general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates. The potential foreclosing effect of retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded."

The methodology is further explained in paragraph 41: "[t]he Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand ('the relevant range') away from the dominant undertaking. The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the relevant range of sales and in the relevant period of time". Paragraph 43 adds that "[t]he lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect."

We could extrapolate the figures in the example provided above to create a hypothetical illustration for the case of retroactive rebates. Assume, as above, that the standard price paid by a distributor (which equals the price paid for the first 99 units) is EUR 100. Then a distributor buying 99 windows will pay EUR 9900, while she will only pay EUR 9950 if she buys 100 windows, since she now gets a discount of 0.5% on all 100 windows. The average price of the first 100 windows is therefore EUR 99.50 while the marginal price for window number 100 only is EUR 50. For rebate systems with larger discounts the marginal price may even become negative, which is sometimes used to argue that it is impossible for alternative producers to compete against such a rebate system. However, often it does not make much sense to focus on the marginal price, since alternative producers typically will try to sell more than one unit to a given distributor. The Commission's Article 82 Guidance introduces the concept of a "relevant range" that alternative producers will try to compete for (6). It is often relatively simple to conclude that a generalized rebate system is unlikely to be exclusionary without establishing precisely what the relevant range is. In the present example, one could, for instance, calculate what the "effective" price a distributor pays for a given "step" is. For example, if a distributor buys 1000 windows instead of 900, what is the effective average price that the distributor pays? It is easy to see that, taking account of the 4.5% rebate, the distributor would pay EUR 85 950 for buying 900 windows. The total price for 1000 windows would be EUR 95 000 after benefitting from a 5% discount. The effective average price for the 100 windows would therefore be (95 000-85 950)/100 = 90.5. This is the lowest average price a distributor would pay for a full "step" of 100 extra windows. This "step average" price decreases steadily with EUR 1 per step from 99.5 for

(5) It is important to note that the below considerations do not relate to rebates conditional on the customer obtaining all or most of his requirements — whether the quantity of his purchases be large or small — from the dominant company. It is beyond the scope of this article to deal with such rebates.

(6) Paragraph 42 of the Guidance states that "the relevant range over which to calculate the effective price in a particular case depends on the specific facts of each case and on whether the rebate is incremental or retroactive. For incremental rebates, the relevant range is normally the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a competitor (the 'contestable share' or 'contestable portion')."

the first 100 windows to 90.5 for the last 100 (from 900 to 1000). In this particular example where the rebate function exhibits numerous very small steps and a relatively low highest rebate of 5%, the effective unit price for the relevant range of EUR 90.5 seems sufficiently high to cover incremental costs. [7] Most manufacturers probably have a margin higher than 10%, although this may not be true for all industries. It therefore seems unlikely that such a retroactive rebate system would be exclusionary.

Indeed, the Guidance acknowledges that "as long as the effective price remains consistently above the LRAIC (long run average incremental cost) of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing in an anti-competitive way" [8]. The case would be different if the effective price were below the average avoidable cost. As a general rule, in this case, the rebate scheme would be capable of foreclosing even equally efficient competitors.

It should be noted that it may be the case that the "relevant range" is smaller than the size of the steps. In the example above, it might be concluded that a competitor realistically can only hope to compete for 50 windows instead of 100. In that case the lost rebate has to be "spread" over 50 units instead of over 100 and the price the competitor has to offer in order to compete for the 50 windows would be correspondingly lower.

### RoofLITE

Concerning the possibility of Velux using fighting brands, the investigation did not find any evidence of a strategy to exclude competitors. Furthermore, there were no indications that rivals exerting or having the potential to exert any significant competitive constraint on Velux' premium brand were foreclosed or marginalised from the market. In fact, the introduction of RoofLITE in the low-cost segment of the market was a natural response to increased competition from private labels and generic goods from China. The resulting increased competition in the lower segment of the market is likely to have led to downward pressure on prices thus benefitting consumers.

With respect to rebates RoofLITE operates in a different way than the Velux brand in that it does not have a generalised rebate scheme, as is the case for Velux. Rather, prices are negotiated on an individual basis. This reflects the nature of competition in the low cost segment which seems to function on a basis similar to tenders. Producers are bidding for the right to sell their low cost products in a certain hard discounter, often as a "second brand" next to a higher priced brand such as Velux. Manufacturers therefore have to adjust their conditions according to the bidding process.

## 5. Conclusion

This case shows how the approach advocated in the Commission's Article 82 Guidance paper can be applied in practice. The Guidance paper states that "the Commission will focus on those types of conduct that are most harmful to consumers". [9] In this case the Commission's investigation showed that Velux had designed a conditional rebate system without any anticompetitive foreclosure effects, that is, competitors were not foreclosed in a way that could cause likely harm to consumers. Similarly, the other theory of harm related to predatory pricing through fighting brands was not confirmed by the investigation. The introduction of RoofLite did not foreclose or marginalise important rivals and did therefore not allow Velux to profitably increase prices to the detriment of consumers. [10] In line with the enforcement priorities set out in the Article 82 Guidance paper the Commission therefore decided to close the case.

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[7] See also paragraph 40 of the Guidance: "The higher the rebate as a percentage of the total price … the stronger the likely foreclosure of actual or potential competitors".

[8] Guidance, paragraph 43.

[9] Guidance, paragraph 5.

[10] Guidance, paragraph 19.

 

# The judgments in the Nintendo case

Augustijn Van Haasteren (1)

## 1. Introduction

This article concerns the Commission Decision against Nintendo and seven of its distributors and, in particular, the judgments handed down on 30 April 2009 by the Court of First Instance (CFI) in the appeals against that Decision by Nintendo, Itochu Corporation ('Itochu'), and CD-Contact Data GmbH ('Contact Data') (2).

The appealed Commission Decision dates back to 2002 and concerned the distribution of Nintendo manufactured game consoles, in particular the NES and SNES static game consoles that were superseded by the N64 console, as well as the portable Game Boy and game cartridges for these consoles. Nintendo was the manufacturer of these products, but acted in certain Member States also itself as the official exclusive distributor of its products to wholesalers and retailers. In other Member States it had appointed independent exclusive distributors.

On 30 October 2002, the Commission concluded its investigation by issuing a Decision finding that the addressees participated in a single and continuous infringement (3) of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement with the object of restricting parallel exports in Nintendo's consoles and game cartridges throughout the EEA. The infringement was organised by Nintendo and actively enforced. Companies that resold the products abroad or to companies that would do so were sanctioned and, as a result, intra-EEA parallel trade was significantly reduced in practice. Nintendo's independent distributors took an active part in, and benefited from, the prevention of parallel trade.

In this case, the Commission decided to use its discretionary powers (4) to fine also Nintendo's exclusive distributors. There was abundant evidence to show that the distributors — all of them wholesalers familiar with cross-border trading — were neither the victims nor passive spectators of what Nintendo was doing. On the contrary, they actively and willingly cooperated with Nintendo in the prevention of parallel trade.

The infringement was deemed to be a very serious infringement of Article 81(1) EC and 53(1) EEA. The duration of the single infringement was from January 1991 until December 1997 (the length of participation of each of the addressees varied, however). The overall fines imposed were accordingly high, namely € 167.8 million. The fines on Nintendo, Itochu and Contact Data were, respectively, € 149.1 million, € 4.5 million and €1 million.

The total fine and the individual fine for Nintendo were, and still are, the largest ever imposed in a vertical case (5). At the time of the Decision, they also ranked among the highest when all fining decisions of the Commission, including those in cartel cases, are considered (6).

The decision applied the 1998 guidelines on fines (7) ('the 1998 Guidelines on fines'), which were superseded by new guidelines on fines adopted in 2006 (8) ('the 2006 Guidelines on fines'). The appeals concerned numerous aspects of the manner in which the

(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) Judgment of 30 April 2009 in Case T-12/03 *Itochu Corp.* v *Commission*, judgment of 30 April 2009 in Case T-13/03 *Nintendo Co., Ltd and Nintendo of Europe GmbH* v *Commission*, judgment of 30 April 2009 in Case T-18/03 *CD-Contact Data GmbH* v *Commission*.

(3) The infringement in the case was characterised as a single and continuous infringement of Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement. The application of the concept of a single and continuous infringement is fairly standard in 'classical' cartel-like infringements. This decision was the first one in which the concept of a 'single and continuous' infringement was applied to a vertical anti-competitive arrangement. Since then, the same approach was also followed in the Commission Decision of 26 May 2004 in Case COMP/C-3/37.980 — Souris/Topps.

(4) The Commission has wide discretionary powers when determining the amount of fines to be imposed, including the power not to impose a fine at all or merely a symbolic fine or, on the contrary, to raise the general level of fines (see judgment in Joined Cases 100 and 103/80 *SA Musique Diffusion Française* v *Commission*, paragraph 109). Evidence that an undertaking, even if negligently, has been responsible for an infringement of Article 81(1) of the Treaty is by itself sufficient to justify imposing a fine.

(5) Since the Nintendo decision, the Commission has imposed fines in two other vertical cases, both concerning parallel trade, namely: the Commission Decision of 16 July 2003 in Case COMP/37.975 — PO/Yamaha, where a fine of € 2 560 000 was imposed, and the Commission Decision of 26 May 2004 in Case COMP/C-3/37.980 — Souris/Topps. In the latter case, a fine of € 1 590 000 was imposed.

(6) For more details about the calculation of fines see IP/02/1584 of 30.10.2002.

(7) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

(8) Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

Commission had set the fines, but only those aspects that are more relevant today will be mentioned here.

## 2. The appeal by Nintendo

Nintendo decided not to contest the infringement, and its arguments focused primarily on the manner in which the Commission had calculated the fine imposed on it.

### Role of Nintendo as manufacturer

When establishing the fine on Nintendo, the Commission had taken account of the fact that Nintendo was, apart from a distributor, also the manufacturer and had increased the fine in order to ensure a deterrent effect. This was challenged upon appeal by Nintendo.

The CFI accepted, however, that the fact that Nintendo was a manufacturer could be used. In the case of vertical infringements, this objective factor relates to the company's effective capacity to cause significant damage to competition. In a vertical case, the manufacturer occupies a central position in the distribution system of its products and it must display particular vigilance and ensure that it observes the competition rules when concluding distribution agreements [9].

Moreover, using this fact for assessing gravity does not preclude the application of an aggravating factor on the grounds that Nintendo, in addition, was also the ringleader in the infringement. Nintendo argued that in a vertical case, these elements essentially amount to the same. However, the mere fact that the manufacturer plays a central role does not preclude the infringement being instigated by other parties to the infringement. The special role of a manufacturer in a vertical setting, an objective factor indicating its ability to cause harm, and the role as ringleader, a specific element characterising a company's role in the infringement, are thus different aspects that may each lead to increases in fines.

This confirmation should warn manufacturers that also are active as distributors of their products to be particularly vigilant in their compliance with the competition rules.

### Application of Leniency Notices in vertical infringement cases

In this case, Nintendo initially tried to hide the infringement from the Commission after it had become aware of the Commission's investigations. Once John Menzies, Nintendo's distributor for the UK and Ireland, started to collaborate, Nintendo also decided to do so. The fact that Nintendo initially continued the infringement was taken as an aggravating factor, but its eventual collaboration also had to be taken into account as a mitigating circumstance.

The Nintendo decision was the first very serious infringement where cooperation by firms in the Commission proceedings outside the cartel field was substantially rewarded [10]. The decision recognises that Nintendo (as well as John Menzies) submitted information that went beyond their obligation to reply to previous requests for information and that the information received allowed the Commission to bring forward the case.

The Commission took the view, however, that the vertical nature of the infringement meant that parties could not benefit from the application of the Commission Notice on the non-imposition or reduction of fines in cartel cases [11] in force at the time ('the 1996 Leniency Notice'). The first paragraph of the 1996 Leniency Notice limited its application to 'secret cartels', that is, to a sub-category of agreements falling under Article 81(1) of the Treaty, namely those that are secret and horizontal. This limitation was maintained in the subsequent leniency notices, the 2002 [12] and 2006 [13] Leniency Notices, which concern only agreements and/or concerted practices between '*two or more competitors*'.

Nintendo complained that the Commission denied it the benefit of the 1996 Leniency Notice and, thereby, the reductions in fines available for leniency applicants [14]. The CFI, however, upheld the Commission's view that the Leniency Notice did not apply, stressing that this notice seeks to encourage undertakings to disclose the existence of restrictive practices that are particularly difficult to detect and that is applicable only in cases involving horizontal restrictions.

(9) See in this regard also the judgment of the European Court of Justice of 7 June 1983 in Joined Cases 100 and 103/90 *SA Musique Diffusion Française* [1983] ECR 1825, paragraph 75.

(10) In 2000, Nathan's effective cooperation with the Commission was also rewarded. However, the infringement in the Nathan-Bricolux case was only of minor gravity. *Nathan–Bricolux*. Commission Decision of 5 July 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (OJ L 54, 23.2.2001, p. 1).

(11) OJ C 207, 18.7.1996.

(12) Notice on immunity from fines and reduction of fines in cartel cases (OJ C 45, 19.2.2002, p. 3).

(13) Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

(14) In particular, submitting evidence before the statement of objections was issued and not substantially contesting the facts. Not challenging the facts is no longer recognised as a ground for a reduction in fines by later leniency notices. In any event, the application of this rebate would most likely have been barred in view of the use of coercion by Nintendo to ensure participation in the infringement. See in this regard paragraph 11(c) of the 2002 Leniency Notice.

### Taking account of collaboration with the Commission's proceedings outside the scope of the Leniency Notice

Even though the Leniency Notice did not apply to this case, the Commission took account of Nintendo's collaboration during the proceedings. The Commission applied the mitigating circumstance provided for in the 1998 Guidelines on fines for this type of situation, namely, that of the effective cooperation by the undertaking in the proceedings, outside the scope of the 1996 Leniency Notice. This mitigating factor was maintained in the 2006 Guidelines on fines ([15]).

In order to decide the actual reductions to be granted, the Commission took into account the fact that, even if the volume of the information provided was less than that of Nintendo, John Menzies was the first to provide valuable evidence to the Commission. Thus, John Menzies was granted a quite significant reduction of 40 %, while that for Nintendo was 25 %. This line was considered consistent with the 2002 ([16]) Leniency Notice (and would be with the 2006 Leniency Notice ([17])).

The CFI argued however that, in order to be comparable, an undertaking's collaboration does not necessarily have to commence on the same day, but it must commence at the same stage of the procedure. It thereby played down the importance of 'being first' to submit evidence, which is an essential element under the leniency notices. It could then conclude that both companies collaborated in a similar manner as they both rendered spontaneously the same decisive evidence ([18]) and at comparable moments in the procedure (even if not precisely at the same moment). Nintendo should therefore benefit from the same reduction, 40 %, that the Commission had granted to John Menzies.

After having made its own assessment of the additional evidence that Nintendo had submitted, the CFI followed the Commission's assessment that, despite its volume, this evidence was not essential to enable the Commission to establish the existence of the infringement. Many of the documents were submitted in response to formal requests for information and had allowed the Commission to establish the geographic scope of the infringements and the identity of the distributors involved, also in the absence of the information submitted voluntarily. Consequently, whereas Nintendo was found entitled to the same reduction in fines as John Menzies, there were no grounds to grant it an even larger reduction.

Nintendo's fine was accordingly reduced to € 119.3 million. This fine still represents the largest fine ever imposed for a vertical infringement on a single company.

The Nintendo case shows that the Commission is ready to reward cooperation by firms in areas that go beyond the classical cartel field and the judgment provides some guidance as to how the Commission can and should take account of such collaboration.

## 3. The appeal by Itochu

### Liability for conduct of 100 %-owned subsidiary

In the case of Itochu Corporation, the appeal centred *inter alia* on the question whether the Commission was right in addressing the decision to Itochu Corporation and in finding that it was liable for the conduct by its subsidiary Itochu Hellas. Itochu Corporation is a very large Japanese trading company and the Commission had increased the basic amount of the fine for Itochu from €1 million to €3 million ([19]) in order to ensure sufficient deterrent effect and in order to take account of the size and overall resources of Itochu. The question whether it could be found liable would therefore directly affect the manner in which the Commission had established the fine.

The CFI recalled, however, that under Community competition law different companies belonging to the same group ([20]) form an economic unit and therefore an undertaking within the meaning of Articles 81 and 82 EC if the companies concerned do not independently determine their own conduct on the market. In the specific case, Itochu Corporation held (directly and indirectly) 100 % of the shares in Itochu Hellas, implying that a (rebuttable) presumption exists that the parent company exercises decisive influence over the conduct of its subsidi-

([15]) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C 210, 1.9.2006, p. 2) . See in particular point 29, fourth indent.
([16]) See in particular points 21 to 23.
([17]) See in particular points 23 to 26.
([18]) Essentially allowing the Commission to prove that John Menzies and Nintendo closely collaborated to prevent parallel trade from the UK in the first part of 1996, when parallel trade from the UK surged.
([19]) The overall fine of €4.5 million followed after taking account of duration.
([20]) The grouping of undertakings that were involved in the infringement for the purpose of determining the basic amount of the fine (before taking account of aggravating and mitigating circumstances and duration) was usual under the guidelines applicable at the date of the decision, the 1996 Guidelines on fines. The practice of grouping has been abandoned under the subsequent 2006 Guidelines on fines.

ary [21]. In the present case, Itochu failed to rebut this presumption. Its conduct during the administrative procedure, the decentralised organisation of the Itochu group and the fact that the distribution of Nintendo products was not part of the core business of the Itochu group, failed to convince the CFI that Itochu Hellas acted independently.

## 4. The appeal by Contact Data

### Evidence of participation in the infringement

Contact Data became Nintendo's distributor for Belgium only in April 1997, i.e. towards the end of the infringement. In reaction to the launch of the Commission's investigations, Nintendo had already by that time altered its distribution agreements (but not its effective conduct) in a way that meant that they no longer contained restrictions to parallel export. Consequently, the Commission had to rely on evidence of a different nature to demonstrate that the infringement had nonetheless continued and that Contact Data was involved in this continuing infringement. This concerned a fairly limited number of fax communications between Contact Data and Nintendo [22].

After scrutinising in detail the available evidence, the CFI concluded that the Commission had rightly concluded that Contact Data reached a 'concurrence of wills' and entered into an agreement with the object of limitation of parallel trade. In this context it is useful to stress that the Commission decision was taken not long after the Court had criticised the Commission's view of what constitutes an agreement within the meaning of Article 81 EC [23] in vertical arrangements.

This judgment consequently sheds some light on the evidence required to find an 'agreement' in a vertical context.

### Exclusively passive role in the infringement

The Commission had characterised Contact Data's role in the infringement as active and had not granted it a reduction in fine for an exclusively passive role [24]. The Commission's assessment had essentially been based on the participants' pro-active role in giving practical effect to the infringement agreements by reporting parallel trade in their territory to Nintendo (that in turn would organise a follow-up by ensuring that the distributor in the territory where this trade originated would stop it).

Apart from the fact that the CFI considered that, on these grounds, no material differences appeared to exist between Concentra and Contact Data in reporting parallel trade, it took the view that Contact Data's participation was much shorter in time and that Concentra had signed, unlike Contact Data, a formal agreement restricting parallel trade. Consequently, the fine was reduced by the same percentage awarded to Concentra, 50 %, and set at € 500 000.

The ground that Concentra, contrary to Contact Data, had entered into a formal agreement restricting parallel trade is puzzling in view of the fact that the CFI upheld the Commission's finding that Contact Data entered into an agreement, although not formalised, restrictive to parallel trade. Form may thus matter [25].

### Role of the Hearing Officer

In this case, no formal oral hearing had been organised because none of the addressees of the statement of objections had requested one. As it happened, Contact Data was the last addressee that had to inform the Commission during the administrative procedure whether it wished an oral hearing. The case handler in question inquired of Contact Data, whilst stating that all other parties had already decided not to exercise their right to an oral hearing, whether Contact Data wished to have one organised.

It was subsequently claimed before the CFI that the way the Commission proceeded (i) infringed Contact Data's rights of defence as the Commission had implicitly [26] pressured Contact Data to waive its rights to an oral hearing, and (ii) violated Article 10 of Regulation No 2842/98, as supplemented by Article 4 of Decision 2001/462, which stipulate that it is the Hearing Officer (and not the case handler) that organises and conducts oral hearings.

Both arguments were rejected. The facts do not constitute proof of an infringement of Contact Data's rights of defence and, moreover, the letter accompanying the statement of objections clearly stipulated

(21) The fact that in previous cases, in particular Case C-285/98 P *Stora Kopparbergs Bergslags* v *Commission* (paragraph 35), the CFI had also relied on other elements was deemed irrelevant.

(22) The evidence against Nortec, the exclusive distributor that Nintendo appointed for Greece after Itochu, was of a similar nature. This company did not appeal the decision, however.

(23) Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383.

(24) A possibility that was provided for in the 1998 Guidelines on fines, but no longer in the 2006 Guidelines on fines.

(25) The CFI in fact used a similar argument when rejecting Itochu's claim that it only had a passive role. See paragraph 137 of the judgment in Case T-12/03.

(26) Contact Data did not claim that direct pressure of any kind had been brought to bear.

 

that, in accordance with Regulation No 284/98, it was for the parties to request an oral hearing. In addition, it does not follow from the above-mentioned Regulation and Decision that only Hearing Officers can contact the undertaking concerned in order to discuss and inform them of the possibility of an oral hearing. Such contact, as part of the day-to-day administrative activities, does not encroach on the tasks of the Hearing Officer.

## 5. Conclusion

Even though the CFI reduced somewhat the fines that had been imposed on Nintendo and Contact Data, the Commission's decision was endorsed by the CFI. The Nintendo decision is a further indication that the Commission remains active and is ready to impose large fines also in the case of vertical infringements.

# The *Marine Hoses* cartel

Maurits Pino

## 1. Introduction

On 28 January 2009, the Commission adopted a decision relating to proceedings under Article 81 of the EC Treaty imposing a fine of over EUR 131 million [1] on six producers of marine hoses.

There was a key novelty in the marine hoses case: it was the first to involve a search in a private home (see below). Otherwise, the marine hoses cartel was a textbook bid-rigging case. The arrangement between the companies was a classic cartel with price-fixing and quotas, which the case team dealt with in little more than two years.

## 2. The marine hoses industry

Marine hoses are used to load sweet or processed crude oil and other petroleum products from offshore facilities (for example, buoys, floating production, storage and offloading systems) onto vessels and to offload them back to offshore or onshore facilities (for example, buoys or jetties).

## 3. Procedure

Yokohama applied for immunity under the Commission's 2006 Leniency Notice [2] on 22 December 2006.

On 2 May 2007, the Commission launched surprise inspections on the premises of Dunlop Oil & Marine, Trelleborg, Parker ITR, Manuli and PW Consulting and at the home of the owner/manager of the latter. In the months which followed, a series of requests for information were sent to the parties involved and other undertakings that might be able to provide details.

These were the first inspections by the Commission under Article 21 of Regulation (EC) No 1/2003 which allows searches in private homes. In this case, the decision to conduct such an inspection proved to be justified: abundant evidence of the cartel, including evidence of a cartel dating back to as long ago as 1986, was found in the home, but not at any of the other sites inspected.

According to the recitals of Regulation 1/2003 'Experience has shown that there are cases where business records are kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, officials and other persons authorised by the Commission should be empowered to enter any premises where business records may be kept, including private homes.' The marine hoses inspections show that this idea was indeed correct and that such inspections can be very successful.

The Commission had carefully coordinated its inspections with the US and UK authorities. The former arrested at the same time a number of individuals involved in the cartel in Houston, Texas. They had just held a meeting at which they discussed price-fixing of marine hoses. Subsequently, most of the individuals and companies involved pleaded guilty and agreed to long prison terms and large fines [3]. The latter pursued the employees involved under UK criminal law resulting in a number of criminal convictions."

## 4. Functioning of the cartel

The investigation by the Commission uncovered evidence that during the relevant period the parties concerned by the decision had been participating in anticompetitive arrangements which consisted of:

(a) allocating tenders,

(b) fixing prices,

(c) fixing quotas,

(d) fixing sales conditions,

(e) sharing the market geographically, and

(f) exchanging sensitive information on prices, sales volumes and procurement tenders.

Evidence uncovered revealed that, at least since 1986, members of the marine hoses cartel had been running a scheme to share out amongst themselves the tenders awarded by their customers. Under the scheme, any member of the cartel who received an inquiry from a customer would report it to the cartel coordinator, who, in turn, would allocate the customer to a 'champion', which means the member of the cartel who was supposed to win the tender. To make sure that the tender was awarded to the 'champion', in the tendering procedure the cartel agreed on the prices that each of them should quote so

(1) Case COMP/39406 *Marine Hoses*.

(2) Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

(3) See the US Department of Justice press releases at http://www.justice.gov/opa/pr/2008/July/08-at-663.html

that all their bids would be above the price quoted by the champion.

Moreover the cartel members agreed on a number of measures to facilitate the implementation of the cartel: reference prices, quotas and sales conditions backed up by penalties to compensate any cartel members who lost tenders which the cartel had allocated to them to another member of the cartel.

The marine hoses cartel was, therefore, in many ways a textbook example. In one important sense, however, it was different. An ex-employee of one of the undertakings involved in the cartel performed the role of coordinator. Cartel members communicated with the coordinator regularly by fax, e-mail and, sometimes, telephone for each new tender. The coordinator gave members market share reports, market development reports and specific instructions on their bids. In addition, the coordinator selected a 'champion' for each contract. This 'champion' would win the tender, while other members of the cartel would submit 'cover bids' so as not to give away the cartel.

## 5. Remedies

Under the 2006 Guidelines on fines ([4]), when determining the basic amount of the fine to be imposed, the Commission starts from the value of the undertaking's sales of the goods or services to which the infringement relates in the relevant geographic area within the EEA.

The Commission calculates the fines to be imposed on each undertaking concerned on the basis of the value of sales of each. As this was a worldwide cartel and EEA sales do not reflect the strength of the different parties, it is appropriate, in line with Point 18 of the Guidelines on fines, to apply the world market share of each undertaking to the total sales within the EEA. The criteria that were considered to determine the percentage of the undertakings' sales were the nature of the infringement, the combined market share of the cartel members, the geographic scope of the cartel and the degree to which the cartel was implemented. On this basis, the percentage for the variable amount and the additional amount ('entry fee') was set.

Although the cartel lasted from April 1986 to May 2007, a period of two years of only limited activity on the part of the cartel was excluded when calculating the fines. Therefore, for the purpose of setting the fines, the cartel was considered to have operated for more than 19 years, so the variable amount was multiplied by up to 19.

There were no mitigating circumstances and no aggravating circumstances (such as recidivism) other than leadership. The fines of two undertakings were increased because they played the leading role.

Yokohama was the first undertaking to submit information and evidence which opened the door for the Commission to carry out a targeted inspection in connection with the alleged cartel. The fine imposed on Yokohama was reduced by 100 %. Manuli was granted a 30 % reduction. Parker ITR's and Bridgestone's contributions were not considered as being of 'significant added value'. Therefore the Commission did not grant these two companies any reduction of their fine.

## 6. Decision

The following fines were imposed (with the duration of the infringement indicated in brackets):

- Bridgestone Corporation (1 April 1986 to 2 May 2007): EUR 58.5 million, of which EUR 48.1 million jointly and severally with Bridgestone Industrial Limited (19 December 1989 to 2 May 2007).
- Yokohama Rubber Company Limited, immunity applicant (from 1 April 1986 to 1 June 2006): EUR 0.
- Dunlop Oil & Marine Ltd (12 December 1997 to 2 May 2007): EUR 18 million, of which EUR 16 million jointly and severally with ContiTech AG (28 July 2000 to 2 May 2007), of which EUR 7.1 million jointly and severally with Continental AG (9 March 2005 to 2 May 2007).
- Trelleborg Industrie SAS (1 April 1986 to 2 May 2007): EUR 24.5 million, of which EUR 12.2 million jointly and severally with Trelleborg AB (28 March 1996 to 2 May 2007).
- Parker ITR Srl (1 April 1986 to 2 May 2007): EUR 25.61 million, of which EUR 8.32 million jointly and severally with Parker Hannifin Corporation (31 January 2002 to 2 May 2007).
- Manuli Rubber Industries SpA (1 April 1986 to 1 August 1992 and 3 September 1996 to 2 May 2007): EUR 4.9 million.

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

# Mergers: main developments between 1 January and 30 April 2009

John Gatti ([1])

## Introduction

The number of notifications has declined significantly, from 98 in the last four months of 2008 to the current level of 75. This reflects the impact of the worldwide financial crisis on merger and acquisition activity. Similarly, the total number of decisions adopted was significantly lower – at 70 as compared to 117 between September and December. It should be noted that this 23% fall in the number of notifications was considerably lower than the fall in the number of decisions adopted, which is perhaps an indication that activity is picking up. The Commission adopted a total of 69 first-phase decisions, of which 64 were unconditional clearance decisions (43 of these were adopted under the simplified procedure) and five were clearance decisions with remedies. One conditional decision was adopted after a second phase procedure and one case was abandoned in phase II.

## A — Summaries of decisions taken under Article 6(2)

### Iberia / Vueling / Clickair

On 9 January 2009, under the EU Merger Regulation, the European Commission approved the proposed acquisition of the two Spanish low-cost airlines Vueling and Clickair by the Spanish flag-carrier Iberia on condition that commitments to safeguard competition and passenger choice are implemented. The Commission's clearance is conditional upon the parties releasing slots in Barcelona airport and other European airports to address competition concerns on several Spanish and other European routes, where the proposed concentration would have led to a restriction of competition. In the light of these commitments, which encourage competing airlines to enter or expand onthose routes, the Commission has concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The Spanish competition authority submitted a request for the concentration to be referred to them for consideration, but subsequently withdrew its request.

([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.

Iberia Líneas Aéreas de España, S.A. is the Spanish "flag"-carrier, based at Madrid-Barajas airport. It provides long-haul and short-haul scheduled air transport of passengers, covering 108 routes. In 2007 it transported around 26.8 million passengers. Iberia also provides air cargo transport, aircraft maintenance and handling services.

Vueling Airlines, S.A. is a Spanish "low-cost" airline based at the airports of Barcelona-El Prat and Madrid-Barajas. It operates scheduled air transport of passengers on short-haul routes in Spain and to other European countries. Vueling covers 56 routes and in 2007 carried 6.2 million passengers.

Clickair S.A. is a Spanish "low-cost" airline based at the airport of Barcelona-El Prat. It provides scheduled air transport of passengers on short-haul Spanish and European routes. Prior to the proposed transaction, Iberia had a 20% stake in Clickair, but did not control it. Clickair covers 49 routes and it transported 4.5 million passengers in 2007.

Under the proposed concentration, to be carried out by means of several interdependent transactions, Vueling and Clickair would merge to become "Nueva Vueling", over which Iberia would acquire control.

The Commission analysed the effects of the merger on a route-by-route basis. The investigation found that the merger as initially notified would have raised serious doubts as to its compatibility with the Single Market, because it was likely to restrict competition or lead to a monopoly on 19 routes, used by almost five million passengers every year, from Spain to other European countries (in particular Italy, France and Greece) or within Spain,. The strong position of the merged entity on these routes in terms of passengers transported would have been further strengthened by its high combined shares of slots at the airports of Barcelona-El Prat and Madrid-Barajas.

In order to remove these serious doubts, the parties offered to transfer slots (i.e. the landing and take-off rights at airports at specific times) free of charge at several airports, in particular Barcelona and Madrid, where congestion at peak hours is very significant. These slots cover all routes where competition concerns were identified and would create the conditions for new entrants or existing competitors to operate over 150 additional round trips per week. The Commission considers that these remedies are likely to considerably facilitate entry for competitors, maintain competitive pressure on the merged entity and thereby benefit Spanish and other European passengers on the affected routes.

In the light of the results of the market test on these remedies, the Commission concluded that the commitments submitted were likely to result in entry by one or more competitors on the routes where competition concerns had been found and that these routes would remain competitive. The Commission therefore considered that the proposed remedies would remove the competition concerns.

## Sanofi-Aventis/Zentiva

On 4 February 2009 the European Commission approved, under the EU Merger Regulation, the proposed acquisition of the Czech generic pharmaceuticals firm Zentiva by Sanofi-Aventis Europe of France, a producer of originator medicines. To remedy the Commission's competition concerns in different therapeutic areas on a number of national markets, Sanofi-Aventis undertook to divest fifteen drugs in the Czech Republic, the Slovak Republic, Romania, Bulgaria, Hungary and Estonia. In the light of these undertakings, the Commission concluded that the proposed transaction would not cause competition concerns in the European Economic Area (EEA) or any substantial part of it.

Sanofi-Aventis is a global pharmaceutical group engaged in the research, development, manufacture and marketing of healthcare products both throughout the EU and worldwide. The main activities of Sanofi-Aventis are originator pharmaceuticals and vaccines for humans. Zentiva is a pharmaceutical group active in the Central and Eastern European Member States focused on the development, manufacturing and marketing of branded generic pharmaceutical products for the treatment of cardiovascular diseases, pain, diseases of the central nervous system, alimentary and genito-urinary tract diseases and inflammatory conditions. Generic medicines are equivalent to original medicines and are sold once the patent for the latter has expired.

The Commission's investigation covered over 100 national pharmaceuticals markets in Central and Eastern European Member States on which the parties' activities overlap. The Commission found that competition concerns could be excluded in most of these markets, in general because the joint market shares of Sanofi-Aventis and Zentiva are moderate and a sufficient number of competitors would remain in the markets after the proposed transaction.

However, the Commission found that the transaction – as originally notified – would have raised competition concerns for 15 pharmaceuticals markets in the Czech Republic, Slovakia, Romania, Bulgaria, Hungary and Estonia. In these cases, there was a risk that the transaction would have reduced choice and/or led to higher prices for hospitals, patients and the State treasury.

To address the Commission's concerns, Sanofi-Aventis offered to divest its Maalox (digestive problems, flatulence) business in Romania, its Ercefuryl (acute diarrhoeal diseases) business in the Czech Republic and its Trental (improving blood circulation) business in the Czech Republic, Slovakia and Estonia. In addition, Sanofi-Aventis offered to divest Zentiva's Papaverinium business in Hungary, its Scobutil and Sulfat de Atropina business (all for alleviating cramps and spasms) in Romania, its Flavobion (liver disease) business in the Czech Republic and the Slovak Republic, its Vasocardin, Betaxa and Tenoloc (heart disease) business in the Czech Republic, its Fokusin, Penester and Zoxon (benign prostate disease) business in Estonia, its Zopiclon (sleeping pills) business in Bulgaria and its Hypnogen (sleeping pills) business in the Czech Republic, Slovakia and Estonia.

## BASF/Ciba

On 12 March 2009, under the EU Merger Regulation, the European Commission cleared the proposed acquisition of Ciba of Switzerland by BASF SE of Germany. Both companies are active in the chemicals industry. To remedy the competition concerns which the Commission had in relation to a number of specialty chemical products, used inter alia in the paper, dyestuffs, plastics and skin care sectors, BASF offered to divest activities in the sectors in question. In the light of these commitments, the Commission concluded that the proposed transaction would not significantly impede effective competition in the EEA or any substantial part of it.

BASF, the ultimate parent company of the BASF Group, is based in Ludwigshafen, Germany and is the world's largest chemical company. BASF is active in chemicals, plastics, performance products, agricultural and nutritional products and oil and gas. Ciba, the ultimate parent company of the Ciba (formerly Ciba Specialty Chemicals) Group, is a specialty chemicals company headquartered in Basel, Switzerland.

On the large majority of markets the Commission's investigation found that the proposed transaction would not significantly alter the competition structure, as a number of credible and more significant competitors would continue to exercise a competitive constraint on the merged entity.

However, the Commission did find that the proposed transaction in the notified form would raise competition concerns in a number of relevant specialised markets, namely:

- DMA3 (dimethylaminoethyl acrylate – a chemical intermediate)
- synthetic dry strength agents (used in the paper industry)
- bismuth vanadate (a pigment)
- indanthrone blue (a pigment)
- SA (styrene acrylic – used as a glue for paper applications)
- HALS (hindered amine light stabilizers – used in plastics) and
- UV (ultraviolet light) filters for skin care products.

In these markets one or both parties held significant market shares even before the transaction, and the proposed takeover is likely to lead to a further strengthening of these positions.

To resolve these competition concerns, BASF proposed to divest DMA3 production assets at Ludwigshafen (Germany), Ciba's entire EEA synthetic dry strength agent business and Ciba's global bismuth vanadate business. Regarding indanthrone blue, BASF agreed to transfer Ciba's know-how of the finishing line, all supply contracts, customer lists and inventories. For SA, BASF agreed to divest Ciba's SA business (and the PVAc – polyvinyl acetate and AA – all acrylate businesses) in the EEA at Kaipiainen (Finland). For HALS, BASF committed to divest Ciba's entire Chimassorb 119 FL business, including the Chimassorb 119 FL production assets, relevant know-how and customer lists. For UV filters, BASF committed to conclude a UV Filter Licence Agreement, giving third party access to the technology behind Tinosorb S (a UV filter patented and currently solely produced by Ciba).

Following a market test of these remedies, the Commission concluded that the divested businesses would be viable and that the commitments would resolve the identified competition.

## IPIC / Man Ferrostahl AG

On 13 March 2009, under the EU Merger Regulation, the European Commission cleared the proposed acquisition of MAN Ferrostaal of Germany, a general contractor that constructs turnkey industrial plants, by International Petroleum Investment Company (IPIC) of the United Arab Emirates. The decision is conditional upon IPIC's commitment to divest MAN Ferrostaal's stake in the melamine production technology licensing and plant engineering company, Eurotecnica. The Commission had concerns that the transaction, as originally notified, would reduce competition on the high-quality melamine markets because of the vertical relationship between Eurotecnica and the leading Austrian melamine producer, AMI, controlled by IPIC. Melamine is a specialty chemical that is used, inter alia, in the paper, wood and automotive industry. In view of the remedies proposed, the Commission concluded that the operation would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

IPIC is an investment company, principally investing on a long-term basis in energy and energy-related companies outside of the United Arab Emirates. IPIC controls Agrolinz Melamine International (AMI) of Austria, a leading melamine producer with a melamine production technology of its own. Melamine is used in a wide range of applications such as surfaces (automotive industry or paper impregnation for the production of laminates), adhesives and glues (particularly in the wood industry for the production of chipboards and fibreboards) and as a flame retardant. For certain applications high quality melamine with specific requirements, such as purity and transparency, is required.

MAN Ferrostaal is active worldwide building turnkey industrial plants and offering related services such as project development, project financing and project management. It has a minority shareholding in Eurotecnica, following a transaction approved by the Commission in January 2007. Eurotecnica is currently the only independent supplier of a licence and related engineering services for high-pressure melamine production technology worldwide. This technology produces high quality melamine. During its investigation, the Commission identified competition concerns related to the high quality melamine market.

Due to the vertical relationship between Eurotecnica and AMI on the melamine market, the Commission had concerns that the merged entity would be able to control entry and/or expansion in the high-quality melamine market by steering Eurotecnica's licensing policy vis-à-vis AMI's competitors which are dependent on this technology.

To address the Commission's competition concerns, MAN Ferrostaal committed to divest its share in Eurotecnica. After market testing this commitment, the Commission concluded that the divestiture would be suitable to remedy its concerns.

## Posten AB / Post Danmark A/S

On 21 April 2009 the European Commission cleared, under the EU Merger Regulation the proposed merger between Posten of Sweden and Post Danmark. Both undertakings are incumbent postal operators. The Commission's decision is conditional upon the commitment of the parties to divest assets and customer contracts covering their entire overlap in the domestic standard business to business (B2B) parcel delivery services market in Denmark. The Commission concluded that the transaction, as modified by these commitments, would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

Posten is wholly owned by the Kingdom of Sweden. It is active in Sweden in the field of postal services (mail and parcels) and mail preparation services (printing and enveloping) through its subsidiary, Strålfors.

Post Danmark (PDK) is owned by the Kingdom of Denmark and CVC (a private equity and investment advisory firm) and is mainly active in Denmark in the field of postal services (mail and parcels).

While the Swedish postal market has been fully liberalised since 1993, the Danish market has not yet been liberalised. The Commission has therefore carefully considered the potential effects of the merger on the upcoming liberalisation of the Danish postal market, which has to take place before 2011. The Commission's investigations showed that liberalisation of the Danish mail market is not at risk, as the proposed merger is unlikely to increase barriers to entry or expansion, or impede competition in the Danish mail market.

There is a horizontal overlap in the activities of Posten and Post Danmark in the provision of parcel delivery services in Denmark, affecting a number of parcel markets. In addition, a conglomerate relationship exists in Denmark between the provision of printing and enveloping services by Strålfors, a subsidiary of Posten, and mail distribution services by Post Danmark.

The Commission's market investigation showed that the proposed transaction, as initially notified, raised horizontal competition concerns with respect to the domestic standard business to business (B2B) parcel delivery services market in Denmark.

## B — Summaries of decisions taken under Article 8(2)

### Arsenal / DSP

On 9 January 2009, under the EU Merger Regulation, the European Commission approved the proposed acquisition of chemical company DSM Special Products (DSP) of the Netherlands by Arsenal Capital Partners (Arsenal), a US private equity firm. Arsenal owns Velsicol, a chemical company active in the EEA through its Estonian plant. DSP is a chemical company with a single production plant, which is in Rotterdam. Both parties produce benzoic acid, a raw material used in the production of a variety of goods, including as an antimicrobial preservative in food and drinks, in plasticisers, pharmaceutical goods and pet food. In August 2008, based on its competition concerns, the Commission opened an in-depth investigation. Arsenal made the commitment to divest the whole of its liquid and solid benzoic acid production, and also its sodium benzoate production, in the European Economic Area (EEA). In the light of these commitments, the Commission concluded that the proposed transaction would not significantly impede effective competition in the EEA or any substantial part of it.

The Commission found that the proposed transaction would have raised serious competition concerns in the EEA market for solid benzoic acid, if the merged entity would have run the only two production plants in the EEA. The Commission also found that imports of benzoic acid into the EEA are very low and would not be capable of constraining the merged entity's behaviour.

To address the Commission's concerns, Arsenal offered to divest the Velsicol production plant in Estonia and therefore its entire solid and liquid benzoic acid production. The proposed divestment also includes the production of sodium benzoate, a product derived from benzoic acid and used primarily as a preservative in food and soft drinks, in order to ensure the full viability of the divested business. The buyer of the divested business will therefore be in a position to compete in the market for solid benzoic acid and become a credible alternative supplier.

# Article 11(3) Decisions – the Commission's Discretion Analysis of the judgment of the Court of First Instance in case T-145/06 Omya v Commission

John Gatti ([1])

The examination of Omya AG's (Omya) proposed acquisition of J. M. Huber's precipitated calcium carbonate business (Huber PCC) ([2]) was one of the most administratively complex cases the Commission has undertaken. From its notification to the Finnish Competition Authority on 4 April 2005 until the adoption of the Commission's final decision on 19 July 2006 it involved nine different Commission decisions, two Advisory Committee meetings, an AKZO procedure for access to documents ([3]) and led to two court cases (T-145/06 and T275/06, subsequently abandoned). This article deals with the case in which Omya challenged the Commission's decision adopted under Article 11(3) of the Merger Regulation ([4]).

## Background

In May 2005, the Finnish Competition Authority requested the referral of the case pursuant to Article 22 ECMR to the Commission, which accepted jurisdiction. This case constituted the first Article 22 referral under the revised Merger Regulation which had entered into force on 1 May 2004. The request was subsequently joined by Austria, France and Sweden. Omya formally notified the operation to the Commission on 23 September 2005.

The Commission began its investigation and, in particular, established a data base containing details of all the shipments made by the main suppliers of ground calcium carbonate (GCC) and precipitated calcium carbonate (PCC) in the EEA between 2002 and 2004. The shipment database was used for the purposes of product and geographic market definition. It was also used in an econometric study to establish the extent of substitution between filler carbonates in defining customer choice in potential catchment areas. Thus the Commission's assessment of the transaction was based not on market shares, but on customer specific analysis of realistic sets of supply alternatives of each customer.

The Commission asked Omya, among other suppliers, for specific data. After Omya had failed to respond in time to a request made under Article 11(2) ECMR, the Commission adopted, on 9 December 2005, a decision under Article 11(3) ECMR relating to the required data and suspending the timetable. Omya subsequently replied in three stages, on 9 and 13 December 2005 and 3 January 2006. The Commission informed Omya by letter of 12 January 2006 that the data were complete and that the deadline for the adoption of a final decision would expire on 31 March 2006.

On 13 January 2006, the Commission services informed Omya that they intended to propose that the concentration be approved and that they had prepared a draft decision to this effect, which had been sent to the Advisory Committee. However, a number of Member States and competitors expressed concerns about the effects on competition. At the Advisory Committee meeting of 22 February 2006 some Member States also expressed doubts about the Commission's assessment and the econometric model applied.

Following further verification of the data, the Commission services informed Omya, by emails sent on 22 and 24 February and 2 March 2006, of inconsistencies in the data it had supplied. On 3 March 2006, the Commission services again expressed concerns by telephone about the inconsistencies in the data. The Commission raised the possibility of extending the deadline by 20 working days by mutual agreement (Article 10(3) ECMR). Omya rejected an extension of the timetable. The Commission services further indicated the possibility of adopting a decision under Article 11(3) ECMR to request that complete and correct data be submitted to the Commission. On 8 March 2006, the Commission adopted a decision to that effect stating that the information provided by Omya in response to the Commission's Article 11(3) decision of 9 December 2005 was incorrect, at least in part. The timetable was consequently suspended as of 8 December 2005.

Omya replied on 21 March 2006 with a revised version of the shipping data. On 30 March 2006 the Commission services confirmed that the data were complete and subsequently, on 10 May 2006, that they were correct. The Commission issued a statement of objections on 2 May 2006 and adopted a

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([2]) Case No COMP M.3796 Omya/Huber PCC.

([3]) Access by the notifying party to documents of the target company.

([4]) Council Regulation No 139/04 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L24 p.1).

final decision conditionally clearing the operation on 19 July 2006.

## The application

On 18 May 2006, Omya lodged an application for the annulment of the Article 11(3) decision of 8 March 2006 (the contested decision). It also requested an expedited procedure, which was refused by the Court.

Omya based its appeal on four pleas in law:

- Failure to comply with the conditions of Article 11(3) ECMR as well as the infringement of the principle of proportionality;
- Infringement of the principle of the need to act within a reasonable time;
- Misuse of powers; and
- Infringement of the principle of legitimate expectation.

Omya also asked the Court to adjudicate on the effects of an annulment of the contested decision. This was refused by the Court on the grounds of manifest inadmissibility, as the Court, when exercising judicial review, has no jurisdiction to issue declaratory judgments or directions.

### First plea: infringement of Article 11 ECMR

#### Preliminary point – information was necessary, correction was also necessary.

As a preliminary point, Omya claims that the Commission may only ask for information to be corrected if both the information and the correction itself are necessary. It is not sufficient that the information may potentially be useful. It further argues that correction is necessary only if the errors are material and, finally, that the principle of proportionality requires that the longer the suspension of the deadline, the more material the reasons giving rise to that suspension must be.

The Court disagrees with the views of the applicant and states that, in accordance with the established precedents, the Commission may use Article 11 only to the extent that it is not already in possession of all the information necessary to assess the compatibility of a concentration with the common market (5).

However, the necessity of the information must be assessed in relation to the view the Commission could reasonably have had at the time when the request is made. "*Accordingly, that assessment cannot be based on the actual need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made.*" (6)

In relation to the necessity to correct information already provided to the Commission, the Court held that it is justified if there is a risk that the identified errors could have a significant impact on the assessment of the proposed operation's compatibility with the common market. Furthermore, the Court also held that the Commission has discretion in view of the complex economic assessment it needs to undertake. In such cases the Court's review is confined to verifying whether the appropriate rules on procedure and on the statement of reasons have been followed, whether the facts have been accurately stated and whether there has been any manifest error of appreciation or misuse of powers. Thus, contrary to what the applicant submits, these criteria are not to be interpreted strictly.

The Court reiterates that the requirement for speed that characterises the ECMR must be reconciled with the objective of effective review, which the Commission must carry out with great care (7) and which requires that it obtains complete and correct information. Under the terms of the ECMR the above criteria cannot, according to the Court, be interpreted strictly.

The Court points out that in using the powers under Article 11(3) ECMR the Commission is bound by the principle of proportionality and cannot exceed the limits of what is appropriate and necessary (8), and, in particular, that the obligation to supply the required information to the Commission should not impose a disproportionate burden (9) on the undertaking. However, as the suspension of time limits depends on the date on which the necessary information is finally communicated by the undertaking concerned "*the Commission does not infringe the principle of proportionality by suspending the procedure until such information has been communicated to it.*" (10)

#### The information whose correction was requested was necessary.

Omya claimed that the corrections requested in the contested decision were not necessary to enable the Commission to adopt its final decision. The econometric study related to filler products and used only

(5) T-290/94 Kayserberg v Commission [1997] ECR II-2137, paragraph 145.

(6) Judgment paragraph 30.
(7) C-12/03 Tetra Laval v Commission [2005] ECR I-987, paragraph 40.
(8) T-177/04 EasyJet v Commission, paragraph 133.
(9) By analogy T-39/90 SEP v Commission, paragraph 51.
(10) Judgment paragraph 34.

the data from 2004, with the result that the requests to correct data relating to coating products and all data relating to 2002 and 2003 were irrelevant.

The Court stressed that the need for information must be assessed by reference to the view the Commission might reasonably have had at the time the contested decision was adopted and not at some later date. In this sense, as the data requested concerned markets that were or could have been affected (not disputed by the applicant), the information requested must be regarded as necessary. Furthermore, the Commission was correct to consider that, as the data for 2002 and 2003 were used to define relevant product and geographic markets, they were also necessary.

### The actual use of the corrected information

According to Omya, the Commission did not use the corrected information, thereby demonstrating that it was not necessary. The company claimed that the corrected information had been used, if at all, only after a Statement of Objections had been issued. It also noted that the Statement of Objections, which was being drafted at around the time of the contested decision, was concerned only with coating products, whereas at the time of the Article 11(3) decision of 9 December the Commission's investigation was focussed on filler products.

According to the Court, the actual use of the corrected information postdates the contested decision and therefore cannot be used to adduce the view the Commission could reasonably have had at the time of the adopted decision. It states that, while the subsequent use of information covered by an Article 11 request may indicate that it was necessary, the fact that it was not used does not mean that it was not necessary based upon the view the Commission could reasonably have had at the time it requested the data.

The Statement of Objections is not a decisive factor in the assessment of the Commission's position as regards the accuracy of information used in its examination of a notified concentration. It merely sets out the potential competition problems and is, by definition, more limited than the overall assessment carried out by the Commission.

Finally, the Court points out that the burden of proof is on the applicant to show that the information of which correction was requested was not necessary for the adoption of the decision on the concentration. It was not sufficient for Omya simply to claim that the Commission had not proved the need for the corrected information.

The Court therefore rejected this part of the first plea.

### First plea: second part, the January data were materially correct

Omya submitted two reports from the economic consultancy LECG which purported to show that the January data (submitted in January 2006) were materially correct by *inter alia* comparing the data from the data sets of January and March, and that therefore it was not necessary to ask for them to be corrected. The applicant took the view that statistical data are rarely, if ever, entirely correct. However, there are methods to remove incorrect data or to assess the effect of errors on the reliability of a given data set.

The Court examined the LECG reports in detail, noting first that any comparison of the two data sets (January and March) was irrelevant as this postdates the contested decision. The Court concluded that the reports did not prove that the errors identified in the January data set were not capable of having a significant influence on the econometric study and on the product and geographic market definitions, and therefore on the assessment of the concentration.

The Court also rejected Omya's argument based on the implausibility of the Commission's claim that the errors were only identified in the second half of February after the meeting of the Advisory Committee and not in January when the data were first received. It reiterates that parties to a concentration are required to supply correct and complete information. The merger control procedure, which is conducted within relatively strict time limits, is based on trust and the Commission cannot be expected to verify immediately and in detail the accuracy of all the information provided to it. The Commission had demonstrated that the discussions in the Advisory Committee on the reliability of the economic model and the data used had prompted the Commission to verify the data.

The Court therefore rejected this part of the first plea and the first plea in its entirety.

## Second plea: Need to act within a reasonable time

Omya submitted that the contested decision had not been adopted within a reasonable time period and that the Commission's real motive was to gain time to enable it to continue its investigation.

The Court held that it is a general principle of Community law to comply with reasonable time limits; non-compliance is not a reason for annulment unless there has been an infringement of the rights of defence of the undertaking concerned. However, in this case, the applicant merely submits a brief allegation to that effect without adducing any specific evidence to substantiate it.

The Court considers that the relevance of the period after which the contested decision was adopted falls to be considered under the third plea: misuse of powers. As a result of the above consideration, the Court rejects the second plea.

## Third plea: Misuse of powers

According to Omya, the contested decision was adopted not in order to pursue the objectives laid down in the ECMR, that is to assess the compatibility of the concentration with the common market, but in order to secure an extension of the timetable for the Commission to enable it to examine additional issues that had been raised by some Member States and competitors. To support its position, the applicant claims that, on 3 March 2006, the Commission had proposed a voluntary extension of 20 working days and, faced with reticence from Omya's lawyers, had threatened to adopt a decision under Article 11(3).

The Court states that a misuse of powers occurs when an administrative body has used its powers for a purpose other than that for which they were conferred upon it. Any finding of a misuse of powers must be based on objective, relevant and consistent factors. Furthermore, the Court continues "*Where more than one aim pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one that would not make the decision invalid for misuse of powers, since it does not nullify the main aim*" ([11]).

The Court considered various items of evidence, including the transcript of the telephone call of 3 March and internal Commission e-mails, before concluding that the evidence showed that the contested Article 11(3) decision was motivated by the Commission's desire to rerun the entire assessment of the concentration on the basis of correct information. Irrespective of the direction which its examination was taking, the Commission was required to examine the notified concentration in relation to both the coating products sector and the filler products sector. The Court also considered that the fact that the Commission had first offered a voluntary extension showed that it was concerned to limit the impact of the discovery of the errors on the assessment timetable. The evidence in the transcript did not support Omya's position that the reference to the possibility of adopting an Article 11(3) decision amounted to a threat designed to persuade Omya to accept a voluntary extension.

The evidence further showed that the Commission had found the errors in the data after the Advisory Committee meeting of 22 February. Internal e-mail exchanges of the Commission shows that the Commission had found serious inconsistencies in the data, that it would evaluate the effects of these errors on its assessment of the concentration and, finally, that it considered that the data had to be corrected. The Commission has, according to the Court, a duty to examine the effects of the notified concentration on all possible markets, including in the present case on both the coating and filler markets. In addition, the Commission had discovered towards the end of February 2006 that Huber had a coating product that was nearly ready for launching.

Moreover, Omya claimed that the Commission was aware that the January data were materially correct, as shown by its letter of 12 January 2006 confirming the completeness of the data and its intention, in early January, to clear the transaction. However, the Court first pointed out that the letter predated the discovery of the errors and was therefore irrelevant. Secondly, Omya had failed to demonstrate that the January data were materially correct.

Omya also relied on the fact that the Commission had not replied to its letter of 6 March 2006 in which it stated that it was faced with an unlawful choice between an extension by mutual agreement to extend the timetable and a decision suspending it. The Court considered this to be irrelevant, as the Commission was not required to reply to letters by parties challenging the need for corrections and that, in any event, silence did not prove that the Commission was pursuing improper purposes.

Omya further claimed that the previous Article 11(3) decisions had been adopted within a few days of receiving the relevant information, whereas in the case of the contested decision two months had elapsed before the decision was adopted. The Court held that the period of time between the discovery of the errors and the adoption of the decision, namely 14 days, was not excessive given that a number of inaccuracies were communicated immediately, the size of the data base and the fact that the contested decision was based on the incorrectness of the data supplied and not on its incompleteness.

The Court therefore rejects the third plea.

## Fourth Plea: Legitimate expectations

Omya claimed that the Commission's letter of 12 January 2006 confirming the completeness of the January data and the Commission's conduct in taking no action for two months until after the investigation had taken a new direction gave rise to legitimate expectation on its part.

In this context, the Court reiterates that the case law requires three conditions to be satisfied for a suc-

([11]) Judgment paragraph 99.

cessful claim to the entitlement to the protection of legitimate expectations. These conditions are:

- Precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities;
- Those assurances must be such as to give rise to legitimate expectations on the part of the person to whom they are addressed; and
- The assurances must comply with applicable rules ([12]).

In the present case, the Court found that the assurances were not precise, unconditional and consistent. First it noted that, even though the letter of 12 January 2006 contained assurances that the Commission regarded the data as materially correct, this assurance could not give rise to legitimate expectations on the part of the applicant that the Commission would not reverse its assessment. As the Commission is required to exercise the utmost care in its assessment of the effect of the concentration on all the markets concerned "*the Commission must retain the possibility to request the correction of materially incorrect information communicated to it by the parties which is necessary for its examination, the reasons which prompted it verify once more its accuracy are irrelevant in this respect* ([13])."

The Commission cannot be required to verify immediately all the information it receives. The parties are required to supply complete and correct information and are therefore best placed to ensure the validity of their information. Furthermore, Omya cannot plead legitimate expectations in order to avoid the consequences of failing to provide correct and complete information.

The Commission's previous practice of reacting within a few days to the receipt of information does not constitute a sufficiently precise assurance that the Commission will not respond to a future communication of information after a longer period of time. Furthermore, this claim is based on the premise that the Commission knew about the errors in the first half of January rather than in the second half of February. As the Court already found, there is no factual basis for this claim.

In relation to the alleged differences between the earlier Article 11(3) decisions and the contested decision, the Court accepted the Commission's position that the earlier decisions concerned the completeness of the information while the contested decision concerned the correctness of the information, and that therefore the earlier practice was not such as to create a legitimate expectation.

The Court therefore dismisses the fourth plea and it follows that the action was dismissed in its entirety.

## Conclusion

The judgment is important for the Commission's effective assessment of mergers and takeovers because it confirms that the Commission is fully entitled to insist on obtaining all information necessary to make an informed decision on whether a given concentration is liable to adversely affect competition within the Single Market and that it is likewise entitled to suspend an investigation until it receives the necessary information.

([12]) Case T-282/02 Cementbouw Handel & Industrie v Commission [2006] ECR-319 paragraph 77.

([13]) Judgment Paragraph 119.

# Recent Commission Merger Control Decisions in the Pharmaceutical Sector: Sanofi-Aventis/Zentiva and Teva/Barr

Sean Greenaway, Erika Jakab, Dag Johansson and Jasmin Kundan (1)

## 1. Introduction

On 5 September and 3 November 2008, respectively, the Commission received two notifications of proposed mergers involving generic drug companies. The first concerned the plan for Sanofi-Aventis, a French innovator drug company, to acquire control of Zentiva, a regional generic player in Central and Eastern Europe particularly strong in the Czech Republic, Slovakia and Romania ('SA/Z'). The second involved two generic companies, with Teva of Israel acquiring control of US-based Barr ('T/B').

These two cases raised a number of new issues, which are reflected in the corresponding decisions. Both transactions were cleared in phase one with commitments, but in reverse order of notification following an incompleteness decision on SA/Z: T/B was decided on 19 December 2008 and SA/Z on 4 February 2009.

## 2. Market Definitions

Both cases display a number of grey areas in the market definition compared with the reference framework of ATC3 classes used in earlier decisions, although the ATC3 approach was maintained as a starting point (2). In both cases, the Commission looked at narrower possible market definitions, which included analysis of potentially problematic markets at ATC4 and molecule level and, in some cases, between different galenic forms (3). These grey areas are the result, in particular, of overlaps in genericised markets, as in *Teva/Barr* both companies were generic companies, whilst in *Sanofi-Aventis/Zentiva* the target was a company active only in the field of generics.

In line with previous decisions, the Commission considered it appropriate to carry out analyses at levels other than ATC3 also, or at a mixture of levels, if the circumstances of the case show that the undertakings involved face sufficiently strong competitive constraints at another level and there are indications that the ATC3 class does not lead to a correct market definition.

In certain instances, in both decisions the Commission considered that the relevant market could be narrower than ATC3 and might be at ATC4 (4) or molecule level (5). In particular, the relevant market was found to be the molecule for the oncology products involved in T/B. This was based on the market investigation which had indicated that, on genericised markets, competition might primarily be between drugs based on the same molecule, especially in the case of drugs against serious illnesses purchased by hospitals. In those cases, in particular if hospitals procure pharmaceuticals by means of competitive tenders, they are limited to drugs based on the same molecule.

In other instances, however, the molecule was explicitly excluded as the relevant market when it could be established that drugs based on other molecules were indeed substitutable, both in SA/Z (for certain beta-blockers, osteoporosis drugs and antihistamines) and in T/B (*inter alia* for tranquilisers) (6). There are also examples where the relevant market was established, or at least considered, based on a subset of more than one, but not all, of the ATC4 classes belonging to a given ATC3 class (sedatives were to exclude barbiturates and antidepressants to exclude herbal products and products indicated exclusively for bipolar disorder) (7).

In a number of other instances the Commission left the exact product market definition open, while nonetheless taking into account the closeness of substitution due to overlaps at either molecule or ATC4 level, both as one criterion contributing to the conclusion that serious doubts existed and also, in cases where there was no such overlap, to exclude such doubts (8).

The Commission also systematically looked at the distinction between OTC and prescription mar-

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
(2) T/B paragraphs 10-11; SA/Z paragraphs 12-20.
(3) SA/Z paragraphs 121-130.
(4) SA/Z paragraph 102 (though this was finally left open) and paragraph 129 (also left open).
(5) T/B paragraphs 34, 42, 49, 84 et al. It should, however, be noted that this approach was already partly prefigured for oncology in COMP/M.3354 *Sanofi-Synthélabo/Aventis*; cf T/B paragraph 28.
(6) SA/Z paragraphs 109, 140-144, 174; T/B paragraphs 116, 158, 164.
(7) SA/Z paragraphs 164-165; T/B paragraphs 162-164.
(8) For the ATC4 level as indicative of closeness of substitution, see, *inter alia*, SA/Z paragraph 223 and *a contrario* paragraph 246; for the molecule level see SA/Z paragraphs 454, 461, 469 and *a contrario* SA/Z paragraph 396.

kets [9] and frequently relied on this distinction [10], but nonetheless left open the possibility that this distinction might not always lead to separate relevant markets [11]. In some instances the Commission also took into account specific characteristics of hospital use and demand [12] and, where relevant, analysed the hospital segment separately [13]. Finally, the SA/Z merger raised the possibility that, as is implicit in the definition of relevant product market [14], price may sometimes be a relevant indicator to consider for market definition purposes in pharmaceutical cases, particularly for drugs whose prices differ greatly. However, price by itself is not conclusive [15].

In SA/Z, two further points are noteworthy in connection with market definition.

The first relates to active pharmaceutical ingredients (APIs), where the Commission concluded that the ingredient (molecule) may not always be the relevant market if it can be substituted by other inputs for the same class of medicines, at least where it takes a limited overall share of comparable inputs used in this class [16]. This was the case for ethylmorphine, a substitutable input in antitussive preparations.

The second is the discussion of contract manufacturing, where the Commission concluded that the relevant geographic market was likely to be at least EEA-wide, but left open the extent to which specific technologies might create separate relevant product markets [17]. Whilst horizontal concerns in the upstream (manufacturing) market were easy to exclude, the Commission also looked at instances where the merging parties manufactured on behalf of a competitor in the same downstream market too, in order to assess whether the market share may be partly accretive, in that this competitor might be less independent of the parties than other competitors and thus unable to compete as aggressively. However, no instances were identified where this consideration altered the analysis.

## Filter system to focus the market investigation

In its merger decisions in the pharmaceutical sector, the Commission has previously relied on a filter system to focus the market investigation, given the frequently large number of product and geographic market combinations in which overlaps occur. The number of such markets was probably even larger in these two cases than on previous occasions.

Since *Novartis/Hexal* [18], the Commission has been using a classification with three groups. This classification was used in the T/B and SA/Z cases too, where Group 1 products are those with a combined market share of over 35 % post-merger and an increment of over 1 %, Group 2 products those with an increment in market share of less than 1 % and Group 3 products those with a combined market share of below 35 %. However, T/B in particular — in which molecule-level overlaps were a particular issue — explicitly required this filter to be passed at both ATC3 and molecule level [19]. This was likewise the case in SA/Z at ATC4 and molecule level [20]. The OTC/prescription distinction was also considered in both cases wherever relevant [21].

The purpose of this classification is to focus the investigation on those markets where issues are most likely to arise. It therefore does not preclude that issues may be identified in other areas. In SA/Z there are a number of instances where market definitions are discussed in areas which initially passed these filters, but based on uncertain market definitions. This is not necessarily limited to alternatives consisting of a single ATC4 class or of a single molecule. Where the Commission was able to exclude certain possible market definitions, as a result of which the filter criteria were then passed, serious doubts could be excluded in respect of such markets without discussing them individually in the decision [22].

In SA/Z the Group 2 classification proved to require particular scrutiny in instances where a low market share reflected Zentiva's very recent entry into a category previously dominated by patent drugs, including those of Sanofi-Aventis [23]. In such instances, it needed to be verified whether this might significantly underestimate the probable market share in the near future. Even if gains by Zentiva might be partly or wholly at the expense of Sanofi-Aventis in such cases — as a result of generic substitution — the potential loss of the Zentiva product following the merger could have had an effect on prices. In all the instances examined, however, such concerns could be excluded.

As in previous cases, the Commission based its assessment on sales value data from IMS. In addition

(9) T/B paragraphs 12-13; SA/Z paragraphs 21-24.
(10) SA/Z paragraphs 106, 148-150, 161.
(11) SA/Z paragraphs 51-54, 58.
(12) T/B paragraph 17; SA/Z paragraph 80.
(13) SA/Z paragraph 80, paragraphs 292-294, paragraphs 297-299.
(14) Section 6(1) of form CO in Annex 1 to the Implementing Regulation.
(15) SA/Z paragraphs 81, 95.
(16) SA/Z paragraphs 184-185.
(17) SA/Z paragraphs 187-192.
(18) Case No COMP/M.3751, Decision of 27 May 2005.
(19) T/B paragraph 21.
(20) SA/Z paragraphs 31, 176-177.
(21) SA/Z paragraphs 21-24; T/B paragraphs 12-13.
(22) SA/Z paragraphs 217-220, 491.
(23) This eventuality is also contemplated by paragraph 20(a) of the Horizontal Merger Guidelines.

to sales value, the Commission also considered, where the specifics of a market in SA/Z made it relevant, market shares based on 'days of treatment'. This allowed comparison of actual use of drugs with different molecules and/or prices ([24]).

## 3. Potential Competition

In SA/Z the Commission had to consider potential competition in two ways. In some instances, there was the issue of a number of planned generic entries by the target into markets where the acquiring innovator had molecules with ongoing or recently expired patent protection. Such competition would very probably materialise in the near term. Secondly, there was the more general issue of whether generic competition itself would be damaged by the transaction, resulting in the innovator's molecules becoming less exposed to such competition. The question was, in particular, whether Zentiva, as a former incumbent national pharmaceutical company in the Czech Republic and Slovakia, might be in a unique position to compete with generic products on its home markets.

Both these causes for concern could be excluded, the first based on a product-by-product analysis and the second based both on the results of an econometric study and on evidence gathered during a field visit ([25]).

## 4. Competition problems identified

In T/B the Commission finally identified serious doubts on seventeen markets in Central and Eastern Europe. All but two of these were molecule-level markets in the oncology field. The other two were vitamin markets in Poland and also defined at molecule level.

In SA/Z the Commission identified fifteen markets raising serious doubts in a range of different therapeutic areas, including gastroenterology, cardiovascular, pain and sedatives. With the exception of the exclusion of barbiturates from the sedative market, which made a material difference only in Bulgaria and Romania, all these markets raised serious doubts at ATC3 level, sometimes restricting the market definition to prescription drugs only.

## 5. Remedies

In both decisions the Commission took a close look at its past remedy practice on pharmaceutical mergers to see whether this approach was still appropriate and was fully applicable to the cases at hand.

In previous decisions the Commission has accepted, as remedies, divestment of medicines limited to the country where the competition concerns actually arise, together with their brand names, marketing authorisations and all relevant know-how, but in most cases without specific staff and manufacturing or distribution assets. The medicines can still be marketed by the parties in question in countries where no concerns are raised and, as a result, end up being marketed by different companies in different countries. This approach has been considered justified because (i) most assets are not earmarked for the businesses concerned, and qualified purchasers will often have their own assets and not require, or wish to acquire, additional assets from the seller and (ii) for many established medicines there are few cross-border spillovers at brand level.

This remained the basic approach in both cases ([26]), but the Commission carefully assessed whether additional safeguards were needed in order to preserve the viability of such divestitures. In this respect, the Commission went further than in many past cases, in particular on two points: the commitments include an option on sales staff for most of the products ([27]) and they provide for stricter purchaser criteria, in order to ensure that the purchaser(s) will be able to compete effectively even without any transfer of production facilities.

Given that no dedicated production capacity was to be transferred, there was a need for transitional supply agreements until the purchaser could move production to its own sites. In this context, an appropriate transitional period was needed in order to strike the right balance between the incentive for the purchaser to transfer production and quickly become independent of the divesting party and the need to re-register production and avoid interruption of supply. In the market investigation the Commission observed that manufacturing relationships often continued long after products had been divested in earlier merger control proceedings. In both cases the Commission considered a period of three years appropriate on the basis of the market investigations ([28]).

The Commission also included provisions to facilitate relocation of production, including reasonable cost-plus pricing for technical assistance and production, no minimum batch sizes during the transitional period and all necessary assistance from the seller to transfer production, including cooperation

([24]) SA/Z paragraph 82.
([25]) SA/Z, paragraphs 542-552.

([26]) SA/Z paragraph 556; T/B paragraph 207.
([27]) T/B paragraph 209 and Commitment 4(f); SA/Z paragraph 556 and Commitments 5(g) and (h).
([28]) S/A paragraph 557 and Commitment 5(f); T/B paragraph 209 and Commitment 4(e).

on the regulatory side [29]. In addition, in SA/Z the ability of the seller to relocate production was specifically included as one of the purchaser criteria in order to avoid a long-term supply dependence which would weaken the incentive to compete aggressively with the divested products [30].

SA/Z raised the related question of whether small batch sizes for individual countries, or use of multi-country labelling, might mean that a divested product for a small country would have insufficient scale and hence could only be produced at increased cost, thereby undermining the efficiencies to be restored by the remedy. Although the answer to this question was no for the products to be divested in that case, this will still have to be checked case by case in the future.

Finally, these cases raised the question of how best to group the products to be divested in order to divest a viable package without running the risk of certain products being purchased but then not aggressively marketed by the purchaser. In T/B, as most of the products to be divested were in the field of oncology and on a group of geographically close markets, it was in the interest of the viability of the package to require that these products should be transferred to a single purchaser, which must be active in the oncology field in the EEA [31]. This solution also took into account that specific expertise is required in the field of oncology in order to be able to compete effectively. Given that the divestitures in S/Z were not focused on any particular therapeutical area, the Commission's market test indicated that this matter should, in this case, not be pre-determined in the commitments since no single approach could be imposed *ex ante* without a risk that certain products might be purchased but then not aggressively marketed by the purchaser. However, in SA/Z too certain groupings were required in the interest of viability. These were (i) a right of first refusal for companies buying the same drug in another geographical area and (ii) that where several drugs were divested within a single (ATC3) market, they should all be sold to the same purchaser.

From the remedy point of view, SA/Z also raised the more general question of whether Zentiva, as a former 'incumbent', might be so specific that the competitive constraint which it exercised could not be reproduced by others, thereby rendering any divested product less effective as a competitive constraint. In principle, this might have been due to a number of factors, including consumer preferences, corporate brand, distribution advantages, economies of scale and scope, and regulatory preference. The Commission was able to exclude this hypothesis, however, based both on the evidence gathered during the site visit and on the market test of the remedies [32].

## 6. Conclusions

The pharmaceutical industry is currently going through a phase of significant consolidation, with a number of other deals reportedly being considered or already announced. Simultaneously, the issue of generic competition has been amply investigated in the Commission's antitrust sector inquiry and a number of concerns were raised in the interim report (see article about the sector inquiry in this newsletter). The *Teva/Barr* and *Sanofi-Aventis/Zentiva* merger decisions are further key developments in the Commission's thinking on competition in the pharmaceutical sector, in particular as regards generics, and will be important for future work in this sector. At the same time, the two cases also highlighted that the specifics of different pharmaceutical merger scenarios and product markets may have an impact on the focus and approach of the assessment.

(29) T/B paragraph 209 and, for example, Points 4-6 of Schedule I; SA/Z, for example Point 4 and Points 6-9 of Schedule I.

(30) SA/Z paragraph 557; Commitment 14(b).

(31) T/B, Commitment 4.

(32) SA/Z, paragraphs 542-552.

# The Joint Venture SonyBMG: final ruling by the European Court of Justice

Johannes Luebking and Peter Ohrlander ([1])

By judgment of 10 July 2008 in Case C-413/06 P, Bertelsmann and Sony Corporation of America v Impala (the "Judgment"), the Court of Justice (the "Court") annulled the ruling by the Court of First Instance (the "CFI"). The CFI judgment had quashed the Commission's decision adopted after an in-depth investigation to authorise the creation of a joint venture between Sony and BMG; (Case COMP/M.3333 – Sony/BMG) (the "Decision").

The Judgment clarifies important procedural as well as substantive principles guiding the Commission's merger control investigations. It caused a significant reversal of several aspects of the CFI judgment and upheld others. Key issues raised in the proceedings are the symmetry of the standard of proof between prohibition and clearance decisions, the Commission's margin of discretion to deviate from its preliminary findings in the SO, the probative value of the parties' reply to the SO, the standard of reasoning, and the applicable test for collective dominance.

## Background

On 19 July 2004, the Commission authorised the creation of the joint venture SonyBMG, combining the two recorded music divisions of Sony and Bertelsmann. The decision was reached after a second phase procedure, including a Statement of Objections ("SO"), a reply of the parties to the SO and an oral hearing. In the SO, the Commission had argued that the merger would reinforce a collective dominant position on the music recording market based on price coordination of the music majors (Universal, Sony-BMG, Warner and EMI). In the SO the Commission had relied, on the one hand, on qualitative elements, in particular the concentrated market structure and the relative homogeneity of the product in terms of format and, on the other hand, on the fact that list prices for records in the wholesale market – so-called published prices for dealers ("PPDs") – were relatively transparent, thereby facilitating coordination. It also undertook a quantitative analysis, investigating the monthly net average wholesale prices charged by the five major music companies for their 100 best-selling albums between 1998-2003 in the five major European territories: France, Germany, Italy, Spain and United Kingdom. In this respect, the Commission had found that those previous net average wholesale prices followed very similar trends.

The Commission reached a different conclusion from the one set out in the SO after hearing the parties, who presented voluminous pricing data in the reply to the SO. In particular, the Commission found in the Decision that average wholesale price trends were not a decisive indicator of past coordination and that there had been some deviations from this trend in the past. Furthermore, actual pricing was transparent only to a certain extent, due to the application of unpublished discounts, in particular campaign discounts to the PPDs, which could vary by album or by customer.

Impala, an association of independent music publishers which had expressed concern during the administrative procedure, appealed against this decision. The CFI followed a number of the arguments made by Impala. It found that the Commission had failed to give adequate reasons for its change of position, had failed adequately to investigate the parties' counter-arguments with other market participants, and had manifestly erred by placing undue reliance on campaign discounts. The CFI found that these discounts are relatively stable, monitored by the industry, and of limited importance to overall pricing levels, especially for the most commercially important hit records. It also criticised the pricing evidence that had been relied on to reject the risk of coordinated effects on statistical grounds and found that the music majors' pricing was governed by a finite number of "rules of thumb" regarding album types, retail strategies and customer types.

On appeal of the CFI judgment before the Court, the parties to the transaction – supported by the Commission – argued that the CFI had committed several errors of law as regards both procedural and substantive issues. The Court did not follow the Advocate General´s opinion ([2]) and found in favour of the appellants.

([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]) Opinion rendered by Advocate General J. Kokott on 13 December 2007.

## Main points of the judgment

### a. Procedural and substantive considerations of general nature

One essential feature of the case was that the Commission changed its position during the procedure, as it first sent an SO and afterwards authorised the concentration (without commitments). This circumstance gave rise to several procedural and substantive issues, namely (i) whether the standard of proof to clear a transaction should be the same as that applied for its prohibition; (ii) the Commission's margin of discretion to depart from its findings in the SO; (iii) the probative value of submissions by the notifying party in response to the SO: and (iv) the scope of the Commission's obligation to state reasons in the event of a change of position between the SO and the final decision.

#### Symmetry of standard of proof

The Court upheld the CFI's rejection of the applicant's argument that the standard of proof applicable when prohibiting a merger must be stricter than that applicable when clearing it. In this regard, it held that it cannot be inferred from the Merger regulation that there is a general presumption of compatibility with the Common Market. (3) It noted in that regard that there is nothing in Article 2(2) or (3) of the Regulation which states that it imposes different standards of proof in relation to decisions approving a concentration, on the one hand, and decisions prohibiting a concentration, on the other. (4)

Therefore, referring to its *Tetra Laval* judgment, the Court stated that "*the prospective analysis called for in relation to the control of concentrations, which consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a significant impediment to effective competition, makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them is the most likely outcome.*" (5)

This conclusion, it held, is not invalidated by the scheme set forth by Article 10(6) of the Merger Regulation, which provides that a concentration is deemed compatible if there is no decision within the statutory time limit. In fact, this is an exception to the principle that Commission is to rule expressly on the concentrations notified to it. (6) Similarly, the case law to the effect that a decision must be supported by a sufficiently cogent and consistent body of evidence does not have a bearing on the standard of proof but only on the quality of evidence in support of any findings. (7)

#### The Commission's discretion to depart from its findings in the SO

The Court confirmed the position that the SO is merely a preparatory document setting out preliminary findings from which the Commission can depart. The final decision has to contain all relevant circumstances and evidence put forward during the administrative procedure, but it is not necessary that the Commission, in the decision, explains the change of its position compared to that set out in the SO. (8)

The Court then found that, while the CFI had also drawn this conclusion conceptually speaking, in reality it applied a different test. In particular, the CFI attempted to make a distinction between "*findings of facts made previously*" and "*assessment*." The former elements should be established already at the stage of the SO whereas the latter could be modified, being a matter of interpretation of facts. Therefore, despite recognising the provisional nature of the SO, the CFI treated what it termed 'findings of fact made previously' as being more reliable and more conclusive than the findings set out in the contested decision. (9) The Court therefore found that the CFI had erred in not merely using the SO (both as regards facts and assessment) as a basis for verifying the correctness, completeness and reliability of the factual material which underpinned the Decision. For example, it treated a particular category of conclusions set out in the SO as established (in particular a finding of a substantial alignment of net average prices of the majors, which is a factor conducive to coordination). (10) By focusing on the discrepancies between the SO and the Decision it excluded the possibility that the Commission can come to a conclusion that is fundamentally different from its preliminary findings set out in the SO as a result of the explanations by the parties of how the market functions and which can shed an entirely new light on the facts.

#### Probative value of the notifying party's reply to SO

The Court went on to find that the CFI had erroneously required that the Commission apply particularly demanding requirements as regards the probative value of the evidence and arguments put forward by the notifying parties in reply to the SO. In fact, having regard to the right to defence, arguments put forward by the parties cannot be subject to more

(3) Judgment, at para. 48.
(4) Judgment, at para. 46.
(5) Ibid, at para. 47.
(6) Ibid, at para. 49.
(7) Ibid, at para. 50.
(8) Ibid, at para. 64-65.
(9) Ibid, at para. 71.
(10) Ibid, at paras. 73 to 76.

demanding standards as to their probative value and cogency than those presented by competitors, customers and other third parties. ([11]) Also, the CFI erred in requiring the Commission, in cases such as the present one, to carry out additional market investigations to verify the parties' allegations in response to the SO. ([12]) In this connection, the Court held inter alia that, considering the time constraints which arise by virtue of the procedural time-limits laid down by the Merger Regulation, the Commission cannot be required, in every individual case, to engage in extensive market testing following communication of the SO and the hearing (and therefore shortly before transmitting its draft decision to the Advisory Committee). ([13]) It noted in this respect that the accuracy of the information provided by the parties is safeguarded by the requirements that the notification or other submissions made by the parties must contain information that is correct and complete and submitted within the periods laid down, failing which the Commission may declare the Form CO incomplete and impose fines and periodic penalty payments. ([14])

As to the timing of providing information to the Commission in the course of an in-depth investigation, the Court also underlined that the right of defence implies that the notifying parties cannot, as a rule, be criticised for putting forward certain arguments, facts or evidence only in their arguments in reply to the SO. It is only through the SO that the parties to the concentration can obtain detailed indications of the Commission's concern in relation to the proposed concentration and as to the arguments and evidence on which it relies in that regard. Therefore, the CFI erred in criticising the notifying party for "waiting to the last minute" before submitting evidence to the Commission. ([15])

### Standard of reasoning

The Court also made some clarifications as to the standard of reasoning in the context of a second phase merger investigation. Referring to established case law, the Court first underlined that, in assessing whether the addressees of a measure or interested third parties are able to ascertain the reasons for the measure and for the Community Courts to exercise their power of review, the reasoning must be assessed in particular in the light of the content of the measure, the nature of the reasons given and the interest that the interested parties have in obtaining explanations. ([16]) In this regard, it acknowledged the particular procedural features of the merger review process, considering that the degree of precision of the statement of the reasons for a decision must be weighed against "practical realities and the time and technical facilities available for making the decision." ([17])

Having regard to these features, the Commission is not obliged to state reasons for the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or of secondary importance to the appraisal of the concentration. Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations. ([18])

In the present circumstances, the procedure was characterised in particular by the short space of time between the written reply to the SO and the hearing before the Commission, on the one hand, and the end of the formal proceedings on the other. Having regard to Impala's ability to challenge the Decision and the CFI's ability to review its merits, the Court therefore concluded that the CFI had committed an error in finding that the Commission had failed to comply with the duty to provide adequate reasoning when requiring a detailed description of each of the factors underpinning the Decision (such as the precise nature of campaign discounts and their application, their degree of opacity and their specific impact on price transparency). ([19])

## b. Issues relating specifically to the analysis of collective dominance

The Court started by setting out the principles which should guide the analysis concerning the possibility of a coordinated outcome in the context of an allegation of a creation or strengthening of a collective dominant position.

In addition to the general framework for analysing the likelihood of tacit collusion in terms of market concentration, transparency and product homogeneity, the Court pointed out that such collusion may arise as a result of a concentration where "*[i]n view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would*

([11]) Ibid, at para. 95.
([12]) Ibid, at para. 95.
([13]) Ibid, at para. 91.
([14]) Ibid, at para. 94.
([15]) Ibid, at para. 89.
([16]) Ibid, at para. 166.
([17]) Ibid, at para. 167.
([18]) Ibid at para. 167.
([19]) Ibid. at paras 179-181. The Court nevertheless acknowledged a certain "unfortunate" imbalance in the contested decision between the presentation of the elements tending to plead in favour of there being sufficient transparency and the presentation of the impact of the campaign discounts pleading against such transparency.

*entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices [...] and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.*" ([20])

The Court then held that such outcome is more likely to occur where the competitors can reach a common understanding of how the coordination should work and where the coordination is sustainable. The participants must thus be able to monitor whether the terms of coordination are adhered to, which requires *sufficient transparency* so that they can be aware sufficiently precisely and quickly about how the coordination is evolving. There must also be *credible deterrent mechanisms* available in case deviation is detected. Finally, the *reactions of customers and future competitors* must not be such as to *jeopardise* the expected results of the coordination. The Court underlined that these criteria are "not incompatible" with those set out by the *Airtours case*. ([21])

In applying these criteria, including that of transparency, it is necessary to avoid a mechanical approach involving the separate verification of each of those criteria taken in isolation, while taking no account of the overall economic mechanism of a *hypothetical tacit coordination*. The Court therefore concluded that the assessment of transparency cannot be undertaken in isolation and in an abstract manner. It must be carried out using the mechanism of a hypothetical tacit coordination as a basis. It is only if such a hypothesis is taken into account that it is possible to ascertain whether any elements of transparency that may exist on a market are capable of facilitating the reaching of a common understanding on the terms of coordination and/or of allowing the competitors concerned to monitor sufficiently whether the terms of such a common policy are being adhered to. ([22])

The Court then found that the CFI had failed to respect these principles when analysing such plausible coordination strategies as may exist in the circumstances. In particular, having regard to a postulated monitoring mechanism, it had not properly assessed whether the elements presented by the parties with regard to price discount variations could call into question the possibilities of adequate monitoring of mutual compliance. The key weakness identified was that the CFI, as regards the transparency of such discounts, referred to "*a set of rules governing the grants of discounts*" by the majors and "*known by a hypothetical industry professional*" without having clarified what those rules consisted of and what are the qualities of such industry professionals. Therefore, the CFI erred in law by misconstruing the principles which should have guided its analysis of the arguments raised before it concerning market transparency in the context of an allegation of a collective dominant position. ([23])

It should be noted also that, in a preliminary remark, the CFI had also held that the approach to analysing the *strengthening* of an existing collective dominance may be different from that of assessing the *creation* of collective dominant position. Whereas the latter requires a prognosis as regards the probable development of the market, the finding of the former requires a concrete analysis of the situation existing at the time of the adoption of the decision and may be based on a variety of factors. ([24]) While the CFI did not base its decision on these considerations (this issue had not been raised by the applicant), they might have served as a background for the further reasoning of the CFI.

The appellants indeed criticised the CFI for, even though stating that it was following the approach adopted in its judgment in *Airtours v Commission*, in practice, committing an error in inferring the existence of a sufficient degree of transparency from a number of factors which were not, however, relevant to a finding of an existing collective dominant position. In that context, the appellants had objected in particular to the fact that the CFI indicated that the conditions laid down in said judgment could "*in the appropriate circumstances, be established indirectly on the basis of what may be a very mixed series of indicia and items of evidence relating to the signs, manifestations and phenomena inherent in the presence of a collective dominant position*". ([25])

The Court rejected this claim, considering that objection cannot be taken to such a position as such, since it constitutes a general statement which reflects the CFI's liberty of assessment of different items of evidence. Similarly, the investigation of a pre-existing collective dominant position based on a series of elements normally considered to be indicative of the presence or the likelihood of tacit coordination between competitors cannot therefore be considered to be objectionable of itself. Nevertheless, the Court considered that the CFI had not carried out its investigation with care and, as noted above, had failed to adopt an approach based on the analysis of such plausible coordination strategies as may exist in the circumstances. ([26])

([20]) Ibid at para. 122. It underlined also that for such communality of interest to occur it is not necessary that the market participants enter into formal agreements or concerted practices within the meaning of Article 81 EC.

([21]) Ibid at paras 123-124.

([22]) Ibid, at para. 126.

([23]) Ibid, at paras 130-131.

([24]) CFI judgment at paras 249-253.

([25]) CFI judgment at para. 251.

([26]) Judgment at paras 128-129.

## Conclusion

The Court ruling provides clarification on a large number of issues not only as regards principles governing the assessment of collective dominance but also as regards procedural and substantive issues in merger review more generally.

### Considerations in relation to merger review generally

First, the judgment re-confirms the principle defended by the Commission that there is a "symmetric" test under the Merger Regulation and that the weight of the arguments and evidence required to authorise a merger must be as strong and convincing as those necessary for its prohibition.

Second, in a procedural respect, the Court judgment relieves the Commission from several far reaching requirements imposed by the CFI judgment more generally and in particular in case of reversal of preliminary findings in the SO.

- The Court has re-established the real purpose of the SO: As this is a preparatory document setting out preliminary findings, the Commission cannot already at the stage of SO be required to establish its findings using a (quasi)prerequisite standard of a final decision. The Commission can therefore depart from the legal and factual assessment in the SO without having to address and disprove each preliminary finding made in the SO. The drafting of a final decision is thus not a matter of a benchmarking exercise involving these two documents.

- Concerning the use of evidence, there is no general obligation *per se* for the Commission to verify the notifying parties´ arguments in response to an SO in a market investigation. On the contrary, it may within its own discretion, unless exceptional circumstances are at hand, rely only or predominantly on data supplied by the notifying parties in response to the SO without verifying it in the market investigation. In fact, the CFI position that market testing is required since the data of the parties on several occasions was considered unreliable and unconvincing has been categorically rejected by the Court. Although agreeing that information must be "*particularly reliable, objective, relevant and cogent*", the procedural constraints of a speedy process in conjunction with the safeguards provided by the Merger Regulation does not make a market testing of parties' information mandatory. such an outcome inevitable.

- The Court has taken a realistic approach in setting out the parameters for the Commission's obligation to state reasons in the context of a final decision departing from the preliminary findings in the SO. In fact, the degree of precision of the statement of the reasons for a decision must be weighed against *practical realities* and the *time and technical facilities available* for making the decision. Therefore, manifestly irrelevant or secondary facts do not need to be addressed. Nevertheless, an effort should be made to ensure that there is equilibrium in stating reasons for factors which speak for a finding of a significant impediment of effective competition and those which speak against it.

### Considerations with regard to the assessment of coordinated effects

As regards the analysis of coordinated effects, more specifically, although using a careful wording that the criteria set forth by the *Airtours case* are "*not incompatible*" with those set out in the present case, it appears that the Court has substantially endorsed the test previously set forth by the CFI in this case. The Court has also clearly manifested that a coordinated effects case must be built on a clear conceptual framework, starting from a *hypothetical tacit coordination*. On this basis, it must be asserted whether in view of the actual market characteristics and their alteration each member of the oligopoly in question considers it "*possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices*". The criteria relevant to such analysis must not be applied mechanically and the factors relevant to the analysis must not be assessed in isolation.

Finally, although stating that there must be a *sufficient degree of transparency* for effective monitoring to occur, the Court did not directly address the CFI's reasoning (in the context of the discussion of the impact of discounts) concerning what degree of market transparency is required for an effective coordinated outcome to occur. However, the general methodology set out by the Court gives broad discretion to the Commission in assessing the likelihood of a coordinated outcome. There is therefore sufficient ground to argue that the test for assessing market transparency has not been made stricter as a result of the Judgment.

## Aftermath

The above judgment did not bring the merger control issues in relation to the SonyBMG joint venture to an end. As a result of the CFI judgment, the Commission had to re-examine the joint venture ([27]), which it did and concluded with a deci-

([27]) The appeal before the CFI did not have suspending effect.

sion of 15 September 2007 clearing the transaction. However, this decision was also appealed by Impala. The CFI would therefore normally have had to deal with the first Commission decision, as the Court of Justice had referred the procedure back to the CFI, as well with the new appeal against the second Commission decision. However, the CFI could ultimately close both procedures as they had become devoid of purpose following the subsequent acquisition of the whole of SonyBMG by Sony, a transaction approved by the Commission on 15 September 2008. Impala had not appealed this transaction.

# State aid: main developments between 1 January and 30 April 2009

Marta Gutkowska, Sophie Leviel and Koen Van de Casteele (1)

The period under review continued to be dominated by the effects of the crisis in the banking sector with spill-over into the real economy. For more details, see the spring edition of the scoreboard. (2)

## 1. Policy developments

In addition to the specific banking communications it has already issued, the Commission adopted on 25 February 2009 a Communication on '**Impaired assets**'. (3) This Communication provides guidance to Member States on how to handle asset relief measures. Impaired assets are categories of assets on which banks are likely to incur losses (e.g. US sub-prime mortgage-backed securities).

The Commission considers that a common European approach is needed to deal with impaired assets, to make sure that foreseeable losses are disclosed and properly handled and to enable banks to use their capital to resume their normal function of lending to the economy instead of feeling the need to retain capital to cushion against potential losses.

The Commission's Communication outlines various methods to deal with impaired assets, notably through asset purchase (including bad bank scenarios) and asset insurance schemes. It explains the budgetary and regulatory implications of asset relief measures and gives details on how to apply State aid rules to such measures.

The aim of this document is to ensure that foreseeable losses are disclosed and that impaired assets are valued properly with the help of an independent expert using a commonly accepted valuation methodology. The aim of the valuation is to establish the real economic value of illiquid assets, which may be significantly above the fair (market) value. The Communication requires that measures designed to protect banks against illiquidity arising from impaired assets are accompanied by adequate burden sharing and remuneration.

In addition, the Commission adopted on 25 February 2009 a series of **amendments to the December 2009 Temporary Framework** (4), in particular to clarify the use of safe harbour premiums with regard to guarantees.

## 2. Cases adopted (5)

### 2.1. Decision taken under Article 87(2)(a) of the EC Treaty

#### UK Homeowners Mortgage Support Scheme (N 179/2009)

On 21 April 2009, the Commission approved the UK Homeowners Mortgage Support Scheme to help households affected by the financial downturn. The scheme aims to reduce the level of home repossessions likely to occur as a result of the current economic downturn.

The measure targets households affected by a temporary income shock and who are at risk of falling behind on their mortgage payments. This scheme enables eligible borrowers to reduce their monthly payments to a more manageable level for up to 2 years on their sole residence, giving them breathing space to restructure their mortgage and helping them to keep their family home.

The government will guarantee a maximum of 80 % of the total interest deferred to financial institutions that provide or hold these mortgages, for a period of up to two years. The guarantee is designed to enhance lender incentives in such a way as to make the policy of forbearance relatively more attractive compared to repossession policy. It seeks to alter lender behaviour by encouraging them to forebear in cases where they otherwise would not have been prepared to take the risk, particularly in a falling market.

The scheme is open to any regulated or unregulated institution offering or holding mortgages in the UK. This includes incorporated banks, UK subsidiaries of foreign institutions and building societies.

The government will only pay the guarantee in the event that the proceeds of repossession are not

(1) The views expressed are purely those of the writers. The content of this article does not necessarily reflect the official position of the European Commission.

(2) Spring 2009 update: COM(2009) 164, 08.04.2009, Special edition on State aid interventions in the current financial and economic crisis. See http://ec.europa.eu/competition/state_aid/studies_reports/2009_spring_en.pdf.

(3) Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector (OJ C 72, 26.03.2009, p. 1-22).

(4) Communication from the Commission — Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (consolidated version) (OJ C83, 07.04.2009 p. 1-15).

(5) This is only a small selection of the cases adopted in the period under review.

enough, once the principal of the mortgage has been repaid by the lender. The guarantee runs for four years commencing when the borrower exits the scheme in order to avoid any perverse incentive for lenders to repossess before the guarantee expires.

Although the primary beneficiaries of the scheme are individual borrowers, the scheme also provides aid to lenders. Therefore the scheme was approved under Article 87(2)(a) of the EC Treaty as it provides aid of a social character to individuals affected by a temporary income shock and at risk of losing their home, on a non-discriminatory basis. Although these individuals may not previously have been considered as disadvantaged, given that they had sufficient resources to fund the purchase of their own home, the worsening economic climate means that many of them have become unemployed and now face the prospect of losing their home.

## 2.2. Decision taken under Article 87(3)(a) of the EC Treaty

#### Aid to Sunfilm AG for the production of thin-film solar modules in Saxony, Germany (N 453/2008)

On 11 February 2009, the Commission endorsed €56 million of regional investment aid to Sunfilm for the production of thin-film solar modules in Saxony, Germany.

Sunfilm AG is a newly founded company which is setting up a plant to manufacture large solar modules based on thin-film technology. The project is to be carried out in Großröhrsdorf, Sachsen, Germany, an area with a below-average standard of living and high unemployment and so eligible for regional aid under Article 87(3)(a) of the EC Treaty.

The Commission's assessment of the compatibility of regional aid for large investment projects depends on the market shares of the beneficiary and on the production capacity created by the investment or the performance of the market. Provided that the thresholds set in the Regional Aid Guidelines are not exceeded, the effect of the aid on competition is deemed to be outweighed by its positive contribution to regional development.

The Commission found that Sunfilm's share of the worldwide solar module market would remain far below the 25 % threshold, both before and after the planned investment. As the solar module market has a double-digit growth rate, which is well above the average European Economic Area (EEA) growth rate, the Commission also concluded that the additional production capacity created by the project would raise no concerns.

Therefore, the Commission found the measure to be compatible with the requirements of the Regional Aid Guidelines 2007-2013, and in particular with the rules on large investment projects, as Sunfilm would not gain significant new market shares and the investment takes place in a fast growing market, the photovoltaic sector. The positive impact of the investment on regional development was considered to outweigh the potential distortion of competition.

## 2.3. Decisions taken under Article 87(3)(b) of the EC Treaty

### 2.3.1. Banking cases

### (a) Aid Schemes

#### UK Asset-Backed Securities Guarantee Scheme (N 232/2009)

On 17 April 2009, the UK notified its intention to set up another scheme to alleviate the funding constraints that banks are currently facing. By guaranteeing AAA rated residential mortgage-backed securities ('RMBS'), the UK Government will encourage the return of confidence in this important market for the UK economy. Unlike other Member States, the UK real estate market is heavily reliant on the securitisation market, which has a significant influence on the availability of mortgages. The scheme will enable the issuer to sell RMBS and therefore provide the necessary liquidity to originating banks or building societies on more favourable terms than would have been possible under the conditions prevailing in the financial markets.

The measure is designed to increase the funds available to banks to promote lending to homebuyers and homeowners. Under the scheme, investors will benefit from the guarantee provided to securities issued by special purpose vehicles collateralised with residential mortgages. Guarantees allocated under the scheme will be limited to a total of £50 billion.

The Commission concluded that the scheme complies with the conditions laid down in its Guidance Communication on State aid to the financial sector during the crisis. In particular, the Commission found that the scheme is well targeted to remedy a serious disturbance in the UK economy, proportionate to the challenge faced and designed to minimise negative spill-over effects on competitors, other sectors and other Member States. The scheme is non-discriminatory, limited in time (six months) and scope and with a market-orientated remuneration.

### (b) Ad-hoc aid

#### ING Illiquid assets (N 138/2009)

On 31 March 2009, the Commission approved for 6 months the illiquid asset back-up facility provided by the Dutch State to the financial group ING, while at the same time initiating the formal investigation procedure laid down in Article 88(2) of the EC Treaty to verify the conditions of the Impaired Assets Communication regarding valuation (including the valuation methodology) and burden sharing of the measure.

In January 2009, the Dutch State and ING agreed on a illiquid assets back-up facility for a portfolio of US$39 billion par value worth of securitised US mortgage loans, mostly consisting of Alt-A mortgages. Alt-A loans are the category of US loans between prime and sub-prime, often granted on the basis of a simple declaration of income by the borrower with no other proof required.

Under the transaction, the Dutch State will buy the right to receive cash flow on 80 % of this US$39 billion portfolio by paying ING about US$28 billion. That amount will be paid by the Dutch State in accordance with a pre-agreed payment schedule.

Following an initial assessment of the complex measure for ING, the Commission decided for reasons of financial stability, similar to those governing the assessment of rescue aid, not to raise objections for a period of six months. The Commission found that the measure complies with the conditions on eligibility of assets, asset management arrangements, transparency and disclosure and the guarantee fee stipulated in the Impaired Assets Communication. However, some conditions such as valuation and burden sharing required further in-depth analysis, which is why the Commission opened an in-depth investigation.

ING had already benefited from an emergency recapitalisation of €10 billion, which the Commission approved in November 2008 (N 528/2008).

#### Recapitalisation and change of ownership of Anglo Irish Bank (N 9/2009 and N 61/2009)

On 19 December 2008, the Irish authorities informed the Commission of their intention to recapitalise Anglo Irish Bank with €1.5 billion. On 8 January 2009, the Irish authorities formally notified this measure.

Due to the current financial crisis, even banks that meet the regulatory solvency ratios may experience distress and be required to reinforce their capital. In addition to difficulties caused by the global financial crisis, recent developments with regard to the Anglo Irish Bank's corporate governance increased the need to reassure the financial markets of the bank's stability. Against this background, the Irish authorities decided to inject €1.5 billion into Anglo Irish Bank.

The shares to be issued will qualify as core tier 1 capital and will produce a dividend of 10 % payable annually, at the discretion of the bank and in priority to dividends on ordinary shares. Dividends on the shares are payable in cash, or (if the bank is unable to pay in cash) in ordinary shares on the basis of the average daily closing price over the previous 30 trading days. The shares will carry 75 % of the voting rights in Anglo Irish Bank. The bank can repurchase the shares at par for a maximum of five years. After that period, shares can be repurchased at 125 % of par. No dividends on ordinary shares are allowed when no dividend on the shares to be issued is paid to the State.

The Commission concluded that the measure complies with the conditions laid down in its Banking and Recapitalisation Communications and approved it on 14 January 2009.

However, the Irish Government eventually decided to take Anglo Irish Bank into public ownership on 21 January 2009. For purposes of legal certainty, the Irish authorities notified the change of ownership of Anglo Irish Bank to the European Commission.

The European Commission considered that the purchase of existing shares and the takeover of assets, when these are not accompanied by a capital injection, assumption of liabilities or other State measures, do not favour the financial institution, inasmuch as they amount to a mere change of ownership. Therefore, they do not constitute State aid. That is also in line with the principle of neutrality as regards property ownership (Article 295 of the EC Treaty).

### 2.3.2. Real economy cases

#### Compatible limited amount of aid (N 7/2009, N 13/2009, N 43/2009, N 47/a/2009, N 77/2009, N 99/2009, N 124/2009, N 156/2009, N 186/2009, N 188/2009, N 222/2009)

The Commission authorised 10 schemes providing for aid up to € 500 000 under the Temporary Framework in Portugal, France, UK, Hungary, Luxembourg, Austria, Latvia, the Netherlands, Ireland and Slovakia. The measures enable aid of up to € 500 000 to be granted in 2009 and 2010 to businesses in difficulty as a consequence of the current economy crisis or facing funding problems due to the credit crunch. The schemes meet the conditions set under the Commission's Temporary Framework. The schemes apply only to companies which were not in difficulty on 1 July 2008 — that is before the start of the credit squeeze. For companies whose difficulties date from before the credit squeeze and which, therefore, must address structural problems, the Rescue and Restructuring Guidelines [6] provide the best tool for ensuring long-term viability.

#### Loan guarantees (N 71/2009, N 23/2009, N 27/2009, N 128/2009, N 139/2009, N 117/2009, N 114/2009 and N 203/2009)

The Commission authorised 8 schemes providing for aid in the form of loan guarantees under the Temporary Framework in the UK, France, Germany, Luxembourg, Latvia, Belgium and Hungary. The schemes allow authorities at federal, regional and local level to grant aid in the form of subsidised guarantees for investment and working capital loans concluded by 31 December 2010 (or 2009 for the Latvian scheme). The loan guarantee measures allow companies to receive State guarantees, at subsidised rates, to raise investment or working capital.

Worth mentioning is the Belgian scheme, which is not a national but a regional scheme. In view of the importance of Flanders for the overall Belgian economy, the Commission considered that the scheme could be approved under Article 87(3)(b) of the EC Treaty even though it was proposed at regional level. The Commission took into account that Flanders represents a very substantial part of Belgium's GDP (57.5 %) and population (57.8 %). Compared to Belgium averages, the share of industry in Flanders is rather high. Its industry is strongly focused on exports, and services are closely linked to port activities (mainly in Flanders) and thus on trends in world trade. About 80.7 % of Belgian exports are produced in Flanders. Export activities and international trade have been strongly affected by the crisis in the real economy. The Belgian authorities submitted extensive material to substantiate the above-mentioned facts, in particular to prove the interdependency between the economy of the Flemish region and the entire Belgian economy. They also demonstrated that the scheme was necessary, proportional and appropriate to remedy a serious disturbance in the Belgian economy as a whole. According to the Commission, a measure of this scale can be reasonably expected to produce effects across the entire Belgian economy.

#### Loans with subsidised interest rate (N 15/2009, N 38/2009 and N 78/2009)

In February the Commission authorised three schemes providing for aid to firms in the form of reduced-interest rates under the Temporary Framework in France, Germany and Hungary. The schemes allow government, local authorities and some public bodies to grant aid in the form of reduced-interest rates on loans of any duration concluded by 31 December 2010. The low rates will be available for loans finalised no later than 31 December 2010, but only on interest payments up to 31 December 2012. After that date firms will have to pay market rates. The schemes apply only to companies which were not in difficulty on 1 July 2008.

#### Aid for the production of green products (N 11/2009, N 72/2009 and N 140/2009)

The Commission authorised schemes offering reduced-interest loans to businesses investing in the production of green products under the Temporary Framework in France, the UK and Spain. In the UK and Spain, the schemes focus mainly on the car and car component industry, whereas the French scheme is not restricted to car sector. The schemes allow state, regional or local authorities to grant reduced-interest loans until 31 December 2010 (until December 2009 under the Spanish scheme) with a maximum term of two years. The schemes will support businesses faced with financing problems due to the credit squeeze, while at the same time making it easier for them to invest in products with an environmental benefit. The investment must relate to products that meet or surpass future Community environmental protection standards. The reduction in the interest rate may not exceed 50 % for small and medium-sized enterprises (SMEs) and 25 % for large businesses, in relation to the reference rate, and must take into account the enterprise's risk profile when the loan is granted. The schemes apply only to businesses that were not in difficulty on 1 July 2008 or that were not in difficulty on that date but have since fallen into difficulty due to the economic crisis. Lastly, monitoring reports to be produced by the authorities must include additional information on the sectors of activity covered and the environmental benefits of the measure.

#### Risk-Capital Schemes (N 39/2009, N 119/2009 and N 47/d/2009)

The Commission authorised temporary changes to certain existing risk-capital schemes in Germany, France and Austria to the Commission's Temporary Framework.

The aim of the schemes concerned is to facilitate access to risk capital for small and medium-size enterprises (SMEs) in their early stages of development. The maximum investment instalments were temporarily increased from € 1.5 million to € 2.5 million over each 12-month period. The minimum private participation for risk capital investments was temporarily reduced from 50 % to 30 %. These amendments will apply until the end of 2010.

[6] Community guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, pages 2-17. These guidelines have been extended until 9 October 2012, see OJ C 156, 9.7.2009, p. 3.

**Luxembourg's export-credit insurance scheme (N 50/2009)**

The Commission authorised on 20 April 2009 under the Temporary Framework a measure adopted by Luxembourg to limit the adverse impact of the current financial crisis on export firms. Under the notified scheme, the export-credit agency concerned, Ducroire Luxembourg, will provide export-credit insurance to complement insurance policies taken out with private insurance companies. Ducroire can provide credit up to a higher limit where evidence exists that private insurers have excessively reduced or even refused credit. The limits authorised by Ducroire will be based on an analysis of the underlying risk conducted by the private insurer and a further analysis carried out by Ducroire itself. The budget earmarked for this measure amounts to € 25 million.

The Luxembourg authorities provided sufficient proof that the necessary cover is unavailable on the private insurance market. The premiums required by Ducroire meet the condition of being aligned to those of the private market, as stipulated by the safeguard clause in the Commission's Communication on short-term export-credit insurance. The premiums were set at a level that encompasses an additional margin, thereby providing an incentive for exporters to have recourse to private insurers again once normal market conditions are restored. The measure's impact in terms of squeezing out private insurers is thus limited, which the Commission described as vital in its analysis. The measure will apply until 31 December 2010.

## 2.4. Decisions taken under Article 87(3)(c) of the EC Treaty

**€800 million public funding for Spanish textile sector (C 52/2007)**

On 24 March 2009, the Commission authorised €800 million of public funding for a comprehensive support programme aimed at the Spanish textile and clothing sector. The programme comprises measures to promote technical research, reindustrialise areas affected by structural changes, loans to modernise SMEs, preferential loans for innovation, collective participation in fairs and consultancy regarding the export potential, specific training and to maintain aged workers in their jobs.

The Spanish textile programme was in force from June 2006 until 31 December 2008 and was not notified to the Commission. An in-depth investigation was opened on 13 November 2007, as the Commission had doubts regarding the possible accumulation of different measures offered by the programme.

The Spanish authorities provided evidence that the *de minimis* threshold of a maximum of € 200 000 aid over three years per company had been respected on an individual and accumulated basis. The aid intensity of the training measure was well below the thresholds set by analogy by the EU Training Aid Regulation and General Block Exemption Regulation. The measure to maintain the employment of aged workers applied mainly to micro-enterprises and its impact on the market was very limited, in line with Commission Decision of 10 December 2008 authorising aid aimed at furthering the training and employment of aged workers in the Spanish footwear, tanning and leather sector (case N 244/2008).

The Commission therefore found the measures to be in line with State aid rules, either under approved aid schemes, the exemption for small amounts of aid or Article 87(3)(c). It also concluded that the positive effects of the measure would outweigh any potential distortion of competition it might create.

**UK measures in favour of Royal Mail (C 7/2007)**

On 8 April 2009, the Commission decided that four State aid measures granted in favour of the UK postal incumbent Royal Mail between 2001 and 2007 were in line with EU State aid rules. Since none of the measures had been notified to the Commission, the State aid investigation was opened in 2007 following complaints.

The Commission's investigation found that three loan measures granted in 2001, 2003 (extended in 2007) and 2007, totalling £1.7 billion (€1.9 billion at today's values) did not constitute State aid because they were granted on commercial terms. The Commission could not reach the same conclusion concerning a fourth measure, under which the UK Government released £850 million from the reserves of Royal Mail which were under specific State control, extending the period over which it could address its large pensions deficit. However, the historic pensions' liabilities of Royal Mail arose solely as a result of employing staff on civil service terms, and over a period of time when Royal Mail enjoyed a monopoly over ordinary letter mail. The Commission also noted that the form of the measure left the pension liabilities of Royal Mail intact and only allowed the company to address the deficit over a longer period, rather than lifting those liabilities entirely. The Commission indicated that, in general, a measure requiring a beneficiary to address its accrued liabilities in full is likely to be less distortive than a measure which relieves them entirely. Thus, the Commission concluded that any aid contained in the pension measure was compatible with the Single Market under Article 87(3)(c) of the EC Treaty.

## 2.5. Decisions taken under Article 88 of the EC Treaty (recovery)

**BT Group plc (C 55/2007)**

On 11 February 2009, the Commission found aid granted to BT to be partially unlawful and ordered recovery.

The Commission concluded that a UK Crown guarantee covering the pension liabilities of British Telecom plc on the EU telecommunications markets was partially unlawful under State aid rules.

In November 2007, following a complaint, the Commission initiated a formal investigation on the Crown guarantee for BT's pension liabilities, granted by the UK Government in 1984, at the time of BT's privatisation. The aim of the measure was to guarantee the pension rights of BT employees working at the time of privatisation. The guarantee can only be called upon if BT goes bankrupt and if there are not enough assets in its pension fund to finance the covered employees' pension rights. The Commission's investigation found that the guarantee benefits directly and exclusively the employees involved and not BT itself, and does therefore not constitute State aid to BT.

However, subsequent UK legislation imposed obligations on pension funds, from which funds with a Crown guarantee were exempted. In particular, as concerns pre-privatisation employees, BT's pension fund is exempt from the payment of a levy to the Pension Protection Fund, a safety net created in 2004 to guarantee pensions when sponsor companies go bankrupt and financed by their contributions. A levy is however paid for BT post-privatisation employees who are not covered by the Crown guarantee.

In that respect, the Commission concluded that exemption from the application of the payment confers a financial advantage to BT and constitutes State aid. Such aid cannot be justified under EU rules because it merely dispenses BT from charges that its competitors have to pay. Therefore, the UK must recover the aid by ensuring that a full levy, corresponding to what would have been due since 2005 by BT without the Crown guarantee, is paid to the Pension Protection Fund plus interest. BT has already blocked an amount of GBP 16.6 million in an escrow account corresponding to the levies payable until 2008, which should accrue to the Pension Protection Fund following the Commission decision.

# The WestLB restructuring decision

Marcel Magnus, Sabine Crome, Anna Samsel, Martin Löffler and Max Lienemeyer [1]

## Introduction

On 12 May 2009, the European Commission took a final decision [2] on State aid given to German bank WestLB AG, by approving a €5 billion risk shield. This conditional decision followed an in-depth investigation [3] opened in October 2008, and was the first step on the way to a final solution of a long story which started many years ago. WestLB is one of Germany's seven, regionally organized public Landesbanks, which not only act as a central giro institution for local saving banks (Sparkassen), but also offer retail, wholesale, special project finance and corporate banking services. Investment banking services, in particular, have over time gained more importance in the balance sheet structure of Landesbanks.

Landesbanks have long been the subject of careful investigation by the Commission, as they have benefited in the past from two complementary forms of unlimited State guarantee, namely the so-called *Gewährträgerhaftung* and *Anstaltslast* [4]. Due to these guarantees, Landesbanks were better rated by credit rating agencies, giving them a competitive advantage through lower refinancing costs. In 2001, the Commission reached a number of understandings with Germany [5] regarding the abolition of *Gewährträgerhaftung* and *Anstaltslast* which, after a transitional period, became effective as of 18 July 2005. Thereafter, public mission activities were transferred to separate, newly created banks [6]. Since then, Landesbanks have actively expanded their business activities, turning to new groups of customers in their quest for additional sources of revenue [7].

The expansion of business activities was one of the reasons why Landesbanks strove towards an increase of their equity capital base. From August 2002 until October 2005, in particular, the owners of WestLB agreed to five re-capitalisation measures, amounting to approximately €6.2 billion. On 18 July 2007 the Commission took a decision clearing the five re-capitalisation measures as being in conformity with the market economy investor principle [8].

## Rescue aid for WestLB

The expansion of WestLB's business activities was accompanied by a noticeable increase in more risky business activities, especially the trading of securities for the bank's own account (so-called 'proprietary trading') and investment management activities that comprised structured portfolios. In short, these activities led to a higher risk exposure.

In February 2008, before the collapse of *Bear Stearns* and of *Lehman*, the bank announced [9] that its owners had reached an agreement to provide a risk shield for risks in the bank's structured portfolios.

(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 12 May 2009 in state aid case No C 43/2008 (ex N 390/2008) implemented by Germany for the restructuring of WestLB AG, OJ L 345, 23.12.2009, p. 1

(3) OJ C 322, 17.12.2008, p. 16.

(4) Gewährträgerhaftung (guarantee obligation) is a public law development of the conventional commercial guarantee, under which the bank's guarantors (usually, but not necessarily, the owners) have an unlimited, joint and several liability to the creditors of the bank to meet any obligations that the bank cannot meet out of its own assets. Anstaltslast (institutional obligation) dictates that the owners of a public law institution (in this case a Landesbank or Sparkasse) have a legal obligation to keep that institution financially viable, i.e. in a position where it can at all times pay its debts as they fall due. Under Anstaltslast, the owners of the bank have no direct obligation to the creditors of the bank. Anstaltslast ensures the solvency of the institution.

(5) Following the first of the Understandings dated 17 July 2001, between a transitional period between 19 July 2001 and 18 July 2005 new liabilities could still be covered by Gewährträgerhaftung - so-called "Grandfathering" -, provided their maturity did not go beyond 31 December 2015. See for details case State aid E 10/2000, OJ C 146, 19.6.2002, p. 6 and C 150, 22.6.2002, p.7. See also the press release IP/02/343.

(6) WestLB AG, for example, emerged from the former Westdeutsche Landesbank Girozentrale on 1 September 2002 after the public mission activities of the latter were integrated into Landesbank NRW, a company under public law, which was established on 1 August 2002.

(7) See, for instance, Klaus Berge, Ralf Berger, Hermann Locarek-Junge, *Deutsche Landesbanken: Status Quo und Strategien vor dem Hintergrund des Wegfalls der Staatsgarantien*, Vierteljahrshefte zur Wirtschaftsforschung, vol. 75, no. 4, DIW Berlin, 2006, p. 73–92.

(8) OJ C 4, 9.1.2008, p. 1.

(9) See, for instance, WestLB's press release dated 21 January 2008 *Eigentümer stärken Kapitalbasis der WestLB AG*

The intended effects of this measure were to protect against the volatility of the markets. As a result of the subprime crisis, there was a significant reduction in its market value, which should have been reflected in the balance sheet. Securities with a nominal volume of roughly € 23 billion were therefore taken off WestLB's balance sheet and transferred to a special purpose vehicle. In turn, the financing of the special purpose vehicle was secured by a risk shield from the public owners of up to € 5 billion, to cover any payment defaults. Under the terms of the arrangements between the owners, the majority stakeholder, i.e. the federal State of North Rhine-Westphalia, would have to bear a disproportionately large part of the financial burden of the measure, while the other public owners – mainly savings banks associations – would only participate to a lesser extent.

On 27 March 2008, the Germany authorities officially notified the €5 billion risk shield to the Commission, pointing out that, from their perspective, the measure was deemed to be in line with the market economy investor principle, since the measure would protect the investment previously made.

Considering WestLB's overall financial situation at that time, the Commission concluded that the bank was in difficulties. On 30 April 2008 ([10]), the Commission approved the risk shield in favour of WestLB, concluding that the announcement of the risk shield committed state resources because it signified an undertaking by the owners to prevent a downgrading of the bank by the rating agencies, which would have posed a serious threat to the bank's refinancing capacity. This gave the bank an advantage, as it could not really be justified from the perspective of a hypothetical market economy investor. Hence, the risk shield constituted State aid. However, it was found to fulfil the conditions for rescue aid, because the measure was limited in time and was reversible. The latter was accepted despite the fact that the risk shield was covering the asset side, because it was the least structural measure possible that met the requirement of prudent management. Furthermore, the approval was conditional on the submission of a restructuring plan outlining how the bank could restore its long-term viability within a reasonable timescale. In line with this requirement, WestLB submitted a restructuring plan on 8 August 2008.

## WestLB's restructuring plan

The restructuring plan that was initially submitted included a number of action points aiming at cost cutting, downsizing and refocusing of WestLB's business model. One of the objectives was to strengthen the less volatile business with savings banks, private-banking customers, and midsize corporates. The plan aimed at a 36% reduction of the risk weighted assets (RWA), and a 27% reduction of total assets. There were plans for a withdrawal from the investment management business, as well as the sale of shareholdings and the closure of several locations. The plan furthermore included a commitment by the bank's owners to change the ownership structure by 31 December 2008.

In its opening decision on 1 October 2008 ([11]), the Commission raised doubts about whether the measures were sufficient to mitigate the adverse effects of the aid on competition, and whether the restructuring plan would be sufficient to achieve the restoration of the bank's long-term viability. Thus, in a series of meetings, the owners of WestLB and the Commission reached an agreement that an amended restructuring plan would need to provide for additional measures both to restore long-term viability and to limit undue distortions of competition.

## Additional measures restoring long-term viability

When the merits of the initial restructuring plan were assessed, one of the main concerns was the issue of whether WestLB would sufficiently address the root causes of its problems and significantly adapt its previous business model, which had proved to be non-viable. The Commission's view was shared by a number of experts ([12]) who recommended more structural changes.

During the discussions it appeared that, due to a conflict of interests between the bank's owners, significant changes to the business model could only be expected if there was a concomitant change of the ownership structure, i.e. after a sale of WestLB to a new owner. The change of the ownership structure commitment was therefore a central element of the restructuring plan. The owners initially undertook to put the first steps in place by the end of 2008 subsequently, the deadline for an ownership change had to be extended. WestLB preferred to merge with another German Landesbank based in Hesse, namely Helaba. In the end, WestLB did not succeed in finding a potential new owner or merger partner.

In order to avoid such difficulties with the ownership change in the future, the amended restructuring plan had to include more intermediate steps which would facilitate the future sale of WestLB. It was therefore agreed that the organisational allocation of

([10]) Press release IP/08/665.

([11]) OJ C 322, 17.12.2008, p. 16.

([12]) See, for instance, S&P report "WestLB AG?" dated 14 August 2008; S&P report "Ratings affirmed on four Landesbanks due to owner support, but how long can it last?" dated 5 August 2008.

core business activities should be incorporated into the amended restructuring plan, so as to separate well-defined business areas ('unbundling'). WestLB defined three core business areas: so-called 'transaction banking' (i.e. the treatment of payments), loan financing for medium-sized companies, and corporate banking activities (e.g. financing of large projects). The organisational unbundling enables the current owners to offer WestLB in form of a public tender in which interested parties may bid not only for the whole bank but also for just one of the core business areas. This splitting of the bank increases the number of potential buyers, making the achievement of a commitment to ownership change more likely.

## Additional measures limiting distortive effects

Following the in-depth assessment of the initial restructuring plan, the Commission called for additional measures to mitigate as far as possible any adverse effects of the aid on competition. This condition usually involves limiting or reducing the company's presence on the relevant product markets by selling production capacity or subsidiaries, or by reducing activities. In line with decisions taken in comparable cases [13], WestLB was therefore asked to reduce its balance sheet by more than 27% (balance sheet reduction proposed in the initial restructuring plan of 8 August 2008). Likewise, the amount of RWA had to be reduced by more than 36% (restructuring plan of 8 August 2008).

The whole package of measures offered by the bank in its amended restructuring plan was submitted in May 2009. In addition to the reduction of the balance sheet and the RWAs, it entailed restrictions to the growth of new business, further downsizing of the network of branches inside and outside Germany, a more comprehensive list of subsidiaries available for sale, and a withdrawal from proprietary trading. In sum, these measures were considered to be suitable to limit the distortive effects of the State aid received.

## Conditional decision

The amended restructuring plan, including the sale of the bank, has to be fully implemented, in line with a three-year timetable. A binding commitment by WestLB's current owners to support the amended restructuring plan – subject to the approval given by the general meeting of its shareholders – was not forthcoming at the time the decision was taken. The approval of the risk shield was therefore made conditional upon the adoption and implementation of the amended restructuring plan.

## Conclusion

The handling of the WestLB story by the Commission is interesting for several reasons. First, the case sets a clear precedent by the application of the private investor test (2007 decision) and its limits (2008 decision). Second, in the rescue aid decision, the Commission indicated how much of a structural measure is allowed in a banking rescue case (before the crisis). Third, the restructuring decision illustrates that a long-lasting conflict of interests between the bank's owners can justify an ownership change. In the meantime it has emerged that additional aid [14] is needed in order to implement the restructuring decision and transfer the impaired and non-core assets into a "bad bank". The setting-up of a "bad bank" is necessary in order to ensure that the viable parts of the bank will be sold.

Recently, other German Landesbanks also got into financial difficulties and have received State aid that qualifies as rescue aid. It is debatable whether the conditions set by the Commission in the WestLB case, and reflected in the details of the amended restructuring plan, may serve as a blueprint for these Landesbanks too. In any case, the decision does not prevent the core bank from being sold to or merged with other Landesbanks.

(13) Commission Decision in case C 327/2004 of 18 February 2004, *Bankgesellschaft Berlin*, OJ 2005 L 116, p.1, Commission decision in case C 10/2008 of 21 October 2008 *IKB*, Commission Decision in case C 9/2008 of 4 June 2008 *SachsenLB*, OJ L 104, 24.4.2009, p. 8 (http://ec.europa.eu/competition/state_aid/register/ii/doc/C-9-2008-WLWL-en-04.06.2008.pdf).

(14) Commission Decision in case N 531/2009 of 7 October 2009, Assumption of risk shield for WestLB, OJ C 305, 16.12.2009. p. 4.

# The Commerzbank recapitalisation decision: providing legal certainty in times of crisis and guidance for future restructuring

Jörg Genner, Max Lienemeyer, Christoph Walkner (1)

On 7 May 2009 the Commission approved the EUR 18 billion recapitalisation of Commerzbank AG ("Commerzbank"). It was one of the first decisions the Commission has taken on a restructuring case originating from the financial crisis. In view of the large amount of the aid, legal certainty regarding the compatibility of the measure with the internal market was required. Following lengthy discussions with the Commission, (2) Germany filed a formal notification which included a plan of measures for the restructuring of the bank. This allowed the Commission to take a position on the compatibility of the aid in the context of Article 87(3)(b) of the EC Treaty. In the following we describe briefly the situation of the bank (1), the measures involved (2), the procedural context of the decision (3) and the assessment of the restructuring measures (4), before drawing some brief conclusions (5).

## 1. Commerzbank and the need for State aid

Commerzbank is a credit institution with a total group balance sheet of approximately EUR 1 100 billion. It is the second biggest private credit institution in Germany since its acquisition of Dresdner Bank AG ("Dresdner Bank") in 2008.

Commerzbank is a universal bank with an extensive branch network in Germany and abroad. It has various subsidiaries in Germany and elsewhere. Commerzbank has positioned itself as a provider of services to retail and commercial customers and to SMEs, but it also looks after numerous large, multinational commercial customers. Although Commerzbank had been steadily cutting down investment banking, with the purchase of Dresdner Bank it acquired the latter's significant investment banking activities.

Up until Lehman Brothers insolvency on 15 September 2008, Commerzbank was less affected by the financial market crisis than some other banks owing to its focus on retail and commercial banking and its low-key proprietary trading and investment activities. As a result of the worsening of the financial market crisis, its ABS portfolio started to deteriorate. On top of this came the need for higher risk provisioning for its loan book as a result of the worsening conditions of the real economy.

The situation was further aggravated by the acquisition of Dresdner Bank. Initially, Dresdner Bank's retail and commercial banking business had proven to be relatively stable too. However, as a result of its larger investment banking portfolio with a high proportion of investment and trading positions, it was hit harder by the effects of the financial market crisis.

## 2. Description of the State aid measures

In December 2008, Commerzbank received a first silent partnership (perpetual hybrid tier-1 capital instrument) of EUR 8.2 billion from SoFFin (3) under the German bank rescue scheme. The remuneration for the silent partnership is 9% p.a., plus a dividend related step up of 0.5% per 0.25 EUR dividend.

However, after conditions continued to deteriorate further, the capital basis shrank and capital requirements rose. The amount of capital received was thus no longer sufficient to calm market concerns and to comply with regulatory capital requirements in the medium term.

Therefore, on 9 January 2009, Germany agreed to make additional core capital totalling EUR 10 billion available to Commerzbank. This additional measure is made up of a further silent participation of EUR 8.2 billion and an acquisition of 25% plus one ordinary shares against payment of EUR 1.8 billion. In addition, SoFFin provided a guarantee for bond issuances worth EUR 15 billion.

## 3. Procedural issues

Before the agreed capital injections could be made, it was necessary to ensure compliance with the State aid rules. The question arose as to whether the aid measures could be authorised under the existing German bank rescue scheme, which the Commission had authorised in December 2008 (State aid

(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) For evidence of the high stakes in the discussions see "Steinbrueck urges EU to give ground on Commerzbank aid", Reuters, 4 April 2009

(3) The Sonderfonds Finanzmarktstabilisierung, created by the German government for dealing with the banking aid measures.

 

No. N 625/2008), or whether they required a notification to obtain an individual approval by the Commission.

The German bank rescue scheme allows, amongst others, recapitalisations for a market-oriented remuneration in line with the Commission's Recapitalisation Communication of 5 December 2008. However, the scheme provides for a limit of EUR 10 billion of recapitalisation per bank "in principle". Furthermore, unless the soundness of the bank can be demonstrated, a restructuring plan is required.

Given that the above limit had been exceeded, and in order to avoid a discussion on the soundness of the bank, Germany decided to file a formal notification to the Commission to create legal certainty. Germany agreed to present a restructuring plan for the bank, which should allow the Commission to approve the aid for the recapitalisation in a single final decision. Given that the restructuring plan did not raise doubts as regards compatibility of the recapitalisation with State aid rules, the Commission was able to approve the aid without the formal investigation which is normally required in cases of such magnitude and complexity.

## 4. Description and assessment of the restructuring

Under State aid rules, the assessment of a restructuring aid requires a restructuring plan which demonstrates inter alia (i) how the beneficiary will restore long-term viability, (ii) how to ensure that aid is kept to the minimum necessary, including a significant contribution of the beneficiary and its owners and (iii) how to mitigate undue distortions of competition caused by the measure.

### Return to long-term viability

The main element of Commerzbank's plan to return to viability is to focus on its core businesses, namely retail and corporate banking, including in Central and Eastern Europe, which generated stable returns in the past. In contrast, the more volatile investment banking will be reduced over time, as well as commercial real estate activities and public finance.

On the basis of this revised business model, the bank needed to carry out a viability analysis on the basis of its short- and medium-term planning. The difficulty to be faced was that such planning is extremely difficult under the current circumstances. It is impossible to project exactly to what extent banks' results will continue to suffer as a consequence of the continuing and deepening crisis. In any case, planning depends to a large extent on assumptions about future developments. In the Commerzbank case, the analysis became even more challenging due to the significant effects of the recent merger. Thus, checking the plausibility of the bank's assumptions, including ensuring that forecasts had not already been reversed by the reality, was a crucial element of the Commission's viability assessment.

In this context, the Commission focused on the potential impact that different economic scenarios would have on the future performance of Commerzbank and its capital ratios. In particular, the Commission concentrated on determining whether the bank would be able to withstand the pressure resulting from higher risk provisioning and increasing capital requirements. In this regard, Commerzbank utilised two differing complex approaches. First, a 'top down' estimate is made of risk trends. This estimate is largely automated and is an important point of reference in the ordinary monitoring of the portfolio. But it can represent only general stress on the portfolio, and it is not possible to estimate and account in detail for more specific effects, such as a running down of the portfolio or changes in provisioning. Therefore, where necessary, additional 'bottom up' analyses are carried out, which incorporate expert judgement. The effects of the stress calculation are simulated for homogeneous sub portfolios and often are made at the level of individual customers. Thus, they offer a clear advantage in terms of detailed results.

Commerzbank also reviewed its practices regarding risk management and corporate governance in order to reduce its vulnerability to risk in the future. Commerzbank also demonstrated that it can meet its liquidity needs, as the bank continues to enjoy market access to both secured and unsecured refinancing. Besides this, Commerzbank has sufficient assets which are eligible for central bank refinancing to obtain liquidity if this were to become necessary.

In order to carry out its assessment, the Commission not only analysed publicly available information but also had access to Commerzbank's internal risk management and controlling reports. Furthermore, the Commission made sure that risk reviews and assessments performed by the competent supervisory authority were also taken into account.

The Commission's assessment concluded that the aid granted will put Commerzbank in a position to withstand further substantial effects of a severe recession, and to emerge from the crisis with a Tier I ratio which meets market expectations.

### Minimum necessary/own contribution

Commerzbank will sell a significant amount of ownership stakes and other assets, amounting to roughly 45% of its current balance sheet total. In this way, it provides a contribution to its restructuring and at the same time limits the aid to the minimum necessary.

Although the existing shareholders and holders of hybrid capital instruments - with the exception of Allianz - have not taken part in the capital increases, they shoulder part of the burden through a ban on dividend payments and a ban on coupon payments on hybrid instruments.

The Commission found that the large-scale divestments and the suspension of payments of dividends and interest provided for in the plan limit the aid to the minimum necessary and ensure an adequate contribution of the bank and its owners to the restructuring.

## Mitigation of distortions of competition

As stated above, the plan includes a number of measures which are aimed at keeping the aid to the minimum necessary and which, at the same time, limit its potential to distort competition. These measures include divestments by Commerzbank of activities and the sale of subsidiaries (including the sale of Eurohypo) to address the Commission's concerns regarding possible distortions of competition due to the large size of the aid granted. The Commission has granted an extended time line for divestitures in view of the current crisis environment.

In addition, to allay further concerns related to potential distortions of competition, the bank will be subject to a general three-year ban on acquisitions of financial institutions or other businesses which potentially compete with it. Furthermore, the bank will not be allowed to do business (including deposit taking) under more favourable price conditions than its top three competitors in markets/products where it has a market share above 5%. On this basis, the Commission found that Commerzbank had sufficiently mitigated the potential distortions of competition.

## 5. Conclusion

The decision gave a first illustration of how the Commission is dealing with large scale structural measures in the current crisis. It anticipated what was subsequently 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 ("the Restructuring Communication"). Two elements stand out:

First, the Commission has again demonstrated that it is contributing to overcoming the financial crisis by not blocking large rescue measures by Member States that are apt to maintain financial stability. The Commission needs however to ensure that they take place in an adequate framework aiming at the long term viability of a bank and propose safeguards against undue distortions of competition and trade in the single market. [4] The present decision is also an example of the pragmatic approach the Commission has taken in the crisis in order to provide legal certainty to Member States and beneficiaries of State aid.

Second, this decision shows that the key principles of the rescue and restructuring guidelines still provide an adequate framework for the assessment of such State aid, whilst a number of refinements were introduced in order to deal with issues specific to banking. For example, the decision illustrates for the first time in the financial crises how a bank's long term viability can be demonstrated on the basis of a number of simulations, including stress test scenarios. This approach is set out in more detail in the Restructuring Communication.

Moreover, in the context of the minimum necessary, the Commission showed a high degree of flexibility regarding own contributions through divestments. For the sake of financial stability and to avoid fire sales, the Commission largely renounced the compulsory selling of businesses and granted reasonably long time frames. Furthermore, it indicated that instead of insisting on static, fixed thresholds for own contribution, as indicated in the rescue and restructuring guidelines. Instead, in the banking sector the Commission is now more interested in the quality and appropriate burden sharing, and, therefore, in the suspension of payments of dividends and interests in order to ensure an adequate contribution to the restructuring from the owners of the bank (as set out in the Restructuring Communication).

Finally, the Commission has clarified that, in order to mitigate potential distortions of competition, a ban on acquisitions and a price leadership prohibition are suitable means to avoid State aid being abused for both organic and non-organic growth at the expense of competitors who have not received State aid. Additionally a ban on acquisitions and a price leadership prohibition maybe an acceptable substitute - at least in part - for divestitures which are required under the rescue and restructuring guidelines, but which may be difficult to implement in the current market environment. Again, these behavioural commitments introduced in the Commerzbank decision have since become a standard instrument under the Restructuring Communication.

(4) This is the leitmotif of all previous communications of the Commission with respect to the financial crisis. See, for example, the banking communication of 13 October 2008.

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| **Deputy Director-General State Aids** | **Lowri EVANS** | 65029 |
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# Documents

## Speeches

### From 1 January 2009 to 30 April 2009

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/09/…" can also be found on http://europa.eu/rapid

**By Neelie Kroes, European Commissioner for Competition**

SPEECH/09/202 - 28 April

The interface between regulation and competition law. Bundeskartellamt conference on 'Dominant Companies – The Thin Line between Regulation and Competition Law. Hamburg

SPEECH/09/203 - 27 April

How competition policy benefits SMEs. "Craft and SME Convention" of UEAPME (European Association of Craft, Small and Medium-sized Enterprises) at European Economic and Social Committee. Brussels

SPEECH/09/165 - 1 April

MasterCard cuts fees. Introductory remarks at press conference. Brussels

SPEECH/09/152 - 30 March

Competition, the crisis and the road to recovery. Address at Economic Club of Toronto.

SPEECH/09/149 - 26 March

European Models for Economic Recovery. Address at Atlantic Council. Washington D. C

SPEECH/09/130 - 19 March.

The forthcoming Broadcasting Communication; measures to promote broadband. Education, Culture and Science Committee of the Dutch Parliament. Den Haag

SPEECH/09/117 - 14 March

Time for banks to shoulder their responsibilities. Address at conference organised by Deutsche Bank. Frankfurt

SPEECH/09/113 - 13 March

Politique de la concurrence – au cœur de la relance économique. Conférence au Cercle des Européens. Paris

SPEECH/09/106 - 12 March

Many achievements, more to do. Opening speech at International Bar Association conference: "Private and public enforcement of EU competition law - 5 years on". Brussels

SPEECH/09/88 - 4 March

Collective Redress – delivering justice for victims. Address at ALDE Conference, European Parliament. Brussels

SPEECH/09/68 - 19 February

The return to long-term viability. Address at Kangaroo Group Breakfast Debate, European Parliament. Brussels

SPEECH/09/63 - 17 February

The Road to Recovery. Address at 105th meeting of the OECD Competition Committee. Paris

SPEECH/09/45 - 9 February

Closing remarks at roundtable to discuss future of the Car Block Exemption. Roundtable to discuss future of the Car Block Exemption. Brussels

SPEECH/09/1 - 8 January

Avoiding the protectionist trap. Address at conference "Nouveau Monde, Nouveau Capitalisme": Round table on "Globalisation and social justice". Paris

**By the Competition Directorate-General staff**

24 February

Herbert Ungerer: Economic crisis and State aid perspectives - Application of EU state aid rules in times of financial and economic crisis. Romanian Competition Council. Bucharest

14 January

Torben Toft: Latest Developments in EC Competition Law. EU-China Workshop on the Abuse of Dominant Market Position in China. Beijing

## Press releases and memos

### From 1 January 2009 to 30 April 2009

All texts are available from the Commission's press release database RAPID http://europa.eu/rapid Enter the code (e.g. IP/09/14) 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/09/683 - 30 April

Commission adopts report on functioning of key antitrust Regulation

IP/09/682 - 30 April

Competition: new publications

MEMO/09/203 - 27 April

Commission opens formal proceedings against telecoms incumbents Telekomunikacja Polska and Slovak Telekom

MEMO/09/191 - 23 April

Commission opens proceedings against Swedish electricity Transmission System Operator concerning limiting interconnector capacity for electricity exports

MEMO/09/168 - 20 April

Commission opens formal proceedings against certain members of Star and oneworld airline alliances

MEMO/09/142 - 31 March

Commission confirms unannounced inspections in the North Sea shrimps sector

MEMO/09/135 - 26 March

Commissioner Kroes welcomes the European Parliament's cross-party support for damages for consumer and business victims of competition breaches

IP/09/470 - 24 March

Commission preliminary views on renewal of Insurance Block Exemption Regulation

MEMO/09/128 - 24 March

Review of Insurance Block Exemption Regulation – frequently asked questions

MEMO/09/125 - 23 March

Commission confirms sending Statement of Objections to alleged participants in heat stabilisers cartel

MEMO/09/120 - 19 March

Commission confirms sending Statement of Objections to ENI concerning the Italian gas market

MEMO/09/119 - 19 March

Commission welcomes European Court of Justice judgment in sodium gluconate cartel case

IP/09/410 - 18 March

Commission opens German gas market to competition by accepting commitments from RWE to divest transmission network

MEMO/09/104 - 11 March

Commission has carried out inspections in the French electricity sector

IP/09/349 - 4 March

Commission adapts nature of monitoring of 2004 Microsoft Decision

MEMO/09/73 - 18 February

Commission confirms inspections in the industry for compressors for refrigeration

MEMO/09/57 - 9 February

Commissioner Kroes hosts roundtable to discuss future of the Car Block Exemption Regulation

MEMO/09/53 - 5 February

Commission confirms sending Statement of Objections to alleged participants in prestressing steel cartel

MEMO/09/46 - 3 February

Commission confirms inspections in high voltage power cable sector

IP/09/137 - 28 January

Commission fines marine hose producers € 131 million for market sharing and price-fixing cartel

MEMO/09/32 - 28 January

Commission action against cartels – Questions and answers

MEMO/09/29 - 27 January

Commission welcomes CFI President's dismissal of Intel's request for interim measures

MEMO/09/22 - 22 January

Commission confirms inspection of Slovak Telekom a.s.

MEMO/09/15 - 17 January

Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows

MEMO/09/6 - 12 January

Commission opens formal proceedings against Standard & Poor's concerning securities identification numbers

## Merger control

IP/09/689 - 30 April

Commission approves acquisition of Delphi Steering Business by General Motors

IP/09/682 - 30 April

Competition: new publications

IP/09/612 - 21 April

Commission approves merger between Posten and Post Danmark, subject to conditions

IP/09/607 - 21 April

Commission approves proposed acquisition of Aracruz by Votorantim

IP/09/604 - 20 April

Commission approves proposed acquisition of joint control over a number of Salvador Caetano's subsidiaries by Salvador Caetano and Mapfre

IP/09/509 - 31 March

Commission approves proposed acquisition of Corinthos Power by Mytilineos and Motor Oil

IP/09/508 - 31 March

Commission approves proposed acquisition of Azucarera by Associated British Foods

IP/09/507 - 31 March

Commission approves acquisition of tour operator Gold Medal by Thomas Cook

IP/09/486 - 26 March

Commission approves proposed acquisition of Philips branded PC monitors and electronic displays business by TPV

IP/09/403 - 13 March

Commission approves proposed acquisition of MAN Ferrostaal by IPIC, subject to conditions

IP/09/396 - 12 March

Commission approves acquisition of Ciba by BASF, subject to conditions

IP/09/385 - 10 March

Commission approves proposed acquisition of joint control of Thales by Dassault Aviation and TSA

IP/09/352 - 4 March

Commission clears acquisition of v. d. Linde by Sanacorp

IP/09/312 - 25 February

Commission approves proposed acquisition of consumer credit company Cofidis by Crédit Mutuel

IP/09/283 - 18 February

Commission clears proposed acquisition of Vania and Polivé by Johnson & Johnson

IP/09/263 - 17 February

Commission approves proposed joint-venture between Rolls-Royce and Mubadala

IP/09/228 - 6 February

Commission clears proposed acquisition of Hapag Lloyd by Kühne, HGV and TUI

IP/09/223 - 5 February

Commission approves proposed acquisition of Porterbrook Leasing Company by OP Trust, Deutsche Bank, Lloyds Bank and BNP Paribas

IP/09/210 - 4 February

Commission clears Sanofi-Aventis' proposed acquisition of Zentiva, subject to conditions

MEMO/09/49 - 4 February

Commission welcomes Court of First Instance judgment confirming its suspension decision during Omya/Huber merger investigation

IP/09/188 - 29 January

Commission opens in-depth investigation into proposed acquisition of joint control of Retriever Sverige by Bonnier and Schibsted

IP/09/129 - 26 January

Commission opens in-depth investigation into proposed take-over of SN Brussels Airlines by Lufthansa

IP/09/123 - 23 January

Commission approves proposed joint venture between Samsung Electronics and Samsung SDI

IP/09/88 - 21 January

Commission approves proposed joint venture between Mauser and Reyde

IP/09/61 - 16 January

Commission approves proposed acquisition of Abieta by Arizona

IP/09/51 - 14 January

Commission approves proposed acquisition of Broström by A.P. Møller-Mærsk

IP/09/29 - 9 January

Commission clears Iberia's proposed acquisition of Vueling and Clickair, subject to conditions

IP/09/28 - 9 January

Commission clears proposed acquisition of DSM Special Products by Arsenal Capital Partners, subject to conditions

IP/09/25 - 9 January

Commission clears proposed acquisition of Rohm and Haas by Dow Chemical

IP/09/21 - 8 January

Commission clears proposed acquisition of Oleon by Diester Industrie

**State aid control**

IP/09/682 - 30 April

Competition: new publications

IP/09/681 - 30 April

Commission approves prolongation of Finnish support scheme for financial institutions

IP/09/680 - 30 April

Commission authorises Slovak temporary aid scheme to grant compatible aid of up to €500 000

IP/09/662 - 29 April

Commission opens in-depth inquiry into rescue measures for Hungarian fertiliser producer Péti Nitrogénművek

IP/09/661 - 29 April

Commission approves three UK fiscal venture capital schemes

IP/09/660 - 29 April

Commission approves €46 million regional aid to Fiat for investment project in Sicily

IP/09/659 - 29 April

Commission adopts Simplification Package to accelerate state aid decisions

MEMO/09/208 - 29 April

Commission adopts Best Practices Code and Simplified Procedure to accelerate state aid decisions – frequently asked questions

IP/09/652 - 28 April

Commission approves amendments to Swedish bank guarantee

IP/09/647 - 27 April

Commission authorises temporary Hungarian scheme for subsidised state guarantees to boost real economy

IP/09/626 - 23 April

Commission authorises temporary Latvian guarantee scheme to boost real economy

MEMO/09/174 - 22 April

Overview of national measures adopted as a response to the financial and economic crisis

IP/09/613 - 21 April

Commission approves UK Asset-Backed Securities Guarantee Scheme

IP/09/603 - 20 April

Commission approves Luxembourg's export-credit insurance scheme

IP/09/602 - 20 April

Commission approves UK Homeowners Mortgage Support Scheme to help households affected by financial downturn

IP/09/586 - 15 April

Commission approves prolongation of UK financial support measures to banking sector

IP/09/585 - 15 April

Commission authorises Irish temporary scheme to grant aid of up to €500 000

IP/09/565 - 8 April

Commission opens in-depth investigation into alleged aids to Fortis Bank Nederland and Dutch activities of ABN Amro

IP/09/564 - 8 April

Commission launches new consultation on revised rules for state funding of public service broadcasting

IP/09/556 - 8 April

Commission approves UK measures in favour of Royal Mail

IP/09/555 - 8 April

Commission approves UK aid for feasibility studies on carbon capture and storage demonstration projects

IP/09/554 - 8 April

Latest Scoreboard reviews Member States' action to fight economic crisis

MEMO/09/160 - 8 April

Latest Scoreboard - Commission's role in the financial and economic crisis – frequently asked questions

IP/09/527 - 02 April

Commission authorises Dutch temporary scheme to grant aid of up to €500 000

IP/09/514 - 31 March

Commission temporarily authorises illiquid asset facility for ING

IP/09/499 - 30 March

Commission approves Spanish temporary scheme to support production of green cars

IP/09/484 - 26 March

Commission approves temporary modification of Austrian risk-capital scheme to boost real economy

IP/09/483 - 26 March

Commission approves recapitalisation of Bank of Ireland

IP/09/471 - 24 March

Commission authorises UK scheme to support lending to businesses

IP/09/470 - 24 March

Commission preliminary views on renewal of Insurance Block Exemption Regulation

IP/09/468 - 24 March

Payments: Commission and ECB provide further clarification to ensure timely launch of Single Euro Payments Area (SEPA) Direct Debit scheme

IP/09/467 - 24 March

Commission approves €800 million public funding for Spanish textile sector

IP/09/466 - 24 March

Commission endorses €40.6 million aid for construction of paper mill in Spremberg, Germany

IP/09/465 - 24 March

Commission orders Greece to recover €1.4 million of unlawful aid from vehicle producer ELVO

IP/09/464 - 24 March

Commission approves extension of French regional aid map to 111 new "communes" (local authorities)

IP/09/461 - 24 March

Commission authorises amendment to French scheme to inject capital into certain credit institutions

IP/09/454 - 23 March

Commission authorises Austrian temporary aid scheme to grant compatible aid of up to €500 000

IP/09/452 - 20 March

Commission approves Slovenian liquidity scheme for financial sector

IP/09/447 - 20 March

Commission authorises temporary Belgian scheme allowing subsidised state guarantees to boost real economy

IP/09/442 - 20 March

Commission authorises Latvian temporary aid scheme to grant aid of up to €500 000

MEMO/09/111 - 17 March

Overview of national measures adopted as a response to the financial and economic crisis

IP/09/406 - 16 March

Commission approves modification of French risk capital scheme to boost real economy

IP/09/400 - 13 March

Commission approves Portuguese state guarantee for €450 million loan to Banco Privado Português

IP/09/399 - 13 March

Commission opens in-depth investigation into restructuring of Dexia; authorises certain urgent measures

IP/09/392 - 12 March

Commission approves Luxembourg's temporary guarantee scheme

IP/09/387 - 11 March

Commission authorises temporary Hungarian scheme allowing subsidised state guarantees to boost real economy

IP/09/378 - 10 March

Commission approves €33.5 million restructuring aid for Polish company Huta Stalowa Wola

IP/09/377 - 10 March

Commission orders Spain to recover unlawful aid from SNIACE

IP/09/376 - 10 March

Commission extends investigation into regulated electricity tariffs in France

MEMO/09/90 - 28 February

Commission obtains guarantees from the French government on the absence of protectionist measures in the French plan for aid to the automotive sector

IP/09/334 - 27 February

Commission authorises temporary scheme of flat-rate aid of up to €500 000 for businesses in Luxembourg

IP/09/333 - 27 February

Commission authorises the United Kingdom to introduce two temporary measures to grant loan guarantees on one hand, and interest rate subsidies to businesses producing green products on the other hand

IP/09/332 - 27 February

Commission authorises temporary French scheme allowing subsidized guarantees to boost real economy

IP/09/331 - 27 February

Commission authorises temporary German scheme allowing subsidized state guarantees to boost real economy

MEMO/09/87 - 27 February

Additional information on guarantees adopted under the Temporary Framework

MEMO/09/85 - 26 February

Communication from the Commission on the Treatment of Impaired Assets in the Community Banking Sector – Frequently Asked Questions

IP/09/325 - 25 February

Commission authorises Hungarian temporary schemes to grant aid of up to €500 000 and reduced-interest loans

IP/09/322 - 25 February

Commission provides guidance for the treatment of impaired assets in the EU banking sector

IP/09/318 - 25 February

EU support to fight the crisis in the automotive sector

IP/09/316 - 25 February

Commission issues guidance on state aid enforcement by national courts

IP/09/314 - 25 February

Commission authorises France to grant €46.5 million aid for "Solar Nano Crystal" R&D programme

IP/09/313 - 25 February

Commission approves €7.4 million investment aid to Pirelli for tyre plant in Piemonte, Italy

MEMO/09/82 - 25 February

Commission issues guidance on state aid enforcement by national courts - frequently asked questions

IP/09/302 - 20 February

Commission authorises amendment of Italian scheme to inject capital

IP/09/296 - 19 February

Commission authorises temporary German scheme allowing reduced interest rates to boost economy

IP/09/271 - 17 February

Commission raises no objections to the change of ownership of Anglo Irish Bank

MEMO/09/67 - 16 February

Overview of national measures adopted as a response to the financial and economic crisis

IP/09/260 - 13 February

Commission approves German real economy crisis measure

IP/09/254 - 12 February

Commission approves €1.5 billion capital injection from the Belgian public authorities for Ethias group

IP/09/253 - 12 February

Commission authorises support package for Hungarian financial institutions

IP/09/246 - 11 February

Commission endorses €56 million aid to Sunfilm for production of thin-film solar modules in Saxony, Germany

IP/09/244 - 11 February

Commission endorses €39 million regional investment aid to ersol Thin Film GmbH for production of thin-film solar modules in Erfurt, Germany

IP/09/243 - 11 February

Commission finds aid to BT partially unlawful and orders recovery

IP/09/242 - 11 February

Commission opens in-depth investigation into Dutch tax exemption for natural gas used for production of ceramic products

IP/09/241 - 11 February

Commission approves Swedish scheme to recapitalise banks

IP/09/216 - 5 February

Commission authorises a temporary French scheme allowing aid to firms in the form of reduced interest rates

IP/09/215 - 5 February

Commission authorises UK crisis scheme for aid of up to €500 000 per business

IP/09/214 - 5 February

Commission approves German real economy crisis measure

MEMO/09/50 - 4 February

Commissioner Kroes meets French Industry Minister Luc Chatel on car support measures

IP/09/206 - 3 February

Commission approves support package for Danish financial institutions

IP/09/205 - 3 February

Commission authorises France to introduce a temporary scheme to grant reduced-interest loans to businesses producing green products

IP/09/186 - 29 January

Commission approves modifications to Swedish support schemes for financial institutions

IP/09/168 - 29 January

Commission opens in-depth investigation into proposed German capital investment law (MoRaKG)

IP/09/167 - 29 January

Commission clears modified Compensation Fund arrangements for organisation of electricity market in Luxembourg

IP/09/158 - 28 January

Commission authorises modification of French scheme to inject capital into certain credit institutions

IP/09/150 - 28 January

Commission authorises aid of €457 million to France for Nano2012 R&D programme

IP/09/139 - 28 January

Commission endorses €68 million loan guarantee to rescue Italian domestic appliances producer Antonio Merloni

IP/09/138 - 28 January

Commission prolongs film support rules until end 2012

MEMO/09/33 - 28 January

Commission prolongs film support rules until end 2012 - frequently asked questions

IP/09/82 - 21 January

Commission approves Finnish state guarantee for Kaupthing Bank

IP/09/72 - 19 January

Commission authorises France to introduce temporary aid scheme for businesses up to a maximum of € 500 000

IP/09/71 - 19 January

Commission authorises Portuguese scheme for aid of up to € 500 000

IP/09/50 - 14 January

Commission approves recapitalisation of Anglo Irish Bank

IP/09/39 - 13 January

Commission opens in-depth inquiry into mining fee exemption for Hungarian Oil and Gas Company MOL

# Publications

## New publications

The following studies have been published on the Competition website. They are available in electronic format in English.

- Should aid be granted to firms in difficulty? A study on counterfactual scenarios to restructuring state aid
- Quantification of harm suffered by victims of competition law infringements
- Terminal handling charges during and after the liner conference era

These studies have been produced by external consultants. Their content should not be relied upon as a statement either of the Commission's or of DG Competition's views.

## Case information: New online case search tool

The European Commission competition website now features an online search tool for cases. While the previously existing case pages only displayed lists of cases by one single criterion, the new search engine allows you to search for cases combining various criteria.

The tool has been available for state aid cases since November 2008, and has now been extended to the other policy areas (antitrust, cartels and mergers). In addition, the state aid part has been expanded with new search criteria.

A key new element is the possibility to search cases across all policy areas by company name, decision date, publication date of the decision, or economic sector, or a combination of these.

More detailed searches are possible within each policy area. Specific criteria for antitrust cases include: type, title or date of the document, legal base of the decision and the possibility to search within a range of cases by case number. Merger cases can be searched by type of decision and by date of notification or its publication in the Official Journal. The search can also be narrowed to cases that have been treated under the simplified procedure, or to cases dealt with in the past under the previous merger regulation in force (Regulation 4064/89). Criteria for state aid cases include, among others: country granting the aid, the primary objective of the aid, type of Commission decision, type of aid instrument, and cases with a related Court proceeding.

Results are displayed as a list of cases in which it is possible to display the case details. When the search is restricted to one policy area, the tool allows the results list to be exported to an excel file.

The search tool is available on http://ec.europa.eu/competition/elojade/isef/index.cfm. Feedback is very welcome. Questions and comments can be sent to comp-web@ec.europa.eu

## Cases covered in this issue

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- priced subscriptions (Official Journal of the EU, Legal cases of the Court of Justice as well as certain periodicals edited by the European Commission) can be ordered from one of our sales agents. You can obtain their contact details by linking http://bookshop.europa.eu, or by sending a fax to +352 2929-42758.

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