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Alain ALEXIS, Direction générale de la Concurrence, unité Politique et coordination des aides d'État

A de nombreuses reprises, la Commission a souligné l'importance qu'elle attache au bon fonctionnement des Services d'Intérêt Général (SIG). Dans son récent Livre vert sur les Services d'intérêt général ([1]), la Commission rappelle notamment que *«les services d'intérêt général se trouvent au cœur du débat politique. En effet, ils touchent à la question centrale du rôle joué par les autorités publiques dans une économie de marché, à savoir, d'une part, veiller au bon fonctionnement du marché et au respect des règles du jeu par tous les acteurs et, d'autre part, garantir l'intérêt général, notamment la satisfaction des besoins essentiels des citoyens et la préservation des biens publics lorsque le marché n'y parvient pas»*.

Dans ce cadre, nul ne contexte que les entreprises en charge d'un SIG doivent pouvoir disposer des ressources nécessaires à leur bon fonctionnement, et que dans un certain nombre de cas, des soutiens financiers publics peuvent s'avérer nécessaires. La tâche de la Commission est toutefois de veiller à ce que le montant de ces soutiens financiers n'excède pas ce qui est nécessaire à l'accomplissement de la mission de service public, et que les ressources ainsi mises à disposition ne soient pas en fait indûment utilisées pour financer des activités sur d'autres marchés ouverts à la concurrence. Un examen attentif est en particulier nécessaire dans les secteurs récemment libéralisés dans lesquelles des entreprises opèrent en même temps dans le domaine du service public, et sur des marchés libéralisés en dehors du service public. Il ne serait pas acceptable que ces entreprises utilisent les ressources du service public pour annihiler les avantages de la libéralisation.

Il est donc important que soient précisées les conditions dans lesquelles les Etats membres peuvent financer leurs entreprises en charge de Services d'Intérêt Economique Général (SIEG), et en particulier les liens entre ces financements et les règles communautaires en matière d'aides d'Etat.

Consciente de la nécessité d'accroître la prévisibilité et la sécurité juridique, la Commission avait proposé dans son rapport au Conseil européen de Laeken des 14 et 15 décembre 2001, une approche en deux temps:

- Dans un premier temps, préparation d'un cadre communautaire pour les aides d'Etat octroyées sous forme de compensation de service public.
- Dans un second temps, dans la mesure où l'expérience acquise par l'application de ce cadre le justifie, préparation d'un règlement d'exemption par catégorie dont le champ d'application devrait alors être défini avec attention.

Le déroulement de ces travaux a toutefois été retardé par les incertitudes quant à la qualification juridique des compensations de service public ([2]).

Dans ce contexte, l'arrêt de la Cour de Justice du 24 juillet 2003 dans l'affaire Altmark ([3]), apporte des précisions importantes sur les modalités d'applications des articles 87 et 88 du traité CE aux financements publics des entreprises en charge de SIEG ([4]).

L'affaire Altmark

L'affaire ayant donné lieu à l'arrêt de la Cour porte sur les modalités d'octroi de licences de services réguliers de transport de passagers par autocar dans le canton allemand «Landkreis Stendal», ainsi que sur les subventions publiques accordées pour l'exécution desdits services.

Des licences d'exploitation avaient été octroyées par les Autorités allemandes compétentes à l'entreprise Altmark Trans en 1990, puis prolongées à deux reprises, en 1994 et en 1996. Ces

([1]) COM (2003) 270 final.

([2]) Voir notamment à ce sujet le rapport de la Commission du 5 juin 2002 destiné au Conseil européen de Séville, relatif à l'état des travaux concernant les lignes directrices relatives aux aides d'Etat liées aux SIEG. COM (2002) 280 final.

([3]) Affaire C-280/00.

([4]) Il convient toutefois de rappeler que deux autres affaires qui portent notamment sur la problématique des compensations de service public restent pendantes, et pourraient donner à la Cour l'occasion d'apporter des précisions supplémentaires. Il s'agit de l'affaire C-126/01 GEMO, et des affaires jointes C-34/01 à C-38/01 Enirisorse Spa.

licences soumettent l'entreprise à certaines obligations, en particulier en matière de respect des tarifs et des horaires fixés par les pouvoirs publics. En contrepartie, des compensations financières peuvent être octroyées pour combler le déficit d'exploitation.

Une entreprise concurrente dont les demandes de licences avaient été rejetées par les Autorités allemandes a introduit un recours devant les juridictions allemandes, au motif qu'Altmark Trans ne répondraient pas aux conditions posées par la réglementation allemande. En particulier, Altmark Trans ne serait pas une entreprise économiquement saine puisqu'elle ne serait pas capable de survivre sans subventions publiques.

La juridiction d'appel a fait droit au recours de l'entreprise concurrente, et a annulé les licences octroyées à Altmark Trans. Cette juridiction a notamment considéré que la santé économique de Altmark Trans n'était pas assurée car celle-ci avait besoin des subventions publiques, et que ces dernières n'étaient pas compatibles avec les règles communautaires relatives aux aides d'Etat.

Altmark Trans ayant introduit un recours à l'encontre de cette décision de la juridiction d'appel devant la Cour administrative fédérale, cette dernière a posé une question préjudicielle à la Cour de justice. Cette question comporte plusieurs aspects, dont le plus intéressant, en ce qui concerne le financement des services publics est ainsi libellé: «les subventions visant à compenser le déficit d'un service public de transport local de personnes sont-elles en toute hypothèse visées par l'interdiction des aides énoncée à l'article 87 paragraphe 1 du traité CE, ou, eu égard à leur portée régionale, convient-il de considérer que de telles subventions ne sont, a priori, pas de nature à affecter les échanges entre Etats membres?».

Le contexte jurisprudentiel

L'applicabilité de l'article 87 paragraphe 1 suppose de démontrer que l'entreprise en cause bénéficie d'un avantage dont elle n'aurait pas bénéficié dans des conditions normales de marché. La Commission considérait traditionnellement que ce critère n'était pas rempli dans le cas de compensations de service public, dès lors que celles-ci ne font que «compenser» une charge particulière imposée par l'Etat.

Cette approche était en particulier conforme à la jurisprudence de la Cour de Justice telle qu'exposée dans l'arrêt ADBHU du 7 février 1985 ([1]), dans lequel la Cour avait indiqué qu'une indemnité versée à des entreprises chargées de collecter et/ou éliminer des huiles usagées ne constituaient pas des aides d'Etat, mais qu'il ne s'agissait que la contrepartie des prestations effectuées par lesdites entreprises.

Cette analyse a été remise en cause pour la première fois par le Tribunal de Première Instance dans son arrêt FFSA du 27 février 1997 ([2]), dans lequel celui-ci a considéré qu'une compensation de service public constitue une aide d'Etat au sens de l'article 87 paragraphe 1, même si son montant n'excède pas les coûts de fonctionnement du service en cause. Selon le Tribunal, une telle aide peut toutefois être déclarée compatible en application de l'article 86 paragraphe 2, si elle est nécessaire au fonctionnement du service public.

Le rapport de la Commission au Conseil européen de Laeken sur les services d'intérêt général se fondait sur cette jurisprudence du Tribunal et proposait une démarche destinée à apporter la sécurité juridique aux Etats membres et aux entreprises en charge de SIEG.

La jurisprudence du Tribunal a toutefois été remise en cause par la Cour de justice dans son arrêt Ferring du 22 novembre 2001 ([3]). La Cour, en rappelant sa jurisprudence ADBHU, a en effet indiqué qu'un soutien financier octroyé à des entreprises en charge d'un SIEG, qui se limite à compenser des surcoûts imposés par l'Etat ne procure pas d'avantage au sens de l'article 87 CE. Un des critères essentiels de la notion d'aide n'étant pas rempli, une telle compensation de service public ne constitue pas une aide d'Etat ([4]). Tout soutien financier allant au-delà de ce qui est nécessaire pour le fonctionnement du service public constitue par contre une aide d'Etat. Par ailleurs, cette aide n'étant pas nécessaire, elle constitue nécessairement une aide incompatible.

Cet arrêt a donné lieu à de nombreux commentaires, notamment de la part des Avocats Généraux dans trois affaires pendantes devant la Cour.

Dans ses conclusions du 19 mars 2002 dans l'affaire Altmark Trans, M. Léger proposait à la Cour de renverser sa jurisprudence Ferring en se fondant sur trois arguments essentiels.

([1]) Affaire 240/83.
([2]) Affaire T-106/95.
([3]) Affaire C-53/00.
([4]) La Cour a en fait suivi les conclusions de son Avocat Général M. Tizzano, du 8 mai 2001, qui avait proposé à la Cour de renverser la jurisprudence FFSA.

D'une part, la jurisprudence Ferring opèrerait une confusion entre la qualification d'aide et la justification éventuelle de cette aide. La notion d'aide étant une notion objective, le but poursuivi doit être pris en considération uniquement pour déterminer si l'aide peut être déclarée compatible, mais non pour déterminer l'existence ou non d'une aide.

D'autre part, l'arrêt Ferring serait de nature à priver l'article 86 paragraphe 2 du traité d'une grande partie de son utilité. Si les compensations ne constituent pas des aides d'Etat au sens de l'article 87 paragraphe 1, le recours à l'article 86 paragraphe 2 pour les autoriser devient en effet inutile. Il en serait de même pour l'article 73 du traité, qui prévoit notamment que sont compatibles avec le traité les aides qui correspondent au remboursement de certaines servitudes inhérentes à la notion de service public.

Enfin, l'approche de la Cour dans l'affaire Ferring aurait pour effet de soustraire les mesures de financement des services publics au contrôle de la Commission.

M. Léger proposait en conséquence à la Cour de revenir à la jurisprudence du Tribunal, et de considérer que les compensations constituent des aides d'Etat, sans préjudice de la possibilité d'autoriser ces aides sur la base des articles 73 ou 86 paragraphe 2 ([1]).

Cette problématique a fait l'objet d'une analyse détaillée par l'Avocat Général M. Jacobs, dans ses conclusions du 30 avril 2002, relative à l'affaire GEMO SA ([2]). M. Jacobs a notamment procédé à une analyse des avantages et inconvénients de l'approche «aide d'Etat» défendue notamment par M. Léger, et de l'approche «compensatoire» telle qu'énoncée par l'arrêt Ferring, en concluant qu'aucune approche ne fournit de solution idéale dans tous les cas. M. Jacobs a dès lors proposé une solution visant à appliquer l'une ou l'autre approche, en fonction des catégories de cas.

La première catégorie comprendrait *«les cas dans lesquels les mesures de financement sont clairement destinées, en tant que stricte contrepartie, à des obligations d'intérêt général clairement définies ou, en d'autres mots, où le lien entre d'une part le financement étatique accordé et, d'autre part, les obligations d'intérêt général clairement définies est direct et manifeste»*. Les cas relevant de cette catégorie devraient être analysés conformément à l'approche compensatoire et donc échapper à la qualification d'aide d'Etat.

La seconde catégorie comprendrait les cas dans lesquels il n'est pas clairement établi que le financement est destiné, en tant que stricte contrepartie, à des obligations d'intérêt général clairement définies. En pareille hypothèse, *«le lien entre le financement étatique et les obligations d'intérêt général qui sont imposées n'est ni direct ni manifeste»*, et les cas de cette catégorie devraient être analysés conformément à l'approche aides d'Etat.

Cette approche proposée par M. Jacobs a reçu le soutien de l'Avocat Général Mme Stix-Hackl dans ses conclusions du 7 novembre 2002 relatives à l'affaire Enirisorse ([3]).

L'approche de la Cour dans l'arrêt Altmark Trans

Dans son arrêt, la Cour confirme l'approche compensatoire, mais en encadrant strictement les conditions dans lesquelles les Etats membres peuvent octroyer des compensations qui échappent à la qualification d'aides d'Etat.

La Cour rappelle tout d'abord que l'existence d'un avantage est une condition nécessaire pour qu'une mesure constitue une aide d'Etat. Dès lors, conformément à sa jurisprudence antérieure dans les affaires ADBHU et Ferring, la Cour en tire la conclusion que *«dans la mesure où une intervention étatique doit être considérée comme une compensation représentant la contrepartie des prestations effectuées par les entreprises bénéficiaires pour exécuter des obligations de service public, de sorte que ces entreprises ne profitent pas, en réalité, d'un avantage financier et que ladite intervention n'a donc pas pour effet de mettre ces entreprises dans une position concurrentielle plus favorable par rapport aux entreprises qui leur font concurrence, une telle intervention ne tombe pas sous le coup de l'article 87 paragraphe 1 du traité»*.

La Cour conditionne toutefois l'absence d'aide à quatre conditions.

— *«L'entreprise bénéficiaire doit effectivement être chargée de l'exécution d'obligations de service public, et ces obligations doivent être clairement définies»*.

— *«Les paramètres sur la base desquels est calculée la compensation doivent être préalablement établis, de façon objective et transparente, afin d'éviter qu'elle comporte un*

([1]) La Cour ayant ordonné le 18 juin 2002 la réouverture de la procédure orale dans l'affaire Altmark Trans, M. Léger a rendu de nouvelles conclusions le 14 janvier 2003, dans lesquelles il maintient son analyse antérieure.

([2]) Affaire C-126/01.

([3]) Affaires jointes C-34/01 à C-38/01.

avantage économique susceptible de favoriser l'entreprise bénéficiaire par rapport à des entreprises concurrentes». La Cour précise à ce propos que «la compensation des pertes subies par une entreprise sans que les paramètres d'une telle compensation aient été préalablement établis, lorsqu'il s'avère a posteriori que l'exploitation de certains services dans le cadre de l'exécution d'obligations de service public n'a pas été économiquement viable, constitue une intervention financière qui relève de la notion d'aide d'Etat».

— *«La compensation ne saurait dépasser ce qui est nécessaire pour couvrir tout ou partie des coûts occasionnés par l'exécution des obligations de service public, en tenant compte des recettes y relatives ainsi que d'un bénéfice raisonnable».*

— *«Lorsque le choix de l'entreprise chargée de l'exécution d'obligations de service public, dans un cas concret, n'est pas effectué dans le cadre d'une procédure de marché public permettant de sélectionner le candidat capable de fournir ces services au moindre coût pour la collectivité, le niveau de la compensation nécessaire doit être déterminé sur la base d'une analyse des coûts qu'une entreprise moyenne bien gérée et adéquatement équipée en moyens de transport afin de pouvoir satisfaire aux exigences de service public requises, aurait encourus pour exécuter ces obligations, en tenant compte des recettes y relatives ainsi que d'un bénéfice raisonnable pour l'exécution de ces obligations».*

Quand ces critères sont remplis, les compensations ne constituent pas des aides d'Etat, et l'obligation de notification préalable n'est donc pas applicable.

Remarques préliminaires sur l'arrêt de la Cour

Il convient tout d'abord de constater que la Cour confirme sur de nombreux aspects, l'approche préconisée traditionnellement par la Commission dans le domaine du financement des services publics ([1]).

Ainsi en est-il de la **qualification de service d'intérêt général.** Des compensations de service public ne peuvent être envisagées qu'en faveur d'entreprises qui sont effectivement en charge d'un SIEG. Si les Etats membres disposent en la matière d'une large marge d'appréciation, la Commission doit néanmoins veiller à ce que cette compétence des Etats membres soit exercée sans erreur manifeste. Il ne serait pas justifié que des subventions publiques soient octroyées à des entreprises qui exercent des activités qui ne poursuivent manifestement aucun but d'intérêt général. Il doit toutefois être souligné que dans les cas concrets, il existe rarement une divergence d'analyse à ce sujet entre les Etats membres et la Commission.

De la même façon, il est impératif que les **obligations** de l'entreprise en charge d'un SIEG soient **clairement définies**. L'existence d'un acte étatique précisant d'une part, les obligations à charge de l'entreprise, et d'autre part les obligations à charge de l'Etat, notamment en terme de compensation financière, est la condition nécessaire de la transparence dans le domaine du financement des services publics. Une définition précise des obligations des entreprises est par ailleurs dans l'intérêt autant de l'Etat que des entreprises. En l'absence d'une telle définition, il est en effet difficile d'imaginer comment les coûts du service en cause et le montant d'une éventuelle compensation peuvent être calculés. On notera également que cette exigence n'est pas nouvelle, car le règlement (CEE) n° 1191/69 du Conseil du 26 juin 1969 ([2]), tel que modifié par le règlement (CEE) n° 1893/91 du Conseil du 20 juin 1991 ([3]), relatif à l'action des Etats membres en matière d'obligations inhérentes à la notion de service public dans le domaine des transports par chemin de fer, par route et par voie navigable, impose déjà aux Etats membres qui souhaitent imposer des obligations de service public, de conclure un «contrat de service public» avec les entreprises concernées.

Les **modalités d'établissement et de calcul de la compensation financière** constituent bien sûr les aspects les plus importants, et trois des critères énoncés par la Cour portent sur cette question.

L'exigence d'une **fixation préalable des paramètres de calcul de la compensation** découle logiquement de la «contractualisation» des relations entre l'Etat et l'entreprise en charge d'un SIEG. Cette fixation préalable est dans l'intérêt de l'Etat et des entreprises en cause. Il est difficile d'imaginer qu'une entreprise s'engage à fournir des services sans connaître les paramètres de calcul de sa compensation. De la même façon, il

([1]) Voir notamment à ce sujet le document de travail des services de la DG Concurrence discuté avec les experts des Etats membres le 18 décembre 2002 (europa.eu.int/comm/competition/state_aid/others).

([2]) JO L 156 du 28.06.1969.

([3]) JO L 169 du 19.06.1991.

est manifestement dans l'intérêt de l'Etat, de déterminer a priori les modalités de son intervention financière. Une telle exigence ne peut que contribuer à un meilleur contrôle des modalités de fonctionnement des entreprises en cause par l'Etat, et notamment de leur efficacité. Il est important de noter à cet égard qu'en l'absence de fixation a priori des paramètres, la prise en charge par l'Etat d'un éventuel déficit d'exploitation constitue une aide d'Etat.

Il doit toutefois être souligné que l'exigence posée par la Cour ne porte pas sur le montant de la compensation, mais uniquement sur les paramètres de calcul de celle-ci. Lorsque le montant de la compensation peut être déterminé a priori, une telle approche ne peut que contribuer à plus de transparence, et doit être encouragée. Toutefois, dans certains cas, il est particulièrement difficile de prévoir l'évolution des coûts des entreprises en cause et de leurs recettes, et donc du montant de la compensation qui pourrait s'avérer nécessaire. L'établissement a priori des paramètres de calcul permet de répondre à cette difficulté. On notera toutefois que la notion de «paramètre» n'est pas précisé par l'arrêt de la Cour, et peut donner lieu à différentes interprétations ([1]). Des précisions ou des exemples devraient probablement être apportés dans les documents futurs de la Commission sur la question du financement des services publics.

Le troisième critère énoncé par la Cour est également conforme à la pratique décisionnelle de la Commission. Si les entreprises en charge d'un SIEG doivent pouvoir disposer des ressources nécessaires au fonctionnement du service, il ne serait pas justifié que la compensation de l'Etat excède les coûts supportés. La Cour confirme également que les entreprises en cause ont bien sûr droit à un bénéfice raisonnable. On peut noter que la Cour ne mentionne pas l'interdiction des subventions croisées, mais celle-ci apparaît implicite dans le raisonnement de la Cour. La compensation doit être autorisée exclusivement pour le financement du service public, et non pour intervenir sur d'autres marchés en dehors du service public.

Ce troisième critère doit toutefois être lu en liaison avec le quatrième critère de l'arrêt, qui apporte certaines modifications dans l'approche en matière de calcul de la compensation.

Selon la Cour, lorsque le choix de l'entreprise chargée d'un SIEG a été effectué «dans le cadre d'une procédure de marché public permettant de sélectionner le candidat capable de fournir ces services au moindre coût pour la collectivité», la compensation en cause ne constitue pas une aide d'Etat. Ces dispositions devraient probablement être précisées. Il convient en effet de rappeler que les règles communautaires en matière de marché public n'imposent pas nécessairement de retenir l'entreprise proposant le prix le plus bas.

A titre d'exemple, dans son arrêt Concordia Bus Finland Oy Ab ([2]), la Cour devait se prononcer sur la conformité au droit communautaire, de la procédure de marché suivie par la ville d'Helsinki pour sélectionner l'entreprise chargée de la gestion du réseau d'autobus urbain. La ville d'Helsinki ayant décidé d'attribuer le marché non à l'entreprise présentant l'offre la moins chère, mais à l'entreprise proposant l'exploitation du service avec des autobus moins polluants, l'entreprise non retenue avait mis en cause la conformité de la procédure de marché.

La Cour a conclu que *«l'article 36, paragraphe 1, sous a), de la directive 92/50 CEE du Conseil du 18 juin 1992, portant coordination des procédures de passation des marchés publics de services, doit être interprété en ce sens que, lorsque dans le cadre d'un marché public relatif à la prestation de services de transports urbains par autobus, le pouvoir adjudicateur décide d'attribuer un marché au soumissionnaire ayant présenté l'offre économiquement la plus avantageuse, il peut prendre en considération des critères écologiques, tels que le niveau d'émissions d'oxyde azotique ou le niveau sonore des autobus, pour autant que ces critères sont liés à l'objet du marché, ne confèrent pas audit pouvoir adjudicateur une liberté inconditionnée de choix, sont expressément mentionnés dans le cahier des charges ou dans l'avis de marché et respectent tous les principes fondamentaux du droit communautaire, notamment le principe de non discrimination*».

La Cour confirme ainsi que «offre économiquement la plus avantageuse» n'est pas nécessairement l'offre la moins élevée, mais peut intégrer des critères de nature qualitative.

Dans la suite des travaux relatifs au financement des SIEG, cette question devrait donc être examinée. Il devrait notamment être précisé si la notion d'offre «au moindre coût pour la collectivité» telle qu'énoncée dans l'arrêt Altmark, est équivalente à la notion «d'offre économiquement la plus avantageuse» au sens de la réglementation relative aux marchés publics.

([1]) A titre d'exemple, le dictionnaire Petit Robert de la langue française définit le mot paramètre comme «une variable en fonction de laquelle on exprime chacune des variables d'une équation».

([2]) Affaire C-513/99.

D'une façon générale, il est utile de rappeler que le recours à la procédure de mise en concurrence pour l'attribution des SIEG et l'établissement du montant de la compensation n'est pas nouvelle ([1]), et se trouve depuis longtemps encouragée par la Commission.

Le document de travail discuté avec les experts des Etats membres le 18 décembre 2002 ([2]) précise à ce sujet: *«le montant de la compensation correspond au prix de marché et ne comporte pas d'éléments de surcompensation lorsque les conditions suivantes sont réunies:*

- *Le marché en cause est, d'un point de vue économique, un marché effectivement contestable (c'est à dire qu'il y a plusieurs opérateurs potentiellement en condition des présenter des offres valables).*
- *La procédure a donné lieu à une véritable concurrence.*
- *Le SIEG est attribué à l'entreprise ayant demandé le montant de compensation le plus faible, et les autres conditions (qualité du service, emploi, investissements…) sont imposées uniquement comme des critères minima».*

Le recours à une telle procédure de mise en concurrence doit être encouragée, car elle permet d'une part, de sélectionner l'entreprise la plus efficace, et d'autre part, de déterminer de la façon la plus simple le montant de la compensation.

Quand la procédure de marché public n'est pas retenue, la Cour estime que la non qualification de la compensation comme aide d'Etat requière que *«le niveau de la compensation nécessaire doit être déterminé sur la base d'une analyse des coûts qu'une entreprise moyenne bien gérée et adéquatement équipée en moyens de transport afin de pouvoir satisfaire aux exigences de service public requises, aurait encourus pour exécuter ces obligations, en tenant compte des recettes y relatives ainsi que d'un bénéfice raisonnable pour l'exécution de ces obligations».* En pareille hypothèse, le niveau de la compensation peut être considéré comme reflétant le prix du marché, ce qui écarte tout risque de surcompensation, et donc d'aide d'Etat.

Par contre, lorsque le montant de la compensation ne résulte pas d'une procédure de marché public, et n'est pas déterminé sur la base d'une analyse des coûts d'une entreprise moyenne bien gérée, une telle compensation constitue une aide d'Etat au sens de l'article 87 paragraphe 1.

Toutefois, dans ce cas, il semble que deux hypothèses doivent être distinguées.

La première hypothèse est celle dans laquelle le niveau de compensation excède le niveau qui résulterait d'un calcul sur la base des coûts d'une entreprise moyenne bien gérée, mais ne dépasse pas les coûts réels de l'entreprise en charge du SIEG. Bien que la Cour n'aborde pas cette question, il semble découler de la logique de l'arrêt que dans certains cas, une telle compensation peut s'avérer nécessaire au bon fonctionnement du service public, et faire à ce titre, l'objet d'une autorisation par la Commission sous certaines conditions, sur la base de l'article 86 paragraphe 2 du traité.. Les conditions fixées par la Cour dans le troisième critère de son arrêt devraient en tout état de cause être respectées.

La même approche apparaît envisageable lorsque l'Etat est obligé d'intervenir a posteriori pour compenser des pertes subies par une entreprise en charge d'un SIEG, sans que les paramètres d'une telle compensation aient été préalablement établis.

La seconde hypothèse est celle dans laquelle le niveau de compensation octroyé excède les coûts effectivement supportés par l'entreprise. Une telle surcompensation n'est pas justifiée par le fonctionnement du SIEG, et devrait constituer une aide incompatible.

Il convient finalement de souligner que sur le plan procédural, le nonrespect des quatre critères fixés par la Cour implique que les compensations constituent des aides d'Etat soumises à l'obligation de notification préalable prévue par l'article 88 paragraphe 3 CE, sauf dispositions communautaires contraires.

Conclusion

Si l'arrêt de la Cour soulève quelques interrogations en ce qui concerne ses modalités d'application, il confirme néanmoins l'aspect essentiel qui est que le droit communautaire ne s'oppose pas au financement des entreprises en charge de SIEG, mais vise uniquement à prévenir d'éventuels abus, qui pourraient par exemples, consister à donner de façon erronée la qualification de SIEG à certaines activités, ou à octroyer des ressources non nécessaires au fonctionnement des services en cause.

([1]) Voir notamment dans le domaine du transport aérien, les dispositions du règlement n°2408/92 du Conseil du 23 juillet 1992, et dans le domaine du transport terrestre, la proposition de modification du règlement du Conseil n° 1191/69 (COM (2000) 7 final.

([2]) Cf note de bas de page 12.

L'arrêt constitue par ailleurs une jurisprudence attendue, qui devrait permettre à la Commission de contribuer à plus de sécurité juridique et de prévisibilité, comme annoncé dans le rapport à l'attention du Conseil européen de Laeken sur les services d'intérêt général.

Two Commission decisions on price abuse in the telecommunications sector

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During the first half of the year 2003, the Commission adopted two formal prohibition decisions pursuant to Article 82 EC-Treaty regarding abusive pricing for the provision of telecommunications services. Those are the first decisions of that kind since the telecommunications sector was fully liberalised in 1998, and even since 1982, when British Telecommunications, still acting under a State monopoly, had been found to abuse its dominant position by restricting the use of telex and telephone facilities. ([1]) These two decisions are particularly noteworthy, because they concern an economic sector subject to ex ante regulation, in which the Member states play an important role through the decision making practice of the national regulatory authorities. The rules of such regulation have been reformed in 2002 with the new Directives on Electronic Communications, and are about to shift towards concepts based on competition law.

1. The Deutsche Telekom case: margin squeeze

On 21 May 2003, the Commission adopted a decision under Art. 82 regarding Deutsche Telekom's pricing strategy for local access to the fixed telephony network. ([2]) In that decision, the Commission found that Deutsche Telekom (DT) was engaging in a margin squeeze by charging new entrants higher fees for wholesale access to the local loop than what subscribers had to pay for retail lines. This discouraged new companies from entering the market and reduced the choice of suppliers of telecoms services as well as price competition for consumers. The Commission's action was originated in 1999 by complaints from numerous new entrants in the German fixed-line telecommunications market.

1.1. The local access market

The local loop is the physical circuit between the customer's premises and the telecommunications operator's local switch. Traditionally it takes the form of pairs of copper wires. New entrants on the telecommunications markets need access on fair and non-discriminatory terms to the local loops (local loop unbundling) to be able to offer retail services to end-customers, as it would be impossible to replicate from the outset such a network built over a century. Effective local loop unbundling is key for the spread of electronic communications services. It was imposed on the incumbent operators by way of legislation at EU level. ([3]) In some Member States, such as Germany, local loop unbundling was imposed much earlier. Despite this clearcut regulatory obligation, local loop unbundling is not developing fast enough. ([4]) However, the regulatory framework is not the only tool available to solve competition problems in this area. The conditions of local loop unbundling, such as pricing, are also subject to scrutiny under the EU competition rules.

In Germany, DT offers local loop access at two different levels. Besides the retail subscriptions to end customers, DT also offers unbundled local loop access to competitors, which allows those to gain direct access to end-users. DT is thus active on the upstream market for wholesale local loop access to competitors and on the downstream market for retail access services to end-customers. Both markets are closely linked to each other. DT's local access network is not the only technical infrastructure allowing for the provision of wholesale access services to competitors and of retail access services to end-users. However, the other alternatives, which include fibre-optic networks, wireless local loops, satellites, power lines, and upgraded cable TV networks, are not yet sufficiently developed and cannot be considered as equivalent to DT's local loop network.

([1]) OJ L 360, 21.12.1982, p. 36.

([2]) Commission Press Release IP/03/717, OJ L 263, 14.10.2003, p. 9.

([3]) Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18.12.2000 on unbundled access to the local loop, OJ L 336, 30.12.2000, p. 4.

([4]) 8th Implementation Report by the Commission on the transposition of the regulatory package in the telecommunications sector, COM(2002) 695 final.

1.2. DT's dominant position

Since the beginning of 1998, DT is legally obliged, under national law, to provide competitors access to its local loops. ([1]) In spite of this clear obligation, there still is very little effective unbundling of the local loops. DT indeed still holds a dominant position on the markets for both wholesale and retail access to the local loops in Germany. The Commission found that regarding wholesale access, DT is the only German fixed line operator having a network with nation-wide coverage. In order to provide a variety of services to end users, new entrants need access to this infrastructure on a wholesale basis. Regarding retail access, even after five years of competition, the Commission found that DT still has around 95% market share for providing both narrowband (analogue and ISDN) and broadband (ADSL) access services. In addition, the remaining 5% maket share are divided up between a large number of competitors. Indeed, many new entrants have, since 1998, tried to compete with the incumbent operator, but none of them has been able to reach significant market share.

1.3. The margin squeeze test

A margin squeeze can be found to exist if a vertically integrated operator charges prices for wholesale access which are so high that competitors are forced to charge their end-users prices that are higher than the ones claimed by the vertically integrated operator from its own end-users for similar services. ([2]) If the wholesale charges are higher than retail charges, the competitors, even if they are at least as efficient as the dominant operator, can never make a profit, because on top of the wholesale charges they also have other costs to bear, such as marketing, billing, debt collection etc., before being able to make a comparable retail service offering.

DT has taken the view that there cannot be abusive pricing in the form of a margin squeeze in the present case, because the wholesale charges are imposed by the German regulatory authority (RegTP). According to DT, any margin squeeze must be the result of excessive wholesale prices or predatory retail prices, or a combination of the two, and it must be legally possible to terminate the squeeze by modifying either of those prices. However, the Commission has come to the conclusion that the margin squeeze is the relevant test in this case, and that it can exist with regard to regulated tariffs. Of course it has also to be shown that the undertaking subject to price regulation has the commercial freedom to avoid or terminate the margin squeeze on its own initiative. If the company has that freedom, the question if and how the prices are regulated ex ante is relevant only for the choice of the correct remedy to bring the margin squeeze to an end.

In the case of local access in Germany, the Commission found an abusive margin squeeze, because the difference between DT's retail and wholesale prices was either negative or slightly positive, but insufficient to cover DT's product-specific cost of providing its own retail services. Because of the insufficient spread, ever since local loop unbundling started in Germany and still at the date of the decision, new entrants had no scope to compete with DT for fixed line access to end consumers. In order to achieve a coherent comparison, the Commission used a weighted approach, taking into account the numbers of DT's customers for the different access types at retail level. The Commission thus compared the tariffs for wholesale access to the local loops with those for a number of different retail offerings, namely analogue, ISDN and ADSL connections, at the end of every year since 1998 as well as in May 2003.

The Commission's assessment revealed, for the period from the beginning of 1998 until the end of 2001, that DT charged competitors more for unbundled access at wholesale level than it charged its own subscribers for access at the retail level. Such a negative spread constitutes a clear case of margin squeeze without any cost element to be taken into consideration. As from 2002, prices for wholesale access became lower than retail subscription prices, so that a positive spread occurred between both prices. However, even during this period, the new entrants could not compete with DT on fair terms. On the basis of information submitted by DT, the Commission found that the positive spread was still not sufficient for DT to cover its own product-specific cost for the supply of comparable end-user services. The Commission thus used DT's own downstream cost as the relevant comparator in this case. This test provides evidence of the margin squeeze, insofar as it became obvious that DT itself could not have offered retail access services without making losses if it had to pay the same wholesale price as its competitors. ([3]) In applying this

([1]) The EC regulation on local loop unbundling (see footnote 3 above) entered into force on 1.1.2001.

([2]) Decision 88/518/EEC (Napier Brown – British Sugar), OJ L 284, 19.10.1988, p. 41, para. 66.

([3]) Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ C 265, 22.8.1998, p. 2, para. 117.

approach, the Commission found that even after the reduction of the monthly wholesale prices by RegTP as of 1 May 2003, the margin squeeze remained in place.

1.4. Company vs Member state responsibility

Any Commission decision stating the abuse of a dominant position by a company is subject to the demonstration that the abusive behaviour was not imposed on the company by way of public intervention. The Commission has therefore set out the conditions under which DT could have avoided the margin squeeze, notably by increasing the retail charges for analogue, ISDN and ADSL connections within the German price cap system. The fact that such scope existed is evidenced by the retail price increases actually introduced by DT in 2002. These tariff increases were steps in the right direction, but largely insufficient in volume to terminate the margin squeeze.

The initial price cap system set up by the Federal Ministry of Posts and Telecommunications gave DT sufficient scope, between 1998 and 2001, to restructure entirely its tariff system. Increases in retail access charges could be offset by reducing call charges. This price cap system did not limit the tariff reductions in number and scope, so that DT was free to increase access charges while reducing call charges by a corresponding amount. DT introduced six reductions of call charges between January 1998 and February 2000. Therefore an increase of the retail access charges was legally and economically feasible. In addition, DT could have further reduced the call charges at any time, in particular for local calls, thus gaining even more scope for increases of the monthly and one-off charges for analogue and ISDN connections. None of this was undertaken by DT.

Under the price cap system in force since 1 January 2002, DT has on the contrary almost entirely exhausted its freedom for access price increases. However, DT's freedom to avoid the margin squeeze did not arise only from the access charges that are regulated under the price cap system, because the unregulated ASDL tariffs must also be taken into consideration. Indeed DT was free at any time to raise access charges for ADSL access in order to reduce the margin squeeze, without any prior approval by RegTP. Nevertheless, DT has left its ADSL charges almost unchanged, Even if DT might not have been able to use this possibility to entirely terminate the squeeze entirely, DT could have at least reduced the margin squeeze.

1.5. Follow-up to the decision

Since the decision was adopted in May, several steps have been taken by DT and RegTP, in order to reduce the margin squeeze. By decision of 30 June 2003, RegTP reduced the one-off wholesale fees for local loop unbundling by up to 20%. This was a first step in the right direction, especially since DT had initially requested higher fees than the ones finally authorised by RegTP. In addition, DT decided to increase the retail subscription tariffs for analogue lines by around 10% as of 1 September 2003. To that end, the price cap regime had first to be adapted by RegTP, which was achieved by decision of 22 July 2003.

This modified tariff structure of DT offers a better basis for more competition in the local loop. DT's competitors now have to pay less at wholesale level and will thus be able to offer more attractive retail access prices. This will help them to better compete with DT for local loop access, especially since DT's retail access prices have been increased.

In parallel to those measures taken or initiated by DT in order to comply with the Commission decision of 21 May 2003, DT has challenged this decision by lodging an appeal under Article 230 before the Court of First Instance (T-271/03).

2. The Wanadoo case: predatory pricing

On 16 July 2003, the Commission adopted a decision relating to a proceeding under Art. 82 of the Treaty regarding Wanadoo's pricing strategy of its ADSL services. ([1]) ADSL is the main available technology in France for the provision of high speed internet access to residential and small office/home office (SOHO) customers. It allows to provide broadband services over the traditional telephone copper pair linking local exchanges to the customers' premises. During the period covered by the decision nearly all ADSL lines in France were operated by the incumbent operator France Télécom. Television cable networks are theoretically an alternative platform for the provision of such services, but their footprint in France is limited, and no cable operator was in a position to roll out a national network comparable to France Télécom's ADSL facilities. The first broadband

([1]) Commission Press Release IP/03/1025, decision not yet published in the OJ.

services were marketed in 1998, but it is not until the end of 1999 that the market started to take off at a significant scale and pace.

2.1. Prices below cost

According to EC case law two tests are possible to find an abuse in the form of predatory pricing: where variable costs are not covered, an abuse is automatically presumed; where variable costs are covered, but total costs are not, the pricing is deemed to constitute an abuse if it forms part of a plan to eliminate competitors. ([1]) The two tests have been applied in the Commission's decision, for the periods before and after August 2001. In this instance, the Commission carried out adjustments to costs and revenue so as to take account of the characteristics of a strongly growing market. In particular, customer acquisition costs, which in an expanding market account for a sizeable chunk of the total costs, were spread and written off over a number of years, thus being treated as if they had been capital expenditures. In addition, the Commission did not take on board the actual average proceeds per subscriber as booked in the firms accounting, but made a number of adjustments to correct the fact that the dynamics of the firm's growth mechanically distorted the revenues per user. All these adjustments were favourable to the company, insofar as they increased the level of cost coverage, without altering the philosophy of the predatory pricing tests as laid down in the Akzo judgment.

From the end of 1999 to October 2002, Wanadoo, a 72% owned subsidiary of France Télécom, marketed its ADSL services known as Wanadoo ADSL and eXtense at prices which were below their average costs. It emerged from the Commission's investigations that the prices charged by Wanadoo were well below variable costs until August 2001 and that in the subsequent period they were approximately equivalent to variable costs, but significantly below total costs. Since the mass marketing of Wanadoo's ADSL services began only in March 2001, the Commission considered that the abuse started only on that date. Wanadoo suffered substantial losses up to the end of 2002 as a result of this practice. The practice coincided with a company plan to pre-empt the strategic market for high-speed Internet access. While Wanadoo was suffering 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 own wholesale ADSL products.

Wanadoo's policy was deliberate, since the company was fully aware of the level of losses which it was suffering and of the legal risks associated with the launch of its eXtense service.

2.2. Effect on the market

The abuse on which the Commission has taken action was designed to take the lion's share of a booming market, at the expense of other competitors. From January 2001 to September 2002, Wanadoo's market share rose by nearly 30 percentage points to between 65% and 75 % on a market which saw more than a five-fold increase in its size over the same period. This level of market penetration by Wanadoo is roughly what Wanadoo was expecting by 2004. The level of losses required in order to compete with Wanadoo had a dissuasive effect on competitors. At the end of the period during which the abuse was committed, no competitor held more than 10% of the market, and Wanadoo's main competitor at the time the abuse began had seen its market share tumble. One ADSL service provider (Mangoosta) went out of business in August 2001. The effects of Wanadoo's conduct were not confined to competitors on the ADSL segment, but extended to cable operators offering high-speed Internet access.

The abuse came to an end in October 2002, with the entry into force of new wholesale prices charged by France Télécom, more than 30% down on the previous prices charged. Since then, the French high-speed Internet access market has been growing much more rapidly and in a more balanced way as far as the various competitors are concerned. Market growth picked up strongly subsequently, with the ending of the abuse, and the number of Internet subscribers grew more between September 2002 and March 2003 (seven months) than between March 2001 and August 2002 (seventeen months).

2.3. Recoupment of losses

The Wanadoo case raised a classical question in EC competition law, namely how to distinguish between the normal behaviour of a company simply actuated by legitimate objectives and an abusive behaviour. Wanadoo claimed that by selling its services below costs, it had acted in a

([1]) Case C-62/86 *Akzo* v *Commission* [1991] ECR I-3359; Case C-333/94 P *Tetra Pak International SA* v *Commission* [1996] ECR I-5951.

rational manner, with the objective of developing a new market and to reach profitability in the medium term.

In particular, the company submitted calculations designed to prove that for each new subscriber the discounted cash-flows of the services sold at a loss would be positive over a period of less than five years. The Commission did not accept that these calculations, although inspired by classical standards of investment decision making, are a relevant tool to assess whether the behaviour of a dominant company amounts or not to predatory pricing. Indeed, the recoupment of initial losses over a certain period of time is in the most common settings the very objective of a predatory pricing behaviour. The firm expects, after evicting or disciplining its rivals, to be in a position to increase its profit margin in order to make up for the losses incurred during the predatory pricing period. Demonstrating that acquiring an ADSL customer is rational since it provides a positive deflated income over five years simply shows that the predatory pricing strategy will pay off. Admitting Wanadoo's reasoning in this respect would have led to the conclusion that by essence predatory pricing can simply not exist.

Another reason for the Commission to reject Wanadoo's contention was linked to the specifities of the case. It appeared that Wanadoo's attempt to demonstrate the profitability of its products was biased by an optical flaw. Even if the discounted cash-flows generated by a single subscriber was indeed to be admitted as positive in the medium term, the ongoing volume of acquisition costs on an expanding market are such that the whole activity (all subscribers together, whatever their date of entry) may well continue for a long time to be unprofitable. Indeed, what counts for the firm and its shareholders is not the individual net revenues produced by a single subscriber, but the overall assessment of the financial situation of the activity at stake.

The Wanadoo decision restates that the behaviour of a company, though apparently financially rational, may in fact be abusive, because it ignores the special responsibility of the dominant firm.

2.4. Emerging markets

The Wanadoo case raised another interesting question, as to whether it was timely and opportune for the Commission to intervene on a market at a nascent stage. At the end of the year 2000, the high speed Internet market in France numbered around 200 000 customers and was well beyond the initial phase of pure technical and marketing experiments. Since mid-2000 it had engaged on a path of accelerated growth. However, it is true that this market will continue to grow and that it definitely had not reached a phase of maturity at the date the decision was taken. In fact, this question can be subdivided into two parts. Firstly, as a matter of principle, is a competition authority entitled to step-in and sanction a company's behaviour at this early stage of development of a mass market? Secondly, were the losses incurred by Wanadoo inevitable in the context of a relatively new activity?

On the first point, the Commission considered that nothing in Article 82 or in the case law provides for an exception to the application of the competition rules to sectors which are not yet fully mature or which are considered to be emerging markets. To subordinate the application of the competition rules to a complete stabilisation of the market would be to deprive the competition authorities of the power to act in time before the abuses established have exerted their full effect and the positions unduly acquired have thus been finally consolidated. On the contrary, it must be possible to sanction predatory pricing whenever there is a risk that competitors will be eliminated. The aim to maintain undistorted competition set out in Article 3(g) of the Treaty excludes that the Commission waits until such a strategy leads to the actual elimination of competitors. ([1])

The intervention of the Commission in this case was all the more justified as first-mover advantages are considerable in such a sector. Indeed, one of the aims of the predation strategy carried out by Wanadoo was to be the first to conquer the high-speed market and to be in the eyes of the general public the one that succeeds in introducing technological innovation. As a matter of fact, Wanadoo, even after the end of the abuse period, is still in a position to cash in on these reputation effects and other first mover advantages. From a policy point of view, the intervention of the Commission in this case was all the more necessary as high-speed Internet access plays a key role in the achivement of the objectives of the Lisbon strategy.

On the second point, it is worth noting that in the context of the development of ADSL products, the objective of rapid profitability was not beyond reach despite the newness of the products in question. France Télécom, Wanadoo's majority shareholder, expected to achieve on its ADSL services a positive net margin on full costs very rapidly. It

([1]) Above-mentioned judgment in Case C-333/94 *Tetra Pak*, paragraph 44.

should be recalled that it was France Télécom that undertook the technical deployment of ADSL and not Wanadoo Interactive, which simply retailed France Télécom's product. Thus, the parent company of the Wanadoo group, which was the chief architect of the ADSL industrial process, expected to attain positive net margin levels very quickly, whereas Wanadoo's net margin levels for 2001 and 2002 were far lower. The data provided by France Télécom to the Commission show that, contrary to what could have been expected, the newness of ADSL services in no way precluded the attainment of an objective of fairly rapid profitability. The incurring of substantial losses on a new type of product such as ADSL could therefore by no means be considered as either inevitable or necessary.

2.5. Promoting Internet use is not a justification

A last question worth mentioning was whether Wanadoo' pricing under costs could not be justified by a legitimate objective of helping to increase awareness of high-speed Internet, which would in turn have benefited Wanadoo's competitors and the market, inter alia by reducing network costs.

The Commission considered in this instance that this argument was deficient in one essential respect: there is no proof that the strategy pursued by the company would alone have made it possible to attain the desired objective of increased broadband use in France. The positive effects linked to market growth could have been brought about had the market developed under conditions of equilibrium among service providers. If it had really been the France Télécom group's intention to develop the high-speed market for the benefit of all operators, France Télécom could have priced all its wholesale products — from shared or full unbundled access to the local loop to IP/ADSL access and routing services — at low levels encouraging the entry of competitors.

Wanadoo has challenged the Commission's decision by applying for an annulment by the Court of First Instance (T-340/03).

3. Conclusion

With these two decisions, the Commission has shown that it is ready to act forcefully against cases of price abuse, even in a scenario where the prices under examination are subject to sector-specific regulation. Both decisions set out the conditions for the relevant tests to be carried out. Predatory pricing requires a straight forward comparison between prices and the underlying cost and triggers an obligation to increase the abusive prices. The margin squeeze test starts with a comparison between wholesale and retail prices and only if the latter are higher than the former includes also the underlying downstream cost. Such an abuse can be remedied at either level, i. e. by reducing wholesale or by increasing retail tariffs. Both tests bear important precedent value for other future cases of price abuse in network industries, both for the Commission and for national regulators as well as national competition authorities.

State aid: key elements for the agreement in the Council on energy taxation

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In October 2003, after six years of negotiation, the Council adopted the future energy tax directive ([1]). A key element for creating unanimity was the manner under which State aid policy has been taken into account in drafting the directive.

The concerns of the Member States

The Council, in particular through the Ecofin and Environment Councils, had pointed out on several occasions that State aid legislation might prevent any agreement on energy taxation ([2]). Member States shared two main concerns.

First, they felt that they would not be allowed by the Commission to support in the long run some energy products, like renewables, which are regarded as a priority in environmental and energy policies, both at national and Community levels.

Secondly, Member States felt too strongly restricted in granting long lasting tax exemptions or reductions, notably in favour of energy-intensive sectors, which are especially exposed to international competition.

While the Commission of course welcomes the development of renewable energy sources and the introduction of energy taxation from an environmental point of view, it has at the same time to ensure that, insofar as these measures involve State aid, they do not lead to distortions of competition which would be contrary to the common interest. This might be the case e.g. if producers of green electricity were overcompensated over their extra costs to the detriment of other electricity producers or if tax exemptions from energy taxes favoured certain users without giving an incentive to them to improve their environmental performance. Given the kind of business and its market structure, such distortions could be very damaging and could hinder the achievement of the single market and its benefits for the consumers.

Information actions

Some Member States' concerns, in particular regarding control of state aid to renewable energy sources, stemmed from a lack of information rather than being a problem of substance.

The Commission explained in detail the meaning and practice of its State aid policy as applied to taxation. Under the Belgian Presidency (July – December 2001), several meetings of the Ecofin working party on taxation, in which DG Competition and DG Taxation and Customs Union took part together, were dedicated to State aid issues. The current environmental guidelines ([3]) were described at length; the respective purposes of Articles 87-88 (State aid) and Article 93 (tax harmonisation) were explained.

Under the Danish Presidency (July – December 2002), the Commission issued a Staff working paper on the "State-aid aspects in the proposal for a Council directive on energy taxation" ([4]). One conclusion here was that greater harmonisation of structures and rates of excise duty would facilitate the application of State aid rules.

The information provided has been sufficient to reassure Member States that tax support in favour of renewables would not be restrained because of State aid rules. On the contrary, it has appeared that an appropriate framework is now available

([1]) Directive 2003/96/EC of the Council of 27.10.2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283 of 30.10.2003).

([2]) For instance, the draft political compromise prepared by the German Presidency in 1999 noted that 'it will be crucial for Member States to evaluate the limits resulting from Community state aid rules for national provisions for reduced rates or exemptions for certain sectors and to be allowed to make use of the resulting freedom of manoeuvre in a flexible way; this applies particularly when, for environmental and/or health policy reasons, Member States wish to go beyond a Community minimum taxation. The Council considers that there is an urgent need to solve the existing problems as to the interpretation and application of Community state aid rules; it invites the Commission to contribute to this solution and to publish a clarifying communication on this subject.' (Council doc 7738/99 Fisc 101 of 5.5.1999).

([3]) Community guidelines on State aid for environmental protection (OJ C 37, 3.2.2001, p. 3).

([4]) SEC(2002) 1142 of 24.10.2002 and Council document 13545/02 Fisc 271 of 28.10.2002.

thanks to the environmental guidelines, which gives due consideration to the needs of renewables in dedicated approaches.

For energy intensive users, it was explained that the Commission has always assessed tax exemption from energy taxes in a constructive spirit. The Commission had approved a number of exemptions and reductions from energy taxes under the Community guidelines for environmental protection 1994 ([1]) and introduced provisions in the current Community guidelines for environmental protection allowing tax exemptions up to ten years. The Commission assessed such tax exemptions favourably, not least taking into account the market distortions due to energy taxes not yet being harmonised.

The nature and the logic of the Community energy tax system

In addition to information, innovative solutions have appeared necessary to tackle Member States concerns, relating to some energy intensive processes. These solutions, accepted by the Council, are based on a comprehensive assessment of the nature and the logic of the Community energy tax system.

The Commission has had a long standing approach in which energy products should essentially be subject to a Community framework when used as heating fuel or motor fuel. This is the case in the present Council directives applicable to excise duties on mineral oils, whereby indirect taxation (except for VAT) is prohibited for mineral oils used for purposes other than as motor fuels or as heating fuels ([2]).

This approach remains valid for the energy tax directive ([3]). In its Article 13(1)(a), the original proposal of the Commission sets out that Member States shall exempt energy products used principally for the purposes of chemical reduction, and in metallurgical and electrolytic processes.

The Council did not however succeed in unanimously agreeing on such measures. Some Member States were willing to tax sectors involved in metallurgical and/or mineralogical processes ([4]) for instance, while other Member States were in favour of granting full tax exemptions.

While a mandatory exemption would have raised no State aid issue ([5]), an optional special tax treatment of certain uses of energy products can indeed constitute a favourable tax treatment, which gives an economic advantage to a specific sector. It may distort competition, and affect trade between Member States. At first sight, being imputable to the Member State, such facultative measure would constitute State aid.

Member States have however considered that energy tax must concentrate on motor fuels and heating fuels.

Therefore, the Council and the Commission considered that **it is in the nature and the logic of the new tax system to exclude from the scope of the directive other uses than as motor fuels or as heating fuels** ([6])**.**

The relevant uses of energy products and electricity

Article 2(4)(b) of the Directive explains what these other uses are.

Several manufacturing processes actually use a large part of energy products for purposes other than for motor and heating fuel, e.g. as feedstock (non fuel use) or for dual uses.

In the so-called 'dual use' processes ([7]), the energy product is used primarily for purposes outside the scope of the directive, but partly also produces heat and would thus in principle be taxable. However, in the technical reality of a 'dual use' process, the two uses of the energy product can hardly be distinguished and quantities of the product cannot readily be apportioned to each use.

([1]) OJ C 72, 10.3.1994, p. 3.

([2]) See Article 8(1)(a) of Council directive 92/81/EEC of 19.10.1992 on the harmonisation of the structures of excise duties on mineral oils. OJ L 316, 31.10.1992, p. 12, as last amended by Directive 94/74/EC (OJ L 365, 31.12.1994, p. 46).

([3]) Com (1997) 30 of 12.03.1997.

([4]) The sectors concerned are among others the glass, cement, lime and steel industries.

([5]) According to the jurisprudence of the Court of Justice, for a measure to be capable of being classified as State aid within the meaning of Article 87(1) EC, it must be imputable to the State (for instance, judgement of the Court, case C 482/99, France vs. Commission, 16.05.2002). If a tax exemption stems from a Directive and must be applied by all Member States without leaving any room for discretionary application, the measure concerned is not imputable to the State. As such, it is not a State aid and does not have to be notified to the Commission pursuant to Article 88(3).

([6]) See for instance Commission Decision of 3.4.2002, State aid C 18 and 19/2001 – United Kingdom, Exemption from Climate Change Levy for dual use fuels (OJ L 229, 27.8.2002, p. 15).

([7]) The energy tax Directive sets that 'an energy product has a dual use when it is used both for heating fuel and for purposes other than as motor fuel and heating fuel. The use of energy products for chemical reduction and in electrolytic and metallurgical processes shall be regarded as dual use.' (Article 2(4)(b) second indent).

Energy products used for dual-use purposes should therefore be treated the same way as energy products for non fuel use. It also appeared important that the tax treatment of different industrial processes, manufacturing identical products, should be as similar as possible, taking into account the environmental merits of each process.

After further examination of technical and political natures, in addition to non fuel and dual uses, mineralogical processes have also been considered as a use other than as motor or heating fuels.

To avoid distortion of competition, electricity used in similar uses and processes should be treated on an equal footing ([1]): it is therefore included in the list of Article 2(4)(b).

Finally, electricity, when accounting for more than 50 % of the cost of a product, followed suit.

Consequences for the State aid assessment

Exceptions to the general system, or differentiations within that system, which are justified by the nature or general scheme of the tax system, do not involve State aid. ([2])

Member States may then take measures to tax, or not to tax, or to apply total or partial taxation to the uses of energy products and electricity listed in Article 2(4)(b) of the future energy tax directive, without creating a State aid in the meaning of Article 87(1) because such measures are in the nature or general scheme of the tax system ([3]).

This applies of course as long as all companies, having recourse to one of these specific uses, enjoy the same treatment in a given Member State.

The Council and the Commission have agreed to enter a corresponding statement in the Council minutes ([4]).

In transposing Article 2(4)(b), Member States have to pay attention to fair treatment of competing production processes.

Conclusion

The directive on the taxation of energy products is to be welcomed under different aspects. Greater harmonisation of structures and rates of excise duty improves the functioning of the internal market and reduces the risk of distortion of competition due to different taxation. By establishing higher energy tax rates than applied before in many Member States, and extending compulsory taxation to nearly all energy products, the new directive also helps to achieve environmental protection targets and enhance cost internalisation.

The legal certainty given to Member States, by means of placing some politically sensitive sectors explicitly outside the scope of the directive, has really been the key element for the unanimous agreement in the Council.

With this Directive, the Commission succeeds in accomplishing a major project in the field of tax harmonisation. The Commission also demonstrates that competition policy, and in particular state aid control, is applied to target distortions of competition without unduly restricting the design of policy measures.

Finally, it is worth noting that this article does not deepen the discussion of the relation between the provision of the environmental aid guidelines and the provisions for facultative tax exemptions for energy intensive users ([5]). This may be a relevant issue for a future article…

([1]) Insofar Article 2(4)(b) takes account of specific situations as encountered by the Commission when assessing State aid C 18 and 19/2001. See footnote 10.

([2]) See for instance 'Commission notice on the application of the State aid rules to measures relating to direct business taxation' (OJ C 384, 10.12.1998).

([3]) This corresponds to the assessment made by the Commission in the above mentioned State aid case C 18 and 19/2001.

([4]) Council document 8084/03 add 1 Fisc 59 of 3.4.2003.

([5]) See article 17 of the energy tax Directive. Such exemptions will in most cases constitute State aid and will have to be notified to and approved by the Commission. The Commission explained the criteria to assess the compatibility of the aid with the environmental aid guidelines at the Working Party on Tax Questions on 14 November 2002.

State aid control and regeneration: rubber straitjacket or passepartout?

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The Commission recently took important decisions on a number of notified aid measures aiming to regenerate problem areas in rural and urban regions. The challenges related to the regeneration of such problem areas are typically multifaceted. Consequently, the respective problems faced by Member States as well as their strategies and policy actions to answer these problems vary significantly. It is therefore essential that the Commission's state aid control policy incorporate the need for variety in this important policy area. This is best done by building upon the existing close cooperation between Member States and the Commission and by striving to enhance the transparency of the Commission's approach to state aid control in regeneration.

What exactly is meant by 'regeneration'?

The *concept of regeneration evades precise definition* and leaves ample room for ambiguities and different interpretations. *Regeneration* typically designates a *renewal process, i.e.* some form of *repair* or *improvement.* In the *context of public policy,* the term is used to describe *courses of action to transform some set of physical* and *socio-economic variables.* A *regeneration process* is therefore commonly *targeted at revitalizing problem areas* in *cities and their surroundings,* but also in *rural settings.*

Regenerating urban problem areas

The *public policy discussion* in the *regeneration domain* is *predominantly focused on* the *specific needs of urban areas. Sustainable cities today* must *simultaneously accomplish economic competitiveness* and *social and environmental progress amidst major socio-economic transformations,* illustrated by the *remodeling of the industrial structure* and the *transition to service economies.* These *transformations* have frequently *engendered significant challenges for cities* such as a *lack of job opportunities, sweeping poverty, labour force migration, housing decline, default of local business and commerce* and the *surge of crime.* These *challenges* are generally *interrelated* and *intertwined* and *threaten to precipitate the decay* of whole *urban neighbourhoods.*

Complex problems demand comprehensive solutions

Interrelated and *multifaceted phenomena* such as the *regeneration* of *urban* and *rural problem areas* pose *specific challenges* to the Member States. Policy makers must *draft and implement savvy strategies* that will *accomplish comprehensive and well-tuned actions and outcomes.* In general, a *holistic approach* that *integrates and reconciliates diverse sectoral policies* seems *specifically suited* to create these outcomes. *Holistically designed regeneration policies* will therefore often be *tailor-made* to perfectly *suit* the *unique problem situations* encountered by *local, regional and national administrations in the Member States.*

Implications for the Commission's state aid control policy

Holistic and *innovative strategies and actions of Member States, designed to respond* to *complex urban and rural regeneration problems, test* the *capacity of the Commission's State aid regime* to *proactively adapt to changes*. In the past years the Commission has had to deal with schemes involving *investment aid for the physical regeneration of business premises* or *aid to attract new companies to deprived areas* or to *prevent existing companies from moving away*. Such aid, especially if it is awarded to *large companies*, has a *high potential for distorting competition* and affecting trade between Member States. Furthermore, many of these deprived areas are in reality *pockets of deprivation inside wealthier regions*, where *no aid for regional development reasons is allowed*. The *State aid regime, i.e. the State aid rules* and *their every-day application in close cooperation with Member States,* must therefore *deliver comprehensible, transparent and quick answers* to *sophisticated policy questions such as the regeneration of problem areas*. Frequently, Member States will adopt *fresh approaches* such as the *cooperation between public and private partners in redeveloping degraded land* as

described in the *excursus* below. *Modern state aid control policy must build upon intensive cooperation with Member States in order to discern new developments and to develop coherent anwers to them.*

Lessons from the past, lessons for the future

The *Commission's regeneration track record demonstrates* that *the State aid regime is prepared to deal with intricate public policy phenomena*. In the *regeneration domain*, the Commission *approved a host of measures* in *areas* as *diverse* as the *provision of social housing, heritage conservation, property development, risk capital funding and tax reliefs for small and medium-sized enterprises in disadvantaged communities*, and *tax exemptions for land sales in disadvantaged regions. Progress in this field is considerably owed to substantial and fruitful cooperation with Member States. Member States and the Commission are thereby gradually building up a broadening knowledge base in the domain of regeneration.*

The call for a formal regeneration framework

Along with the ongoing effort to gradually build up the knowledge base in the area of regeneration, an *open debate about the usefulness of a formal regeneration framework emerged. Frameworks and guidelines typically specify* the *Commission's position on a certain policy issue*. For the purpose of *state aid control*, a *framework would outline the conditions that would have to be met in a specified policy area in order for an aid measure to be declared compatible. Frameworks and guidelines* have proven to be *important and succesful instruments, promoting predictability and transparency*. Unfortunately, they *can also fall short of their potential* if the *subject area is not sufficiently defined.*

The 'Guidelines for undertakings in deprived urban areas'

The *Commission's* 'Guidelines on State aid for undertakings in deprived urban areas' ([1]), adopted in 1996 in order to *identify urban districts qualifying for classification as deprived urban areas eligible for state aid, exemplify guidelines that do not live up to their full potential. Modeled against the background of one Member State's specific experiences,* these guidelines only *represented* a *very narrow fraction* of potential *regeneration situations encountered in reality*. As the *Member States did not make use of these guidelines,* the Commission – in its *effort to simplify and streamline legislation* – decided to *abandon them*. ([2])

State aid control: Rubber straitjacket or passepartout?

A formal regeneration framework based upon *limited experience* can quickly turn out to *restrict choices and options* and become a *rubber straitjacket*. The *challenges associated with the regeneration of problem areas* are *numerous and diverse* and *sometimes even contradictory*. And *Member States' approaches and instruments* in this domain are *often too dissimilar* and *new* in order to *define an all-embracing and exhaustive general line on a European level*. Therefore, for the time being, *the current state aid rules – applied by and enriched through extensive cooperation between Member States and the Commission – deliver* the *necessary flexibility to accommodate all regeneration measures fulfilling the conditions of the EC Treaty.* The *fundamental transparency of the Commission's approach* will be safeguarded *by the publication of a concise manual for practitioners on the world wide web, following a joint initiative of Commissioners Monti and Barnier and subsequent fine tuning by Directors General of DG Competition and DG Regional Policy.*

Excursus: Recent developments

In the context of the aforementioned *evolution of the existing state aid rules* in cooperation with the Member States, the Commission recently *adopted far-reaching decisions* on several *notified regeneration schemes*. In the following, we will briefly *introduce the main elements* of a decision on the *remediation of degraded land.* ([3])

([1]) OJ C 146, 14.5.1997, p. 6.

([2]) Commission notice on the expiry of the guidelines on State aid for undertakings in deprived urban areas. OJ C 119, 22.5.2002, p. 21.

([3]) Commission decision of 11 June 2003 (C/2003/1741) on *'State aid N 385/2002 – United Kingdom: Support for Land Remediation'*.

What does the scheme intend to achieve?

The scheme intends to bring *contaminated land* ([1]), *brownfield land* ([2]) and *derelict land* ([3]) back into productive use by *addressing the detrimental effects of previous usage*. The *remediation* of such land reduces the pressure for development on *greenfield land* ([4]). The *reclamation of such degraded land is a first necessary step towards socio-economic regeneration.*

Degraded land: How does it hamper socio-economic development?

The *adverse consequences* of *contaminated land, brownfield land and derelict land* go well beyond the impact on the physical environment. In *urban areas*, such sites have often been left as *wasteland or derelict buildings* that have *environmental, economic and social negative effects* on the surrounding area. Such areas accordingly undergo a *decline in business activity, lost employment opportunities, reduced tax revenues*, as well as a *spotted community image*.

What does remediating degraded land mean?

Remediating degraded land means *transforming it in order to make it suitable for new uses*. A large part of degraded land *justifies remediation*, but it generally is particularly *hard to develop*, which places it at *a significant competitive disadvantage compared to greenfield land*.

How does the UK advocate the remediation of degraded land?

As part of the UK's *urban regeneration strategy*, the reuse of *contaminated land, brownfield land and derelict land* is strongly favoured to using *greenfield land*. Around *66,000 hectares of degraded land* are *available for redevelopment* in England. The government has set a *national target* to *increase the proportion of new homes built on such land to 60 per cent by 2008*.

Why does the UK encourage private participation?

The UK's approach to the *remediation of degraded land* is focused on *public private partnerships (PPPs*). The *partnership approach with the private sector* advocates the *time-limited use of public funding in order to lever resources from the private sector*. By leveraging private sector money, a relatively *small amount of public money* will bring in larger amounts of *private money and private sector knowledge*.

How is private risk aversion overcome?

The *remediation of degraded land* is *complicated by the significant risks associated with contamination*. The *introduction of public money via public-private partnerships* will *stimulate private sector engagement* in the *redevelopment of degraded land*. This *redevelopment* will in turn *ensure the cleaning up of the land* and *reduce pressure* on the development of *greenfield land*.

How does public money kick-start regeneration?

The *redevelopment* of *contaminated, brownfield and derelict land* transforms surrounding areas and promotes the *reconstruction of their socio-economic base*. *Land and property values will increase*, the *image of problem areas* will *improve*, and *higher confidence* will help to *secure future private investment*. *Public money* will only be used to *kick-start this process*.

What are the features of the aid instrument?

A *dereliction aid grant* will be obtainable for *identified and approved remediation programmes* aiming to *remediate contaminated land, brownfield land and derelict land*. The *eligible costs* will *be equal to the cost of the work less the increase in the value of the land* and will *include a*

([1]) *Contaminated land* is any land which appears to be in such a condition – by reasons of substances in, on or under the land – that significant harm is being caused or there is a significant possibility of such harm being caused; or pollution of controlled waters is being, or is likely to be caused.

([2]) *Brownfield land* – more recently referred to as 'previously developed land' – is land which is or was occupied by a permanent structure and associated fixed surface infrastructure. Previously developed land may occur in both built-up and rural settings. The definition includes defence buildings and land used for mineral extraction and waste disposal where provision for restoration has not been made through development control procedures.

([3]) *Derelict land* is land that is so damaged by industrial or other development such that it is incapable of beneficial use without treatment.

([4]) *Greenfield land* is land that has not previously been developed.

reasonable level of profit. The *aid intensity* will be *up to 100% of eligible costs*.

How is public aid limited to the minimum necessary?

All *aid applicants must demonstrate* that their application will deliver *value for money*. The *regeneration bodies* will *rigorously appraise* that the *public sector support* is the *minimum necessary* to enable the *remediation* to proceed. *Remediation projects* will be *subject to open competition between prospective applicants* and applications must demonstrate that *all works have been competitively procured*. ([1])

How is the 'polluter pays principle' respected?

Where the *person responsible* for causing the pollution is *clearly identified*, that person *must finance the rehabilitation* and there will be *no public support.* Where the *person responsible* for the pollution *is not identified or cannot be made to bear the cost*, the *person undertaking the rehabilitation work may receive public support*.

How is cumulation ruled out?

Remediation projects covered by this scheme will be treated as *separate, discrete projects from any subsequent development of the land* in question. Grants under the scheme *cannot be cumulated with any other form of aid.*

How did the Commission assess the scheme?

The Commission concluded that the measures under the scheme *constitute aid within the meaning of Article 87(1) EC*. Those *submeasures* of the scheme *aimed at remediating contaminated polluted industrial sites* were *found to be compatible* as they *satisfy the conditions outlined under point 38* of the *Community guidelines on State aid for environmental protection.* ([2])

In the case of aid to *remediate* land on which there are *buildings, structures or works that are derelict* and aid to *remediate land damaged from or suffering risk of subsidence*, the Commission concluded that *none of its existing guidelines, frameworks or regulations were applicable*. Although the submeasures have *evident environmental objectives*, the *Community guidelines on State aid for environmental protection* were not applicable because of their *strict definition of pollution*.

The Commission therefore assessed these submeasures directly on the basis of Article 87(3)(c) with regard to their *necessity to ensure environmental protection and sustainable development without having disproportionate effects on competition and economic growth.* It concluded that these measures *contributed to the achievement of the Community objectives of environmental protection and sustainable development* while at the same time *excluding disproportionate effects on competition and economic growth.*

([1]) Where open and transparent competition to carry out the remediation work has not been possible, *independent Chartered Surveyors will assess the cost of remediation to a state where the land is ready for a wide range of new uses.*

([2]) OJ C 37, 3.2.2001, p. 3-15.

Liberalisation and competition policy in railways

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Introduction

Historically, DG Competition activity in the rail transport sector has been fairly low key because, until relatively recently, all the national railway markets were operated on the basis of statutory monopolies. Cross-border services, where they existed at all, were possible only on the basis of co-operation between the flag carriers. Competition was non-existent.

However, after a slow start, rail transport liberalisation at European level is now gathering pace. A first liberalisation package entered into force in March 2002 and a second package is on the way. A number of established railway companies (some of them in protected home markets) have ventured onto neighbouring markets. Some new players have also entered the market.

Nevertheless, competition in railways is still at its infancy. Economic, technical and legal barriers continue to make it difficult for new railway companies to start operating international railway services. In addition, vertically integrated national railway companies have considerable market power. Their position has now been challenged by a Commission decision under Article 82 against the Italian national flag carrier, Ferrovie dello Stato. Under the decision, adopted on 27 August 2003, FS is obliged to provide access to the international passenger railway services market in Italy.

After first describing the general policy framework of the EU railway sector, we provide an overview of the main elements of this decision.

Policy framework

The Lisbon agenda

Railways have a key role in contributing to the overall Community objectives of greater competitiveness and sustainable development by providing services at times, frequencies and fares attractive enough to persuade people to switch from road to rail, and thereby help to relieve road traffic congestion and pollution. The problem is that national governments have presided over a sustained and uninterrupted decline in the fortunes of the largely unreformed State railways, which have continued to lose market share to road, in both relative and absolute terms. On various occasions, the Council, Commission and the European Parliament have emphasised the importance of revitalising the European railway sector which remains a key strategic aim in EU transport policy ([1]). Last year, Commissioner Monti set down the main competition concerns which need to be tackled to make the reforms effective ([2]). More recently, the Van Miert High Level Group on the trans-European transport network has proposed that the priority status given to a large number of railway projects, including projects on the high speed passenger services network, should be maintained ([3]).

The railway packages

The chosen method for tackling railway restructuring and reform at EU level is to do it step by step on the basis of legislation proposed by the Commission and tabled in the Council of Ministers and the European Parliament.

The process started with Directive 91/440/EEC ([4]). The idea behind the Directive was to start to make improvements in the way the railways are operated. First, the railways had to take responsibility for their own day-to-day management and, as part of this, financial accounting changes were introduced as the first tentative steps towards separating train services from track management. Second, the Directive opened the door, for the first time, to third parties interested in starting new, cross-border container freight services. The Directive also introduced the concept of the 'international grouping', an association of at least two

([1]) *European transport policy for 2010: time to decide* http://europa.eu.int/comm/eneregy_transport/en//lb_en.html.

([2]) *Effective competition in the railway sector: a big challenge* UNIFE annual reception, Brussels, 21 May 2002, http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/02/216/0/RAPID&lg=EN&display=.

([3]) http://europa.eu.int/comm/ten/transport/revision/hlg_en.htm.

([4]) *of 29 July 1991 on the development of the Community's railways*, OJ L 237, 24.8.1991.

train operators based in different Member States to operate cross-border passenger or freight services. Only after having formed such an international grouping and after its partners have obtained a safety certificate from the national regulator, can an international railway passenger service be provided in the EU. At least at this early stage of liberalisation, this gives significant power to the incumbent national railway undertakings. As long as there is no other suitable partner in the other Member State, new entrants have to rely on the co-operation of incumbent national railway undertakings if they are to establish an international grouping.

1st railway package

With regard to freight services, this dependency on the incumbent undertaking was abolished under Directive 2001/12 ([1]). As part of the 1st railway package of Directives, it renders individual operators free to provide all types of cross-border freight services (i.e. not just container trains). For a transitional period, these new opportunities are limited to the so-called Trans-European Rail Freight Network ('TERFN'). But from 2008 onwards, access rights will be the same as for container trains and extend across the whole EU rail network. Additionally, the Directive takes separation a stage further by requiring separate balance sheet accounting for train operations and infrastructure management and clearer accounting separation between passenger and freight services. The Directive also says that certain essential functions ([2]) concerning track charging, train path allocation, operator licensing, monitoring compliance with public service obligations and setting safety standards can only be carried out by people who do not themselves provide rail transport services.

Another ingredient of the package, Directive 2001/14 ([3]), provides a framework for *conditions* of access, for both freight and passenger services, to the rail network - how train paths are allocated on the tracks, what the track charges should be, who should be responsible for the allocation and charging process, and how the newly created national railway regulators should oversee the process. Critically, the Directive makes clear that if the infrastructure manager also happens to be a train operator, the capacity allocation process on his network has to be carried out by someone else. The same rule applies for track charges (though not to their collection). In addition, the Directive requires governments to make sure that infrastructure managers encourage cross-border services by co-operating in the train path allocation process in a fair and non-discriminatory manner.

Second railway package

The Council has already agreed a Common Position on a 2nd package of reforms and the Commission tabled revised proposals ([4]) on 30 June. These include market opening for national rail freight markets. In its First Reading, Parliament voted heavily not only in favour of freight market opening, but also to open up both national and international passenger services, too. The Commission has decided not to include those amendments in its revised proposal, because there is already a separate proposal on the table to open up public transport and the Commission has said that further proposals for opening up cross-border railway passenger services will have to await the outcome of an impact assessment, now underway. Parliament will be debating the package again in the autumn.

Controlled competition for public transport

The existing EU framework for land public transport was drawn up over 30 years ago at a time when virtually all services were provided by local, regional or national monopolies operating under a public service obligation in return for which they received subsidy. The pattern in the rail sector was one of State railways with a statutory monopoly. But some countries have already opened up their national passenger markets and the result is that a number of train operators (some in protected home markets) have been able to bid successfully for the exclusive right to operate services, under fixed term contract, on neighbouring markets. This type of market opening – also known as 'controlled competition' – has brought about the highest

([1]) *of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways,* OJ L 44, 15.3.2001.
([2]) With some derogations for Ireland, Northern Ireland and Greece.
([3]) *of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification* OJ L 75, 15.3.2001.
([4]) *Communication from the Commission to the European Parliament.* SEC(2003) 754 final of 30.6.2003.

growth in passengers with the ability to control subsidy more efficiently and effectively. The effect of the Commission proposal ([1]) would be to extend controlled competition right across the EU rail, road and inland waterway passenger markets. But the proposal has got stuck in the Council, largely because of a blocking minority resisting the inclusion of railway services.

Remaining obstacles and red lights

But, difficult and controversial as market opening undoubtedly is, it is not the end of the story. There are serious structural problems, even in some nominally open markets, which prevent the market from operating as it should. Newcomers face a range of barriers. These include inadequate separation between track and trains; the absence of a level playing field in the provision of in-use rolling stock for those bidding to provide services in controlled competition; and a lack of transparency in the procedures which train operators have to go through to get suitable slots on the network to enable them to run their trains. On the first point, proper transposition of the 1st railway package ought to provide some relief though, certainly from the competition policy perspective, complete separation of services from infrastructure would be the preferable option. On the second issue, any Member State seriously interested in making the market for controlled competition work effectively ought to be interested in structuring it in such a way that incumbents do not enjoy perpetual competitive advantage. On the third point, we are currently in a dialogue with the organisations which co-ordinate international rail timetables in order to ensure that the process is genuinely open, transparent, objective and non-discriminatory and does not exclude new entrants.

The GVG/FS decision

This case was initiated by a complaint from the private German railway undertaking Georg Verkehrsorganisation GmbH (GVG) arguing that Ferrovie dello Stato S.p.A. (FS), the Italian national railway carrier, had prevented it from providing an international passenger rail service from Germany to Milan. GVG wanted to feed passengers originating in different cities in Germany into Basle. It then proposed a non-stop ("Sprinter") rail link that would operate twice a day from Basle to Milan via Domodossola. Some of the passengers would continue their journey from Milan. Similarly, the train from Milan to Basle would take local passengers as well as beyond passengers.

This is one of the busiest north-south connections in the EU. In co-operation with the Swiss national operator SBB, FS already provides 10 trains a day. In addition, the FS/SBB joint-venture Cisalpino provides one daily connection between Basle and Milan. GVG's envisaged Sprinter train would add a service which differs significantly from the existing ones. Unlike the Cisalpino, which calls at several stations between Basle and Milan, GVG's envisaged Sprinter would be a non-stop service. By operating a connection which is more than one hour faster and by providing additional services on the train, GVG has been aiming to cater in particular for business customers.

In order to provide such a service, GVG needs access to the Swiss and the Italian railway network; it must form an international grouping with an Italian railway undertaking; it needs a safety certificate to operate on the Italian network; and it has to be able to ensure traction, i.e. a locomotive and a driver, on the Swiss and the Italian network.

As a vertically integrated company, FS has a statutory monopoly to operate the Italian railway infrastructure. In addition, as the designated infrastructure manager and allocation body, FS has assumed regulatory functions of the State. It is responsible for establishing and maintaining the Italian railway infrastructure and for assigning train paths to railway operators in Italy in return for a fee. FS is also responsible, as infrastructure manager, for issuing safety certificates to railway undertakings.

Since 1995, GVG has been asking FS to enter into an international grouping, to provide information about the price and availability of train paths, and to provide traction. For several years FS did not provide train path information on the grounds that EC legislation had not been transposed in Italy, that GVG had not established an international grouping and that it did not have a safety certificate. At the same time, it refused to enter into an international grouping with GVG and to provide traction. As regards the late transposition of EU legislation, the Commission concluded that Article

([1]) *Amended proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway* COM(2002) 107 final of 21.2.2002.

10 (1) of directive 91/440, which establishes an international grouping, has direct effect. ([1]) Railway undertakings like GVG could therefore rely directly on the provision of Article 10 for instance to request from FS information as regards the price and the availability of train paths.

The relevant market

In the decision, the Commission establishes that there exist two upstream markets, i.e. the market for access to infrastructure and the traction market. With regard to the downstream market, it found that for a number of reasons the international rail passenger transport market is distinct from the market for transport by coach, car or aircraft. Access to the downstream market is limited to international groupings which establish the necessary access and transit rights (this includes Switzerland).

Dominance

FS is found to be dominant on the market for access to its national rail network, the latter being considered an essential facility. As regards traction, the Commission concluded on the basis of a detailed market investigation that FS is dominant on that market, too. For the time being, no other Italian railway company is equipped to provide the required traction service to GVG. In addition, it was concluded that GVG cannot provide traction by itself on the Italian market. As European railways have developed along national boundaries, each national railway has adopted its own technical and administrative standards. National systems differ in their operating procedures, safety systems, driver training and route knowledge. Therefore, unless they are equipped with multiple technology, locomotives have to be changed at borders. Similar barriers also exist for drivers, who need route knowledge, a national licence and language skills. To provide traction for international services by itself, a railway undertaking would have to set up separate locomotive and driver pools in every Member State where it wishes to operate. This, however, is prohibitively expensive and could not be justified on the basis of the existing relatively limited freedom to provide services at this stage in the liberalisation process (cabotage not being possible in Italy). It is therefore concluded that GVG depends on FS to provide such traction services.

Finally, as regards the downstream market, FS was found to be dominant, as it is the only company which provides railway passenger services on the Italian segment of the Basle – Milan route. As pointed out above, it provides a number of daily passenger train services between Basle and Milan in co-operation with SBB.

Abuse

Given that the national rail network is considered to be an essential facility and, in addition, that FS fulfils the regulatory function of an infrastructure manager, it was found that FS was obliged to provide the requested information as regards the access to the infrastructure to GVG. By effectively refusing to deal with GVG's requests for access to the railway network, FS abused its dominant position in the infrastructure market with foreclosure effects in the downstream market.

As FS had not responded to GVG's requests for traction, it also had effectively refused to provide traction services to GVG for this particular service. It is found that FS' refusal was not justified by any objective reasoning, such as for instance the lack of any spare capacity in traction services, or a refusal by GVG to pay an adequate remuneration for the provision of such services, etc. As GVG depends on FS providing such services, FS's refusal preserved its monopoly position on the separate downstream market for passenger transport. It eliminated potential competition on that market.

Finally, with regard to the downstream market, it was found that for the time being it is indispensable for GVG to enter into an international grouping with FS, as there is no other Italian railway company which fulfils the legal requirements for the purpose of operating passenger services on this particular route. FS did not provide any objective justification for its refusal to enter into negotiations with GVG to form an international grouping. By doing so, it prevented GVG from entering the downstream market which constitutes an abuse of dominant position.

Remedies

With a view to settling the case, FS has given important undertakings. In particular, FS has undertaken to enter into international grouping agreements with any duly licensed train operator

([1]) In line with the relevant case law of the Court of Justice, it is considered that this provision is sufficiently clear and precise, and unconditional, not leaving any margin of discretion in the implementation. See C 287/98 Linster, 19.9.2000, C-8/81 Becker of 19.1.1982, ECR p. 53 as well as case 28/67 Molkerei-Zentrale of 3.4.1968, ECR, p. 211.

with concrete proposals to start an international rail service. Furthermore, FS has undertaken that, for a period of five years, it will provide traction to other railway companies intending to provide cross-border passenger services. On this basis, FS has entered into agreements with GVG. It has also undertaken to provide GVG suitable train paths as soon as corresponding train paths are made available by SBB on the Swiss network.

Given the novelty of this case and the important commitments made by FS, the Commission decided not to impose a fine.

Modernisation

Modernisation will give the NCAs competence to enforce Community anti-trust law fully in the rail transport sector. With that and all the above developments in mind, DG Competition has taken the initiative of setting up a network of rail experts from the NCAs and DG Competition. The group will have its first meeting in October. Its job will be to identify current topics of common interest in the context of ongoing railway liberalisation, to discuss key issues arising out of individual cases and, in co-operation with DG Transport and Energy, to develop best practice between and among the NCAs and new national rail regulators set up under the 1st package. The overall aim is to get a common approach to the application of anti-trust law in the railway sector, so as to avoid conflicting decisions.

Conclusion

The EU is continuing to invest considerable resources, both financial and legislative, into the European railway market. European industry and consumers are entitled to expect a reasonable rate of return in the form of effective competition. That will only come about if passengers and freight customers are given freedom of choice in a genuinely European internal market.

In that respect, the GVG/FS decision is a landmark for competition in European rail transport and a good example of how competition cases can contribute to the railway liberalisation process. It deals not only with GVG's immediate concerns *vis-à-vis* FS but also has implications for third parties generally and the way in which incumbents react to reasonable requests from them. It means that, for as long as the international grouping requirement remains on the statute book, the refusal of a dominant train operator to enter into such a grouping amounts to an abuse of the competition rules if the national flag carrier is the only possible partner with whom the grouping can be formed. Likewise, a refusal to provide traction services, in circumstances where there is no realistic alternative supplier, will also be deemed abusive. And there can be no excuse for refusing to discuss terms for access to the tracks.

The fact that FS continued to refuse track access to GVG demonstrates that the infrastructure manager within a vertically integrated structure, even if part of a holding structure as in the case of FS, faces a conflict of interest. Otherwise it is difficult to explain why the network operator FS (RFI) did not play a more pro-active role in marketing its own network capacity to GVG with a view to maximise revenue from infrastructure charges. This case therefore supports the view that the railway network must be completely separated from the transport service provider if the market is to operate in the public interest.

Le caractère public d'un avantage en droit communautaire: après les arrêts PreussenElektra et Stardust

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Depuis plusieurs années, et les réflexions actuelles sur le service public ou les règles «de minimis» en sont l'illustration, les débats sur les aides d'Etat s'étaient focalisés sur la légitimité de l'intervention de la puissance publique dans la vie économique. La Cour de Justice des Communautés Européennes a cependant pris récemment une approche différente de la matière. En effet, à travers ses deux arrêts PreussenElektra ([1]) et Stardust ([2]), elle remodèle actuellement le contrôle communautaire des aides d'Etat en se concentrant sur les modalités d'action retenues par l'Etat, le but étant de caractériser plus finement l'existence de l'intervention publique.

Les deux axes retenus par la Cour dans les arrêts en question pour renouveler l'analyse du caractère public d'un avantage accordé, sont d'une part les ressources utilisées pour le financer, et d'autre part le degré d'implication des autorités publiques.

I – La mise en place des deux critères: les arrêts PreussenElektra et Stardust

A) L'arrêt PreussenElektra: la mise en œuvre de ressources d'Etat

1) Un arrêt peu disert

Afin de soutenir la production d'électricité à partir d'énergies renouvelables, l'Allemagne a imposé en 1990 aux entreprises publiques d'approvisionnement en électricité d'acheter toute l'électricité produite de cette manière dans leur zone, à un prix minimal fixé. La Commission a considéré cette aide compatible avec le Traité, mais ce régime a été modifié par la suite sans que la Commission ait été consultée.

La réforme de 1998 permettait, dès lors que l'électricité «verte» dépassait 5% des achats d'une entreprise d'approvisionnement, que celle-ci soit compensée du surcoût correspondant par l'entreprise de transport électrique dont elle dépend, ce mécanisme de compensation étant reproduit pour cette dernière dans ses relations avec les producteurs auprès desquels elle se fournit. Preussen Elektra, productrice d'électricité, avait ainsi payé 500.000 DM de compensation à Schleswag, entreprise de distribution dont elle était l'actionnaire principal. Elle l'avait assignée pour en obtenir le remboursement devant le Landgericht de Kiel, qui a demandé à titre préjudiciel à la Cour si les mesures en causes constituaient une aide au sens de l'article 92 du Traité CE.

La Cour a rappelé, au sein d'une jurisprudence fluctuante et parfois contradictoire, les arrêts qui font de l'existence de ressources d'Etat une des conditions de l'existence d'une aide ([3]), puis a conclu de manière assez sibylline au point 60 que le système considéré ne saurait *«constituer un transfert direct ou indirect de ressources d'Etat»*.

2) L'application du critère par la Commission

Les systèmes de compensation de coûts échoués ou de financement de l'énergie verte ayant été bâtis en Europe sur des modèles assez similaires, c'est d'abord dans le cadre du secteur électrique que la Commission a mis en œuvre le critère des ressources publiques après l'arrêt Preussen Elektra.

Dans un premier temps, elle a évité de se prononcer sur le sujet en indiquant dans trois décisions ([4]) qu'elle n'était pas en mesure de déterminer si des ressources d'Etat avaient été mobilisées, mais qu'en tout état de cause, les mesures analysées étaient compatibles avec le Traité quand bien même elles constitueraient des aides. Ces décisions sont intéressantes car elles précisent les différents éléments envisagés par la Commission pour se déterminer. Dans les trois cas, une taxe prélevée sur les opérateurs ou sur la consommation finançait un fonds placé sous le contrôle du régulateur public, afin de compenser certains coûts identifiés comme coûts échoués ou liés à la production d'énergie verte. Suivant

([1]) Arrêt de la Cour du 13 mars 2001 dans l'affaire C-379/98 PreussenElektra AG contre Schlewag AG, Rec p. I-02099.
([2]) Arrêt de la Cour du 16 mai 2002 dans l'affaire C-482/99 Stardust Marine, Rec 2002 p. I-04397.
([3]) En particulier l'arrêt du 24 janvier 1978 dans l'affaire 82/77 Van Tiggele, Rec p. 25, sur la fixation de prix, ou celui du 17 mars 1993 dans les affaires C-72/91 et C-73/91 Sloman Neptun, Rec p. I-887 sur la notion de ressources d'Etat.
([4]) Décisions du 25 juillet 2001 n°NN 49/99, Espagne – Régimen transitorio del mercado de la electricidad et n°N 34/99, Autriche – Ersatz von « Stranded Costs », ainsi que décision du 30 octobre 2001 n°N/6/A/2001, Irlande – Generation of electricity out of peat.

l'analyse classique de la Cour avant l'arrêt PreussenElektra, la Commission a considéré que ces fonds constituaient des ressources d'Etat mais que, le régulateur étant contraint dans le recouvrement et l'utilisation de ces sommes, il n'avait pas la possibilité de les employer à d'autres fins que celles prévues pour le mécanisme. Ainsi, le système de financement, d'un point de vue économique, n'était pas fondamentalement différent d'un versement direct au bénéficiaire de la taxe prélevée, la supervision par le régulateur du transfert de ces sommes ne constituant qu'une modalité comptable de traitement.

Par la suite, la Commission a nettement opté dans le sens de la continuité, en se prononçant sur l'existence de ressources d'Etat dans quatre affaires, concernant respectivement le financement du secteur électrique en Irlande, en Irlande du Nord et au Luxembourg.

Dans les deux premiers cas ([1]), les autorités nationales avaient imposé à l'opérateur public de transport d'électricité en monopole, ESB, d'acheter une certaine quantité d'électricité à un prix fixé auprès de producteurs d'énergie «verte», le surcoût étant répercuté sur les consommateurs par la mise en place d'une contribution – «a levy» - sur la connexion au réseau, collectée par les fournisseurs d'électricité et versée par eux directement à ESB. Le paiement était contrôlé et certifié par le régulateur public (le CER), qui déterminait également le niveau de la «levy» en fonction de critères légaux.

La Commission a qualifié le système d'aide, compatible par ailleurs avec le Traité, en suivant deux raisonnements alternatifs dans l'incertitude de la solution qui serait dégagée dans l'arrêt Stardust. Selon le premier raisonnement, qui a été confirmé à juste titre par l'arrêt Stardust, les ressources d'ESB, opérateur public, sont par définition des ressources publiques, et l'obligation d'achat entraîne donc un transfert de ressources publiques. Selon le second, qui présente plus d'intérêt pour notre analyse, la «levy» est instituée par l'Etat, sa transmission est contrôlée par le CER, organisme public, et les fonds transitent par ESB, également public. Ces sommes constituent donc des ressources d'Etat.

Dans le troisième cas ([2]), à la suite de l'ouverture à la concurrence du marché de l'électricité en Irlande du Nord et de la privatisation de tous les opérateurs publics, l'opérateur privé en monopole de distribution, NIE-PPB, se voyait imposer de se fournir exclusivement auprès de producteurs nationaux à un prix fixé pour couvrir leurs coûts de production élevés. Le surcoût qui en résultait était financé par la création d'une «levy» dite «competitive transition charge» (CTC), payée par les consommateurs en proportion de leur consommation et dont le montant est déterminé par le régulateur public au niveau du surcoût considéré. La Commission a estimé cette fois que le système ne mettait pas en œuvre de ressources d'Etat, au motif notamment (point 26) que les sommes en question ne transitaient par aucun fonds créé ni géré par l'Etat.

Dans le quatrième cas ([3]), enfin, un fonds de compensation était créé au sein du secteur électrique luxembourgeois, pour répartir entre les distributeurs la charge de l'achat d'énergie verte. Ce fonds, géré par le régulateur, était financé par une contribution acquittée par les consommateurs. La Commission a considéré qu'il s'agissait de ressources publiques, car le fonds était établi par l'Etat et alimenté par un système de contributions obligatoires; elle n'a pas jugé nécessaire de rappeler à ce propos le rôle tenu par le régulateur. Par contre, elle a indiqué au point 20 de sa décision qu'avant la mise en place du fonds de compensation, les obligations d'achat d'électricité verte qui pesaient sur Cegedel n'impliquaient aucune ressource d'Etat ([4]).

L'existence d'un contrôle public sur la transmission des fonds et surtout leur transit par un fonds créé ou géré par l'Etat, seule condition mentionnée dans les cas CTC et Fonds de compensation et qui soit susceptible d'interrompre le passage de personne privée à personne privée des fonds, semblent donc à l'heure actuelle déterminants de leur condition de ressources publiques aux yeux de la Commission. On peut se demander jusqu'à quel point cette exigence de l'interposition d'un fonds créé ou géré par l'Etat apporte une réponse globale aux interrogations soulevées par l'arrêt Preussen Elektra.

D'application difficile, cette jurisprudence est en outre rapidement apparue insuffisante à elle seule pour circonscrire l'action de l'Etat dans le jeu de la concurrence.

([1]) Décisions du 15 janvier 2002 n°N 826/01, Irlande – Alternative Energy Requirements I to IV, et n° N 553/01, Renewable Energy Sources.

([2]) Décision n° N 661/99 du 27 février 2002, Royaume-Uni – Competitive Transition Charge.

([3]) Décision du 5 juin 2002 d'ouvrir la procédure formelle d'examen dans le cas n°C 43/2002 (ex NN 75/2001) - Fonds de compensation dans le cadre de l'organisation du marché de l'électricité au Luxembourg, publiée au JO C 255 du 23 octobre 2002, p. 15.

([4]) Sans doute parce que l'Etat ne possède que 41% de cette entreprise, dont 33 % directement.

B) L'arrêt Stardust: l'imputabilité de l'aide à l'Etat

Crée en 1989, l'entreprise Stardust agissait dans le domaine maritime, avec pour seule banque SBT, sous-filiale de la banque publique Crédit Lyonnais. Ayant accordé à Stardust des garanties et des prêts directs pour 420 Mio FF, SBT s'est trouvée fortement engagée auprès d'une société dont les pertes étaient supérieures au chiffre d'affaire, avec le risque en cas de liquidation de se voir appelée en comblement de passif pour soutien abusif. En octobre 1994, une incorporation au capital de Stardust d'une partie des créances de la SBT donne au CL le contrôle de l'entreprise, transférée au début de 95 à sa structure de défaisance appelée CDR. Le CDR procèdera à plusieurs augmentations de capital par incorporation de ses créances pour près de 500 Mio FF, avant de la vendre enfin à l'entreprise Marine. Le CL évaluait ses risques de pertes en cas de liquidation à près d'un Milliard de FF.

Le 8 septembre 1999 ([1]), la Commission a décidé que les augmentations de capital consenties à Stardust par le CL constituaient des aides d'Etat prohibées. Elle relève à plusieurs reprises que les prêts constituaient des ressources d'Etat, puis démontre longuement ([2]) que Stardust a bénéficié d'un avantage car le CL ne s'est pas conduit comme un investisseur privé. Ainsi, la Commission note (point 26) que *«la constance et le caractère permanent de ce soutien permettent de conclure qu'il ne relève pas d'une erreur isolée de gestion de la banque, mais d'une pratique suivie et délibérée d'accompagnement de la croissance de l'entreprise, ayant favorisé Stardust par rapport aux conditions de financement qu'il aurait pu trouver auprès de banques privées sur le marché»*. Notamment, les prêts mis à disposition par le CL n'auraient pas servi à apurer la situation financière, mais ont permis à Stardust une croissance interne et externe jusqu'à devenir un des leaders mondiaux du secteur.

Il apparaît immédiatement que le recours à la notion de ressource d'Etat ne permet pas, à lui seul, de saisir l'action de l'Etat lorsqu'il accorde une aide. En effet, si l'on admet – à juste titre – que les ressources des entreprises publiques constituent des ressources d'Etat, et que celui-ci, hors les cas où une aide est compatible avec le Traité, ne peut intervenir dans la concurrence qu'aux conditions d'un investisseur privé prudent et avisé, alors tout acte imprudent et malavisé d'une entreprise publique qui bénéficie à un tiers constitue une aide d'Etat. Le problème est d'autant plus net en l'espèce, que la Commission fustige au sein de sa décision le défaut de contrôle exercé par l'Etat sur la banque publique.

La Cour fait donc appel à un critère supplémentaire, qui est l'imputabilité à l'Etat de la mesure analysée. Cette notion d'imputabilité, qui permet de prendre en compte l'action volontaire de l'Etat, était déjà présente dans sa jurisprudence, mais sans être véritablement explicitée ni systématisée ([3]). La Cour crée donc plus qu'elle ne synthétise ce nouveau critère, et l'ampleur des développements qui y sont consacrés ne laisse pas de doute quant au caractère de principe de cet arrêt. De fait, la Cour s'attache longuement à détailler les modes de preuve recevables pour apporter la démonstration de cette imputabilité. L'existence d'une instruction précise n'est ainsi pas nécessaire, la Commission pouvant recourir à un faisceau d'indices parmi lesquels : le statut juridique de l'entreprise, son intégration dans les structures de l'administration publique, l'intensité de la tutelle exercée par les autorités publiques, la nature de ses activités et ses conditions d'exercice sur le marché, et généralement la probabilité de l'implication des autorités publiques ou de l'absence de leur implication dans l'adoption d'une mesure, eu égard à ses caractéristiques.

Ces deux critères posés, il importe de définir une approche cohérente dans leur application pour assurer leur efficacité.

II – Une tentative de mise en place de critères de définition des aides d'Etat

A) Les enseignements du Traité

1) Une interprétation littérale du Traité CE?

La Cour, dans sa tentative de dégager de nouveaux critères, s'est heurtée à la rédaction même de l'article 87 du Traité CE qui prohibe *«les aides accordées par les Etats ou au moyen de ressources d'Etat»*.

([1]) Décision n°200/513/CE, concernant les aides accordées par la France à l'entreprise Stardust Marine, JO 2000 L 206, p. 6.

([2]) Démonstration réalisée au demeurant de façon incorrecte, la Commission réfutant le caractère prudent et avisé des prêts par référence aux déboires ultérieurs de Stardust, dont le CL ne pouvait par hypothèse pas avoir connaissance à l'époque.

([3]) La Cour cite entres autres les arrêts C-67/85 du 2 février 1988 Van der Kooy e.a./Commission, Rec p. 219, points 37 et 38, C-305/89 du 21 mars 1991 Italie/Commission points 13 et 14, et ailleurs dans le texte C-290/83 du 30 janvier 1985 France/Commission, Rec p. 439, points 14 et 15.

Dans ses conclusions sous l'arrêt PreussenElektra présentées le 26 octobre 2000 et suivies sur ce point par la Cour, M. l'avocat général Jacobs a pu déterminer à la suite d'une savante exégèse, que le texte du Traité séparait, d'une part le cas classique de l'aide financée par les ressources publiques et accordée par un Etat membre, et d'autre part le cas plus rare des aides financées au moyen de ressources d'Etat, et octroyées par des entités publiques ou privées, désignées ou institués par l'Etat. Il faudrait donc lire en quelque sorte: «les aides accordés par les Etats au moyen de ressources d'Etat, ou par des entités publiques ou privées, désignées ou institués par l'Etat au moyen de ressources d'Etat». Il a affiné cette analyse dans ses conclusions relatives au cas Stardust ([1]), pour prendre en compte la notion d'imputabilité. En rapprochant ces gloses, on aboutit ainsi à: «les aides accordés par les Etats au moyen de ressources d'Etat, ou au moyen de ressources d'Etat par des entités publiques ou privées, désignées ou instituées par l'Etat, la mesure devant être le résultat de l'action de l'Etat membre concerné».

Il est sans doute vain de rechercher l'origine des critères de ressources d'Etat et d'imputabilité dans les termes même de l'article 87, *«les aides accordées par les Etats ou au moyen de ressources d'Etat»*, qui précisément les excluent en les présentant comme alternatives. Sans chercher à démontrer que le Traité de tous temps aurait contenu ces critères, il faut admettre que leur apparition correspond à une création jurisprudentielle, rendue nécessaire par l'extension du contrôle communautaire des aides d'Etat, et par la sophistication des modes d'évitement de ce contrôle par les Etats membres. C'est ainsi que l'on pourra déterminer leur bon usage.

2) L'esprit du texte: préserver les ressources publiques et éviter les distorsions de concurrence par l'Etat

L'interdiction des aides d'Etat, issue du Traité, visait d'une part à prévenir les distorsions de concurrence, et d'autre part à éviter que des ressources d'Etat ne soient stérilisées par leur emploi dans des conditions non économiques.

L'action de l'Etat est donc effectivement requise par le Traité, pour caractériser une intervention de l'Etat. Cette constatation, qui peut sembler tautologique, impose en réalité de déterminer à quel point cesse le périmètre de l'Etat. Or celui-ci, loin de présenter un contour net et organique, se prolonge largement par des véhicules au statut parfois douteux. Fondamentalement, le rôle du critère d'imputabilité est de poser une borne, parfois éloignée, nécessairement mouvante, au-delà de laquelle il n'y a plus d'Etat.

Une analyse plus précise de la notion de ressources d'Etat, par contre, semble plus respectueuse au premier abord de l'objectif de maîtrise des dépenses publiques, dans la mesure où elle limite le contrôle du droit communautaire à ce qui est objectivement nécessaire pour prévenir les dépenses improductives. En réalité, ce serait méconnaître que l'Etat ne crée pas ses propres ressources, mais qu'il les prélève sur le corps général de la nation ou sur des masses plus spécifiques. Les ressources, même si elles ne sont pas à sa disposition au sens strict, que l'Etat oriente vers un bénéficiaire, ne peuvent avoir une origine différente. Une définition trop stricte de la notion de ressources d'Etat met ainsi en péril les deux objectifs du Traité, puisqu'elle permet que l'Etat intervienne effectivement dans le jeu normal de la concurrence au moyen des ressources de la collectivité.

A l'inverse, une analyse extrêmement large de ces critères étendrait la notion d'aide à la plupart des effets secondaires des actes de la puissance publique. En effet, et notamment dans les pays européens qui ont un modèle commun d'économie sociale de marché, il n'existe pour ainsi dire pas de marché à l'état «naturel», et leur régulation comme leur équilibre découlent, directement ou indirectement, de l'action de l'Etat et des cadres réglementaires qu'il a mis en place. Le contrôle des aides d'Etat dépasserait alors son objet direct pour aller jusqu'aux structures même des sociétés européennes.

Il faut donc apprécier plus précisément les risques liés à une interprétation erronée des critères de ressource d'Etat et d'imputabilité pour déterminer leur étendue précise, et quel standard de preuve leur démonstration doit requérir.

B) Vers une appréciation cohérente des critères de ressources d'Etat et d'imputabilité

1) L'effet d'une interprétation inappropriée: perturbations de la structure des marchés.

On évoquera moins les risques d'une interprétation large de ces notions, qui n'ont été créées et

([1]) Conclusions de l'avocat général Jacobs présentées le 13 décembre 2001 dans le cas C-482/99 France contre Commission (Stardust), Rec 2002 p. I-0497.

systématisées précisément que parce qu'en leur absence, le contrôle communautaire des aides d'Etat s'étendait au-delà de la sphère qui lui est spécifique. Par contre, l'inconvénient majeur d'un resserrement des critères en cause réside dans le fait qu'il pousse les Etats nationaux à se tourner vers d'autres ressources que les leurs propres pour aider des opérateurs économiques.

Or qui ne voit le champ d'action qui s'offre ainsi à l'Etat? Son pouvoir de direction est restauré, au prix d'un effacement de ses interventions les plus visibles. Ses possibilités d'aider un opérateur s'élargissent, alors même que sa présence la plus immédiate se fait moins apparente, et donc moins sujette à contrôle. Sa situation financière est améliorée, car les ressources utilisées ne sont plus celles de son budget, et que leur coût de gestion et de perception est supporté par des opérateurs économiques. Les sommes ainsi susceptibles d'être utilisées par l'Etat pour favoriser une entreprise sont extrêmement diverses, leur seul point commun étant qu'il n'intervient pas directement dans leur gestion. On peut penser par exemple à des relations commerciales imposées à des conditions particulières, à des «contributions» obligatoires mais de nature privée, aux sommes levées dans le cadre d'un monopole, aux fonds des entreprises publiques sur lesquelles la tutelle publique serait limitée, à des organisations para-étatiques comme la Sécurité sociale. L'échappatoire ainsi ouverte au contrôle des aides d'Etat serait formidable.

Par ailleurs, le recours à de telles ressources renforce l'effet anticoncurrentiel de l'aide. Le système des taxes parafiscales offre déjà une possibilité de mutualiser certains coûts au sein d'une même branche économique. Or dès lors que le financement de l'aide à une entreprise est obtenu sur l'ensemble des entreprises d'un secteur, il risque lui-même de ne pas être neutre concurrentiellement en fonction de la structure du marché, car il met l'aide à une entreprise à la charge de ses concurrents. Un tel système peut aller jusqu'à exonérer cette entreprise de la charge commune, comme dans un secteur verticalement intégré, si la contribution est requise sur un marché dont l'entreprise bénéficiaire est absente. Dans un tel cas, la distorsion de concurrence est double, puisque les entreprises, en sus d'être opposées à une entreprise qui a reçu un avantage, ont elles-mêmes subi une charge.

Un système comme celui qui était mis en place dans le cas PreussenElektra renforce encore ces effets anticoncurrentiels car il organise les flux économiques. Il impose en effet aux opérateurs d'un secteur la réalisation d'opérations à des conditions non économiques. Si l'inconvénient semble moindre pour ces entreprises au premier abord, c'est en fait la structure même du marché qui est modifiée pour s'adapter à la structure de production de l'entreprise bénéficiaire, qui plus qu'un simple avantage sur ses concurrents, voit ainsi le marché s'organiser autour d'elle pour correspondre à ses impératifs propres.

2) Un standard de preuve pour ces deux critères ?

La question se pose du standard de preuve à apporter pour démontrer l'existence d'une aide d'Etat, l'évolution récente du droit de la concurrence, notamment dans le domaine des concentrations, étant à un contrôle plus sévère de la Cour.

Il convient tout d'abord de noter que les deux critères en cause n'ont pas la même nature : l'imputabilité à l'Etat, concerne un fait passé, alors que le contrôle de ressources financières par les autorités publiques constitue un pouvoir sur ces sommes, et donc une potentialité. Ceci apparaît très nettement dans le cas Stardust, qui oppose ainsi la preuve de l'imputabilité au point 52: *«En effet, même si l'Etat est en mesure de contrôler une entreprise publique et d'exercer une influence dominante sur les opérations de celle-ci, l'exercice effectif de ce contrôle dans un cas concret ne saurait être automatiquement présumé.»*, et celle du caractère public de ressources au point 38: *«En effet, l'Etat est parfaitement en mesure, par l'exercice de son influence dominante sur de telles entreprises, d'orienter l'utilisation de leurs ressources pour financer, le cas échéant, des avantages spécifiques en faveur d'autres entreprises.»*

La technique choisie par la Cour afin de prouver l'imputabilité à l'Etat, est celle du faisceau d'indice (point 55 de l'arrêt Stardust). Il est en effet très délicat de démontrer que l'Etat, dans ses relations avec ses entreprises, leur a donné des instructions précises sur des mesures déterminées. C'est là que réside la difficulté d'application de ce nouveau critère, puisque le niveau de preuve à apporter n'est pas défini: il ne suffit pas de se référer au statut général de l'entreprise, mais il n'est pas non plus nécessaire de démontrer l'intervention spécifique des autorités publiques. Le standard de preuve se situe entre ces deux extrêmes, sans qu'on sache encore quelle intensité de contrôle la Cour se réserve sur ce sujet. Il semble en définitive que, sans aller jusqu'à l'idéal d'une caractérisation nette, l'on puisse chercher à démontrer l'intervention de l'Etat dans la prise d'une décision de façon plus ou moins spécifique à cette mesure, en la déduisant d'un ensemble d'indices. Plus précisément, il faut atteindre un

haut niveau de vraisemblance, soit positivement que l'Etat a imposé ou conseillé l'adoption de cette mesure, soit négativement que les faits sont tels qu'il n'est pas concevable qu'elle ait été prise sans l'intervention de l'Etat.

En ce qui concerne le critère des ressources d'Etat, l'avocat général Jacobs dans ses conclusions sous PreussenElektra, retire de l'examen de certains précédents ([1]) deux termes qu'il utilise de façon interchangeable, et qui doivent caractériser le caractère public de ressources, à savoir le contrôle exercé par l'Etat sur ces sommes et le fait qu'elles sont à sa disposition. Dépassant la question de la simple propriété des fonds, la Cour reprend ces deux critères aux points 37 et 38 de son arrêt Stardust, les présentant effectivement comme équivalents: *«le fait qu'elles restent constamment sous contrôle public, et donc à la disposition des autorités nationales compétentes, suffit pour qu'elles soient qualifiées de ressources d'Etat»*.

On a vu que l'arrêt PreussenElektra lui-même se montre fort peu explicite, et que la Commission, en l'appliquant, tend désormais à recourir à des critères formels tels que le transit ou non par un fonds, dont on suppose qu'il doit être désigné, institué ou géré par l'Etat, mais une analyse formelle en termes de degré d'intervention de l'Etat sur des ressources est sans doute inappropriée pour permettre leur pleine qualification. Un raisonnement qui privilégie l'existence de structures «raisonnablement publiques» par lesquelles transitent les fonds, risque en effet de n'appréhender la qualification de ressources qu'au travers d'une casuistique tatillonne et incertaine, dépendant du degré d'implication des organes de l'Etat que l'on parvient à déterminer, et esquive la réalité du contrôle exercé par l'Etat. Ce risque apparaît nettement dans les deux décisions précitées de la Commission, énergies alternatives et CTC, où les fonds issus d'un «levy» ambiguë, contribution générale et obligatoire, déterminée par l'Etat dans son principe, son mécanisme, son montant et son affectation, prennent tantôt le visage de ressources publiques et tantôt de fonds purement privés. La Commission en est d'ailleurs parfaitement consciente, comme le démontrent ses hésitations premières sur le sujet.

Pour qu'il remplisse efficacement son objet, le critère de ressources publiques doit donc s'attacher au pouvoir réel de l'Etat sur des sommes. Le contrôle exercé par l'Etat devrait ainsi être entendu, non pas comme la possession ou la possibilité d'utiliser une ressource de façon arbitraire, mais comme un pouvoir de déterminer la mobilisation et l'utilisation de ressources données. La Cour, au point 38 déjà cité de l'arrêt Stardust, s'approche d'ailleurs de cette optique, en notant que: *«En effet, l'Etat est parfaitement en mesure, par l'exercice de son influence dominante sur de telles entreprises, d'orienter l'utilisation de leurs ressources pour financer, le cas échéant, des avantages spécifiques en faveur d'autres entreprises.»* C'est ainsi le pouvoir de mobilisation et d'orientation de l'Etat sur certaines ressources qui, en définitive, leur confère un caractère public.

De ce point de vue, la fixation de prix, par exemple, ne mobilisera pas de ressources publiques, alors qu'une contribution «privée» obligatoire sera réintégrée dans la sphère du contrôle des aides d'Etat. L'obligation d'achat à des prix imposés constitue un cas limite de ce critère. Mais si l'on appréhende comme un transfert de ressources la réalisation par les entreprises publiques d'actes économiques à des conditions anormales, alors il faut sans doute considérer symétriquement que l'obligation pour des entreprises privées de conclure de tels actes constitue pour l'Etat un moyen de créer un flux financier vers des opérateurs identifiés.

La technique du faisceau d'indice demeure parfaitement pertinente pour appréhender le caractère public de fonds, les critères organiques étant cette fois déterminants dans la mesure où ils définissent les pouvoirs et les moyens d'action de l'Etat sur les structures en cause. Mais tout indice de droit ou de fait doit être pris en compte, qui atteste par exemple d'une pratique constante des autorités publiques, du caractère économique de l'activité considérée ([2]), ou de tout autre élément démontrant l'existence d'un pouvoir de l'Etat. Ainsi définie de façon plus compréhensive, la preuve du caractère public de ressources devrait par contre être rapportée avec davantage de précision, pour distinguer précisément les fonds mobilisés par la simple influence de l'Etat mais qui demeurent parfaitement privés, l'opérateur restant libre de déterminer leur utilisation, de ceux sur lesquels l'Etat exerce un pouvoir effectif. La démonstration devrait ainsi conduire à une quasi-certitude pour éviter une dilution inadéquate du contrôle des aides d'Etat.

([1]) Arrêts du 16 mai 2000 dans l'affaire n°C-83/98 France/Landbroke Racing contre Commission, Rec. p. I-3271, et du 12 décembre 1996 dans l'affaire n° T-358/94 Air France contre Commission, Rec p.II-2109.

([2]) Pour les critères de l'activité économique, voir notamment l'arrêt de la Cour du 17 février 1993 dans les affaires C-159/912 et C-160/91 Christian Poucet contre Assurances générales de France et Caisse mutuelle régionale du Languedoc-Roussillon, Rec p. I-637.

Le développement systématique de ces deux critères devrait ainsi amener à une appréciation plus fine du point central mais souvent obscur du contrôle des aides d'Etat en droit communautaire, à savoir l'intervention étatique dans les rapports de concurrence. Cette interposition de l'Etat dans les rapports économiques entre entreprises ne peut se déterminer uniquement au regard de critères juridiques formels ou d'évaluations économiques pures, mais doit être saisie dans sa réalité par une analyse qui combine chacun de ces deux aspects.

Au-delà de la progression du droit, cette évolution contribue à renforcer le contrôle de la Cour sur les décisions de la Commission. La plus grande clarté des concepts, en effet, se traduit nécessairement par un renforcement de la motivation des décisions, qui est conduite à aborder des questions auparavant laissées dans l'ombre. Or, d'avantage que dans les fautes formelles de démonstration, c'est au sein de ces points aveugles du raisonnement que prennent naissance les erreurs d'analyse, ou que la Commission se dégage des marges de liberté dans l'appréciation des situations en cause.

The Article 7 consultation mechanism: managing the consolidation of the internal market for electronic communications

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The new regulatory framework

Until a few years ago, a telecommunications operator in France would face not only a very different regulatory environment than its counterpart in the UK or Spain, but also a very different regulatory environment depending on which markets of the electronic communications industry it was operating in. After a number of years of talking about convergence, it seemed that the meaning behind the word was struggling to find its way through the legislative framework supporting the Single Market. However, following the conclusions of the special European Council of Lisbon of March 2000, and building on the results of the public consultation held in 1999, the Commission succeeded in proposing, in July 2000, a package of measures for a new regulatory framework for electronic communications networks and services.

On 7 March 2002, Council and Parliament adopted the new regulatory framework which entered into force on 25 July 2003. It consists of four Directives ([1]) and a number of accompanying measures ([2]) which replaced the many legislative measures on which regulatory intervention in the sector had been based in the past. With the publication of the last Recommendation on notifications and consultation ([3]), the so-called Procedural Recommendation, and the current inflow of draft measures from national regulatory authorities ('NRAs') as from early August 2003, the framework has indeed become operational. It is our view that it will prove to be pioneering as to the interaction of sector-specific regulation and antitrust in newly liberalised markets.

The new framework brings about significant changes both as regards the scope and role of regulation of the telecommunications industry in Europe and as regards the role played by competition policy. Its main objective is devising a simpler, more modern and more effective legislative framework for ex ante intervention. This framework explicitly recognises the increasingly important role of technological convergence and makes use of the most recent thinking in industrial economics and the economics of competition analysis. A first concept embodied in the framework is that the degree and the intensity of ex ante regulatory intervention must be proportional to the competition problem at hand: where markets are already, or are in the prospect of becoming, effectively competitive, existing regulatory measures will be withdrawn or be lighter. A second concept is that markets need to be analysed following competition analysis principles, from the very definition of the market ([4]), to the assessment of market power ([5]), to the identification of remedies to address the competition problems observed. A third concept can be described as the need to consider products and markets on the basis of their economic value rather than on their physical or technological or regulatory characteristics. This principle finds perhaps its most accomplished

([1]) Framework Directive – Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, p. 33. Access Directive – Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities, OJ L 108, 24.4.2002, p.7 . Universal Service Directive – Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108, 24.4.2002, p. 51. Authorisation Directive – Directive 2002/20 of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108, 24.4.2002, p. 20.

([2]) Amongst them the Radio Spectrum Decision – Decision 676/2002 on a regulatory framework for radio spectrum policy in the European Community, OJ L 108, 24.4.2002, p. 1.

([3]) Commission Recommendation 2003/561/EC of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 190, 30.7.2003, p. 13. See also press release IP/03/1089 of 23 July 2003.

([4]) Under the old framework, ex ante regulation was focused on certain markets which were not 'markets' within the meaning of competition law but rather 'market areas' based on specific policy considerations.

([5]) Under the old framework, NRAs could impose regulatory obligations on undertakings which had at least 25% of the market, whereas under competition law equivalent obligations could be imposed on the same undertaking only if the latter was deemed to be in a dominant position.

expression in the concept of technological neutrality, based on which markets and products must not be defined according to their underlying technology, but rather according to their economic value to end users.

From a competition policy perspective, the new framework contains two main aspects which have a foreseeable impact on the future regulation of the telecommunications industry. The first aspect concerns the new definition of significant market power ('SMP'), which is no longer based on the former, static criterion of 25% market share, but on the competition-law based notion of 'dominance'. ([1]) This has the effect of raising the existing threshold for ex-ante regulation, while at the same time creating the necessary conditions for legal certainty throughout the Community. In that regard, the Commission's Guidelines on market analysis and the assessment of SMP (the 'SMP Guidelines') ([2]), published last July, provides further guidance and assistance to the NRAs and the industry as to how the new competition law-based provisions of the new regulatory framework should apply. The second key aspect of the new framework is that only those electronic communications markets in which competition law remedies may be considered insufficient to remedy persistent market failures will be regulated in the future. The Commission, as required by Article 15 of the Framework Directive, has adopted a Recommendation on relevant markets ([3]) which sets out a list of 18 markets the characteristics of which are such as to justify ex ante regulation and which proposes three main criteria for NRAs to apply when deciding whether to regulate or not a market. ([4])

The Article 7 consultation mechanism

We can say that the new framework sets out to face an important and difficult challenge: reconciling the seemingly contradictory aims of harmonising the regulatory framework across the EU and therefore strengthening the Single Market on the one hand, while allowing for a much-needed degree of flexibility to reflect national circumstances on the other. In order to achieve this, the Framework Directive requires NRAs to carry out market analyses to establish the state of competition in relevant communications markets and identify any providers with SMP in these markets. Once an operator has been deemed as having SMP, NRAs have to identify which specific obligations are appropriate to impose on that operator. Obligations can vary according to the nature and the source of the competition problem, which, combined with the wealth of possible remedies to be used, allows for a high degree of tailoring to specific circumstances.

NRAs must, however, conduct a 'national' and a 'Community' consultation on the measures they intend to take. Pursuant to Article 7 of the Framework Directive, NRAs have to make their draft regulatory decisions accessible to other NRAs and the Commission for comments. In most cases, other NRAs and the Commission have a period of one month within which they may make comments to the NRA concerned. However, when a draft measure would affect trade between Member States and either (i) aims at defining a relevant market which differs from those defined in the Commission's Recommendation on relevant markets or (ii) decides whether to designate or not an undertaking as having SMP, the Commission may within a further period of two more months require the NRA concerned to withdraw the notified draft measure mainly on grounds of incorrect application of the competition law principles enshrined in the new framework, such as 'market definition' and the assessment of single or collective dominance (the so-called 'veto powers' of the Commission).

([1]) An operator is deemed to have SMP if it is in a dominant position within the meaning of Article 82 of the EC Treaty. Thus whether operators are faced with ex ante regulation or find themselves involved in ex post antitrust proceedings, they should have the legal certainty that issues such as 'relevant market' or 'market power' will have the same meaning irrespective of whether the proceedings in question are initiated by NRAs or national competition authorities ('NCAs'). Ultimately, sector-specific regulation should lead to further de-regulation, limiting thus the scope of ex ante regulation to areas where competition law instruments cannot be effectively applied.

([2]) Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, p. 6.

([3]) Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and services markets within the electronic communications sector susceptible for ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 114, 8.5.2003, p. 45.

([4]) These criteria are in fact based on the following questions: (i) is the market subject to high and non-transitory barriers to entry (static criterion)?; (ii) does the market have characteristics such that it will tend towards effective competition (dynamic criterion)?; and (iii) is competition law sufficient to deal with perceived market failures?

The Article 7 Task Forces

The procedure described above implies the use of considerable resources and puts a heavy administrative burden on the Commission, given the strict deadlines provided for in the new framework for carrying out such assessments. To manage the Community consultation, the Commission has set up two Task Forces, one in the Competition DG and another one in the Information Society DG. The Task Forces carry out the duties which the Commission derives from the new framework. They review and analyse the draft regulatory measures ('cases') notified by NRAs under the Community consultation. They work very closely together and establish joint case teams in each case in order to meet the tight deadlines of the Article 7 consultation mechanism.

Seven months before the Commission received its first notification on 4 August 2003, the Task Forces had been brought into being. Since then, the Task Forces were mainly busy with (1) setting up the procedural environment for the Article 7 consultation mechanism to function and (2) preparing, holding and following up pre-notification meetings with NRAs. As to the latter, pre-notification meetings are crucial in preparing for the actual notifications of draft regulatory measures by NRAs, as they enable NRAs to present their positions and receive guidance from the Commission services on how to best proceed. The particular aim of such informal meetings is to identify those markets where the regulator intends to deviate from the Recommendation on relevant markets, and to preliminarily analyse the approach taken by the regulator when designating companies with SMP. Usually, several pre-notification meetings are necessary with one particular regulator, as individual meetings cover specific market areas. Until the end of September 2003, the Task Forces held more than 20 pre-notification meetings with 9 different NRAs.

In the notification phase of the Commission's co-operation with an NRA, case files are opened following formal notifications. On a daily basis, the centralised Article 7 Greffe/Registry (with electronic archive function), which is administratively attached to the Information Society DG, must inform the Heads of the Task Forces of new notifications received. The Heads of the Task Forces must then assign case teams, composed of case leaders, case handlers and case secretaries. Regular internal management meetings ensure a proper review of case allocations and case handling.

Competition versus Regulation

As mentioned above, the Article 7 consultation mechanism has already started to receive notifications, and thus to manage the consolidation of the electronic communications markets across the EU. In fact, in August and September 2003, 16 notifications have been received, and all cases have been dealt with. The first ever case which the Commission reviewed (regarding the UK wholesale mobile market for access and call origination) was concluded by way of comments (according to Article 7(3)) sent to the UK regulator Oftel on 29 August 2003. ([1]) These comments did not question Oftel's analysis. Instead, the Commission concurred with Oftel's analysis that there was sufficient competition in the UK wholesale mobile market concerned, making existing sector-specific regulation redundant.

This first case under the new consultation mechanism clearly showed that the new regulatory framework functions and that regulators take the opportunity to repeal ex ante regulation that is no longer needed. This in fact touches upon the question that may arise, at least for some observers, i.e. of how it is possible to couple the principles underpinning competition analysis with what has been traditionally regarded as their opposite, that is, the concept of sector-specific regulation. The involvement of both the Competition DG and the Information Society DG is perhaps the best representation of how both these sides are intertwined.

One of the reasons for this close collaboration is, of course, that the trend of technological convergence, which has been so much talked about in the last 15 years, has finally started to become a reality. However it would be wrong to reduce the new endeavour of the application of the Art. 7 consultation mechanism to something which is dictated by the evolution of technology alone. The reason for reconciling competition to sector-specific regulation is, more properly, that by now we are at a stage at which ex ante regulation in the electronic communications sector and the application of antitrust instruments are based on the same set of competition law concepts. In fact, the essential point about the new framework, and also about the Competition DG's involvement in overseeing its application, is not the question of whether there is more or less regulation, but what type of regulation is needed.

([1]) See Commission press release IP/03/1203 of 5 September 2003.

In the past, regulation has sometimes been considered as a synonym for a fragmented and inconsequential set of norms, which might have eventually led to a situation where the development of competition was held back rather than supported. Regulatory frameworks in the telecommunications area, as well as in other traditionally regulated industries, used to not only be very fragmented from one Member State to another, but also to be totally different from each other. Today, regulation is essentially economic regulation, and economic regulation is based on the perspective that intervention on the market is necessary and beneficial only when it offers the solution to certain sorts of market power, and in particular to market failures which derive from formerly monopolistic market structures.

The perceived antagonism between competition and regulation is, therefore, only apparent, and it is destined to disappear. In fact, competition has already been shaping regulation: it is the latter which has been adapting itself to suit the philosophy and the approach of the former. Regulatory policy cannot be seen anymore as independent of competition policy: it must be seen as a part of a broader set of tools of intervention in the economy based on competition analysis principles. The Article 7 Task Forces are perhaps the best expression of how competition instruments and regulatory tools are complementary, rather than substitute, means. They deal with a common problem and try to achieve a common aim. The problem is always high levels of market power and the likelihood of it being abused, and the aim is putting the end user at the centre of any economic activity. Only through a combination of both tools can we ensure that market power does not distort and hamper the development of competition in the communications markets. This in turn allows end users to drive and steer such development, as well as to benefit the most of it.

Conclusions

Perhaps, an even more important achievement than good regulation of the electronic communications sector is being met through the new framework, and through the proper functioning of the Article 7 consultation mechanism. Putting aside how important the objective of good regulation of this important sector is in itself, a greater achievement might be accomplished if this type of regulation became a model for other sectors. A regulatory framework solidly grounded on competition analysis principles could be the best approach to ex ante regulation of any sector of the economy still in need of regulatory intervention. The term ‘sector-specific regulation’ is already incorrect, and could become obsolete: because the same set of tools, the same competition-based philosophy and the same concerns may soon govern regulatory intervention in all sectors where some form of economic regulation can still be useful.

In order for the EU to achieve this, and to be at the forefront of regulatory developments worldwide, it is imperative to rely on a network of independent competition and regulatory authorities, the powers and responsibilities of which have already increased substantially, and which experience ever increasing degrees of collaboration with each other. Power and responsibility must be met with judgement and composure: NRAs, NCAs and the Commission are partners and will take firm action not only to consolidate competition, but also to achieve harmonisation. It is with this type of results in mind that this new endeavour, the Art. 7 consultation mechanism, will strive to achieve, together with the Commission’s partners, harmonised and effective regulatory and competition actions for European citizens.

The International Competition Network (ICN) two years on: concrete results of a virtual network

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National and regional competition regimes have been proliferating around the world during the past 15 years or so. Estimates put the number of competition regimes of some sort or another at around 100. However, in the absence of internationally accepted competition standards, these regimes show a marked variety of features. This diversity presents a double challenge: on the one hand, it complicates the task of enforcement agencies that wish to co-operate in the investigation of potentially anti-competitive behaviour, given the often divergent procedural and substantive rules. On the other hand, the mushrooming of enforcement regimes has added to the financial and legal burden for businesses whose activities affect more than one jurisdiction.

Only the emergence of a broad global consensus on the right approaches to international competition problems is liable to remedy this situation. The desire to foster such a consensus through 'soft' convergence – i.e. without requiring jurisdictions to accept binding international rules - was at the heart of the decision by 14 competition authorities ([1]) in October 2001 in New York to launch the International Competition Network (ICN) ([2]). After the ICN's highly successful inaugural conference in Naples in 2002, the leaders of many competition agencies, as well as a multiplicity of non-governmental representatives, convened in June 2003 in Mérida, Mexico, for the 2nd annual conference. This article seeks to explain where the ICN stands at the present time, and to summarise what has been achieved so far.

The ICN at a glance

One of the clearest testimonies to the ICN's rapid development is the breadth of its membership. In less than two years, membership has risen from the 14 founding agencies to 79 member agencies, representing 70 jurisdictions ([3]), and more may yet join. The ICN thus represents the vast majority of the world's existing anti-trust enforcers. This geographic spread puts the ICN in a pre-eminent position to address global antitrust issues generally, and more specifically to tackle issues of international co-operation in competition matters.

Membership in the ICN is open to national or multinational competition agencies entrusted with the enforcement of antitrust laws. About half of the existing members represent countries whose economies would generally be considered as being in the process of development or transition. In this sense, the ICN provides an appropriate forum for sharing experiences and expertise between well-established and more recent competition authorities. This is also echoed in the mission statement of the ICN which describes it as a 'project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure.'

One of the ICN's salient features is that it involves the stakeholders of the various relevant anti-trust constituencies in its projects, namely experts from, in particular, the business community, consumer organisations, the 'private bar' and academia. The ICN also maintains close links with other international bodies working in the same field, such as UNCTAD and the OECD, which pursue complementary activities.

As befits an informal and virtual network such as the ICN, participation is voluntary and based on goodwill. In this spirit, the 'Operational Framework' ([4]) of the ICN only sets out a minimalist framework for co-operation. The day-to-day management of the Network is entrusted to a 15-member Steering Group which on the average

([1]) These were the anti-trust agencies from the following jurisdictions: Australia, Canada, EU, France, Germany, Israel, Italy, Japan, Mexico, South Africa, South Korea, the United Kingdom, the United States and Zambia.
([2]) All relevant information on the ICN is publicly available at its web site: www.internationalcompetitionnetwork.org.
([3]) Jurisdictions where two agencies have joined include Belgium, France, Malta, Romania, the United Kingdom and the United States. There are three agencies from Brazil and South Africa.
([4]) See http://www.internationalcompetitionnetwork.org/operational_framework2.pdf.

meets once per month, usually via conference call. After two successful years at the helm of the Steering Group, the Canadian Competition Bureau recently passed on this role to the Mexican Federal Competition Commission, thus underlining the important role that emerging economies play in the ICN.

The ICN's work projects

But what has the ICN achieved during its first two years of existence, and what will be the main focus of its activities in the run-up to its third annual conference, scheduled for 21-22 April 2004 in Seoul?

Control of multi-jurisdictional mergers

One of the most prominent of the ICN's efforts to-date has been the achievements of the ICN Working Group on Merger Control, which consists of three sub-groups dedicated to: 1) notification & procedures in merger control, 2) the analytical framework for merger control, and 3) investigative techniques in merger investigations.

The mission of the **Notification & Procedures sub-group** includes a number of projects, including the creation of a compendium of *web links* to facilitate ready access to merger laws worldwide, the preparation of *templates* to facilitate comparison of key features of worldwide merger systems, and the compiling of available information on the *costs and burdens* of multi-jurisdictional merger review. The results of each of these projects can be found on the ICN website ([1]), and are frequently accessed by interested parties.

However, the most visible and important projects undertaken by the subgroup consist in the development of a set of eight **Guiding principles** ([2]) and **Recommended practices** pertaining to the notification of proposed mergers and to their review by competition authorities. The ambition is threefold: to enhance each jurisdiction's effectiveness; to facilitate convergence; and to minimise the public and private burden of multi-jurisdictional merger control.

The recommended practices, which expand on a set of agreed guiding principles, are being produced in collaboration between the competition officials in the sub-group and its non-governmental advisors. The Naples Conference agreed on 3 initial sets of practices covering: (i) nexus between the transaction and the reviewing jurisdiction; (ii) clear and objective notification thresholds; and (iii) timing of merger notifications. This was then followed up by an additional 4 Recommended Practices that were adopted at the Mérida Conference in June of 2003. The four new topics extended to: (i) Review Periods (i.e the duration of investigations); (ii) Requirements for Initial Notification (i.e what information notifying parties are required to provide to agencies "up front"); (iii)Transparency (i.e how an agency communicates the reasons for its enforcement action/non-action); and (iv) Review of Merger Control Provisions (i.e. periodic review of merger control legislation, procedures etc.) ([3]).

The sub-group's work plan up until the next Conference in Seoul foresees, *inter alia*, additional work on further Recommended Practices, as well as an examination of appropriate ways to promote conformity with Guiding Principles and Recommended Practices. The latter may take the form of speeches and articles, contacts with other competition agencies, promotion of the practices through training programmes, through "leading by example", and so on. The sub-group will also consider whether to pursue the development of separate recommended practices for merging parties, third parties and their legal advisors.

The **Subgroup on Investigative Techniques** is active in the field of development of best practices for investigating mergers, including (i) methods for gathering reliable evidence; (ii) effective planning of a merger investigation; and (iii) use of economists/the evaluation of economic evidence. Its focus, so far, has been on exchanging practical information and experience between agencies, rather than working on recommendations to be agreed by the ICN member agencies. An example of this was the 2-day international merger investigation workshop for staff lawyers and economists which was held on 21/22 November 2002 in Washington. The workshop consisted of several panels on the investigative tools used in the different jurisdictions, the agencies' experience with these tools, as well as on the role of economists in merger investigations and possibilities to enhance international co-operation in merger case investigations. Also the private sector perspectives on merger review processes was represented at the conference.

([1]) www.internationalcompetitionnetwork.org.
([2]) Adopted at the plenary session in Naples on 29 September 2002, see ICN homepage.
([3]) All seven Recommended practices can be found at the ICN homepage.

At the Mérida Conference, the group presented a **Summary report on investigative techniques** used in 35 ICN jurisdictions, as well as an overview of methods for developing **reliable evidence**, and a report regarding the **role of the economists** and econometric data ([1]).

The subgroup may proceed with further papers on other subjects discussed at the 2002 workshop. There would appear to be scope for developing best practice recommendations for merger investigations and this option is also being considered. Another workshop will be held in autumn 2004, probably hosted by the EU in Brussels, at which it is expected that there will be more emphasis on the use of hypotheticals, and sessions in smaller groups.

Finally, the **Analytical Framework Subgroup** is focusing on the general analytical framework for merger review, including the substantive standards for analysing mergers and the criteria for applying those standards. Information has been compiled on the substantive standard applied in each member jurisdiction, including information on enforcement guidelines or other interpretative material.

At the Mérida Conference, the sub-group presented a series of **research papers** produced by non-governmental experts, who were commisioned to study the merger guidelines of 12 jurisdictions (including the EU's draft guidelines on horizontal mergers) ([2]). Five papers have been produced, on: (i) market definition, (ii) unilateral effects, (iii) coordinated effects, (iv) barriers to entry and expansion, and (v) efficiencies. While the papers are still in draft form, the intention is to finalise them in the coming months with a view to publishing a final authoritative report in the autumn of 2003. Although it is not currently envisaged to produce an actual set of recommended merger guidelines, the sub-group intends to work towards framing proposals for the topics that "model merger guidelines" should cover and, perhaps, to prepare a list of questions they should address.

Capacity building in developing and transition economies

As membership in the ICN is quite comprehensive, it groups together agencies with varying degrees of experience with competition law and policy: whilst a few jurisdictions pride themselves on having a national competition legislation dating back more than a 100 years, a significant proportion of ICN member agencies has only had a couple of years to gradually acquire the know-how and standing that are so crucial to the effective implementation of competition policy. One of the key purposes of the ICN is thus to share the expertise of the well-established agencies with those that are still building up their capacity to implement a credible competition policy.

Gaining stature on the domestic scene through credible and consistent enforcement work is a tall order for any competition agency. In the particular context of an emerging market economy, it is likely to be an even more difficult task. Many young competition agencies in developing and transition economies find the economic, administrative and political environment in which they are operating particularly challenging.

Under the joint leadership of the European Commission and the South African Competition Tribunal, ICN members in Mérida presented a comprehensive **Report on Capacity Building** that sets out how these challenges could be successfully addressed. ([3]) In particular, the report discusses how the efficiency of the programming and delivery of technical assistance – as external support to the national/regional capacity building process – can be further enhanced.

Adopting a long-term horizon, there are good reasons to argue that it is not only the recipient country that will benefit from such technical assistance in terms of know how and finances. Those who wish to create functioning governance mechanisms in a globalising world, will inevitably have to rely on effective enforcement structures in many parts of it. In this sense, support for individual elements of the emerging network of enforcement structures will over time also contribute to the development of an overarching, international global framework for co-operation.

With the many issues that the Report on Capacity Building has identified, the relevant working group has its work cut out until the ICN's Seoul conference, now under the joint chairmanship of the European Commission, and of Mexico's Federal Competition Commission. First of all, the working group is currently developing an on-line **'loose-leaf manual'** comprising practical tools that should facilitate the design of effective assistance projects. Moreover, DG Competition envis-

([1]) All these documents may be found at the ICN homepage.

([2]) The 12 jurisdictions are: Australia, Brazil, Canada, the EU, Finland, Germany, Ireland, Japan, New Zealand, Romania, the US and the UK.

([3]) See http://www.internationalcompetitionnetwork.org/Final%20Report_16June2003.pdf.

ages organising, in February 2004, a **Workshop** to foster the **dialogue between aid granting bodies** (as the providers of assistance funds) **and enforcement agencies** with their special expertise in competition policy. Finally, the regional competition frameworks that are currently emerging in various continents – often, it should be noted, with financial support from the European Commission budget ([1]) – will receive particular attention. Time permitting, the results of these efforts may also be condensed into a recommendation, or 'checklist', of issues that ought to be considered when elaborating new assistance projects.

Competition Advocacy

The ICN has already largely completed its work in the field of competition advocacy. To avoid a frequent misconception, it should be noted that this term does not allude to the role that lawyers play in the implementation of competition policy. 'Advocacy' rather refers to the non-enforcement activities of competition agencies that seek to prevent or redress distortions of competition created by *state* intervention. In Naples, this - academically rather neglected - subject had already been the object of a **Report 'Advocacy and Competition Policy'** ([2]).

In Mérida, the advocacy working group presented the results of two follow-up studies. ([3]) First of all, ICN members had carried out a **survey of the legal provisions** that govern their advocacy efforts. This survey gives an impressive overview of the varying legal and institutional frameworks in which agencies carry out their advocacy missions. The survey concluded with the observation that no clear connection could be drawn between the effectiveness of an agency's advocacy work, and the wording of the legal provisions underpinning its work. Secondly, the working group examined how certain competition agencies have used their advocacy powers in relation to the following **four regulated sectors**: (i) telecommunications, (ii) energy, (iii) airlines, and (iv) the legal professions.

In addition, the working group has begun to set up an on-line data base, or **'Information Centre'** which is intended to give ready access to interesting cases and other initiatives of the many competition agencies that have joined the ICN. This project is expected to gain in momentum over the coming months, as a growing amount of information is made available. Finally, the former advocacy working group presented in Mérida a **tool kit for agencies' advocacy work**, covering for example media relations. As part of this tool kit, DG Competition had prepared a CD-ROM that gives an overview of its own advocacy initiatives.

Conclusion

After less than two years of the ICN's existence, few would dispute that it has produced some very concrete results. More is set to come as the ICN launches new work projects over time. For example, in Mérida, ICN members decided to start discussing the challenges and peculiarities of anti-trust enforcement in the so-called 'regulated sectors', such as utilities and the professions.

It may be argued in some quarters that the ICN recommendations are entirely non-binding and that they will therefore make little difference in practice. But in our view, the very strength of the ICN lies in this 'soft-law' approach, enabling it to make such swift progress. The resulting flexibility has already facilitated the drawing up, unanimous endorsement and promulgation of an impressive and growing body of accepted principles and best practices, and this despite the diversity in the Network's membership. The organisation is built upon the understanding that each jurisdiction, as a voluntary participant in the process of convergence, is itself best placed to decide how and to what extent domestic reforms of its competition regime might be desirable, drawing inspiration from this multi-lateral project.

While much remains to be done, the achievements of the ICN in just two short years are undeniable. It is only a question of time until the tangible benefits of this virtual enterprise will be felt quite concretely in the 'real' world of anti-trust enforcement across the globe.

([1]) Such as the Common Market for Eastern and Southern Africa (COMESA), or the Andean Community.
([2]) See http://www.internationalcompetitionnetwork.org/advocacyfinal.pdf.
([3]) See http://www.internationalcompetitionnetwork.org/annualconference2003.html.

EUROPEAN COMPETITION DAY IN ROME

The European Competition Day under the Italian Presidency will take place on 9 December 2003 in Rome. The Conference will be inaugurated by speeches of Giuseppe Tesauro, Chairman, Italian Competition Authority, Rocco Buttiglione, Italian Minister for European Policies, Mario Monti, Member of the European Commission and Christa Randzio-Plath, MEP, Chairman of the Committee on Economic and Monetary Affairs of the European Parliament.

Topics of the Round Tables will be

- Liberalisation, Competition and Economic Growth
- Antitrust enforcement in Europe: the new challenges
- Competition oriented regulatory reform: is there a political consensus?

For more information on the programme please consult the homepage of the Italian Competition Authority, in Italian under http://www.agcm.it and in English under http://www.agcm.it/eng/index.htm.

For further information please write to the following address: concorrenza@agcm.it

Network sharing in 3rd generation mobile telecommunications systems: minding the coverage gap and complying with EC competition rules

David GABATHULER, Directorate-General Competition, unit C-1 and Wolf SAUTER, formerly Directorate-General Competition, unit C-1

Introduction

In February 2002, T-Mobile and mmO2 notified two agreements that provided for the Parties to cooperate by way of network sharing in the build-out of their third generation ('3G') mobile telecommunications networks in the United Kingdom and Germany. The cases were considered as important precedents given the need to provide regulatory certainty in a fast developing but unsettled industry and therefore the Commission adopted two exemption decisions ([1]) in April and July 2003 which set out how far mobile operators can cooperate through network sharing. This article describes the two agreements before going on to explain the Commission's initial thinking on market definition in the 3G ([2]) mobile telecommunications environment and the competition issues raised by such cooperation.

Network sharing

Network sharing can be implemented at different levels of a mobile network. Ranked by the increasing degree to which the network is shared it is possible to distinguish between shared use of:

- sites, which ranges from sharing individual mast sites up to grid sharing (requiring a uniform layout of networks), and may include site support infrastructure, such as site support cabinets ('SSC');
- base stations ['Nodes B' ([3])] and antennae;
- radio network controllers ['RNCs' ([4])];
- core networks, including mobile switching centres ['MSCs' ([5])] and various databases ([6]);
- frequencies.

Finally, national roaming concerns a situation where the operators concerned do not share any network elements but simply use each other's networks to provide services to their own customers.

The Agreements: site sharing and national roaming

UK Agreement

T-Mobile and O2 UK divide the United Kingdom into three distinct areas: (i) the Initial Build Area ('IBA'); (ii) the Divided Area ('DA'); and (iii) the Remaining Area.

- In the IBA (i.e. urban areas covering about 30-50% ([7]) of the United Kingdom population), the Parties agree to site share ([8]) and to roam on each other's respective networks where there are coverage gaps. The agreement also allows the Parties to look into more extended forms of site sharing (e.g. sharing antennae and Node Bs);
- In the DA (i.e. less populated urban areas as well as rural areas covering about 40-70% of the UK population), the Parties agree to site share on the basis of a common radio plan and roam

([1]) Commission Decision of 30 April 2003 in Case number COMP/38.370 – O2 UK Limited/T-Mobile UK Limited ('UK Network Sharing Agreement'), OJ L 200; 7.8.2003, p. 59. Commission Decision of 16 July 2003 in Case number COMP/38.369 T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag, not yet published.

([2]) 3G will provide transmission rates that have a maximum rate of up to 384 kbit/s (kilo bits per second) outdoors and possibly up to 2Mbs indoors – depending on the time and location of the call, the number of users within a cell and the applications used. Innovative multimedia services are expected to develop, such as mobile videoconferencing, mobile video/phone mail and various B2B applications.

([3]) Nodes B receive and send data across frequencies and control a particular network cell.

([4]) RNCs each control a number of Nodes B and are linked to the core network.

([5]) MSC stores information about subscriber location and is responsible for directing calls to them.

([6]) The core network is the intelligent part of the network that consists of MSCs, various support nodes, services platforms, client home location rgisters and operation and maintenance centres.

([7]) Population ranges are provided due to the confidentiality of the exact figures.

([8]) Sharing mast, site support cabinets, power supply, racking and cooling but not transmission equipment or antennae.

on each other's networks. Each Party is responsible for rolling-out the network in a particular geographic area but not on an exclusive basis;

- In the Remaining Area (i.e. remote areas covering the remaining UK population), the Parties agree to roll-out their networks on the same basis as in the DA when market conditions allow.

The agreement also provides for each Party to benefit from some limited exclusivity over the sites of the other Party for a limited number of years.

The Agreement was amended in March 2003 and the IBA was subdivided into:

- a 'core area' consisting of 10 top cities in the United Kingdom covering approximately 32-38% of the population where both parties will separately roll-out their networks; ([1]) and
- a 'residual area' consisting of a further 13 cities covering less than 10% of the United Kingdom population where each Party is allocated a number of cities in which to roll-out the network ([2]).

German Agreement

T-Mobile and O2 Germany divide Germany into two areas each comprising around 50% of the German population. The primary area covers the most populated cities and regions and broadly corresponds to the area which each Party must separately cover by 31 December 2005 as part of its licence conditions. The secondary area covers the less populated urban areas as well as rural areas and remote parts of Germany where there is no regulatory coverage requirement.

The Agreement provides for the following cooperation:

- extended site sharing ([3]) within the primary area;
- RAN sharing ([4]) within the primary area;
- national roaming by O2 T-Mobile network across the primary area;[5]
- reciprocal roaming by both parties on each others network in the secondary area.

The German agreement also contains a restriction preventing the resale of the other Party's national roaming capacity to Mobile Virtual Network Operators ('MVNOs') ([6]) if such capacity is to be used for the provision of voice or voice-like services.

Market definition in 3G

The Commission's analysis provides the first insight into how competition authorities may view market definition in mobile telecommunications markets in the new 3G environment. The Commission found that there are two directly affected markets in both cases. First, the market for sites and site infrastructure for digital mobile radio-communications equipment and secondly, the market for wholesale access to national roaming for 3G communications services. Markets for wholesale access to 3G services as well as downstream retail markets for 3G services are also affected albeit indirectly. However it is the possibility of defining separate markets for 3G services that is of most interest.

The Commission in its case law has not to date defined separate markets for 2G, 2.5G and 3G retail services nor distinguished between mobile voice services and mobile data services. However, the development of innovative and advanced services using 3G network capability may change this since 2G and 2.5G services are unlikely to be effective substitutes ([7]).

It is anticipated that 'rich voice (services) over 3G networks' may develop that consist of voice services integrated with data services such as consumer videophones and multimedia conferencing that go beyond the capability of 2G and 2.5G networks. It is therefore possible that distinct retail market for 3G enriched voice services – beyond

([1]) Greater London, Birmingham, Manchester, Glasgow, Leeds, Edinburgh, Liverpool, Nottingham, Newcastle and Bristol.
([2]) Sheffield, Leicester, Brighton, Northampton, Cambridge, Southampton, Cardiff, Belfast, Coventry, York, Preston, Stoke-on-Trent and Oxford.
([3]) Sharing mast, site support cabinets, power supply and possibly antennae, combiners and transmission links.
([4]) Sharing Nodes B and RNCs but to conform with the German regulatory regime, they would need to be logically separate.
([5]) The Agreement initially provided for roaming to be provided on a reciprocal basis only in the secondary area. The Agreement was modified to allow O2 Germany to roam on T-Mobile's network (but not vice versa) in the primary area.
([6]) MVNOs have their own mobile network code and an own range of mobile IMSI numbers, as well as a user numbering range, but that do not have a licence to operate wireless frequencies nor own any substantial network infrastructure. Their cost base and risk are by definition much lower than those of network operators as they do not have significant investments in network equipment.
([7]) Any substitution is likely to be one-way, that is to say customers will substitute 3G services for 2G or 2.5G services but not vice versa.

simple 2G and 3G voice – will develop or indeed that 3G (rich) voice and data services will merge into a single market.

As regards data services, there is expected to be some overlap between 2.5G and 3G data services as 2.5G allows, for example, mobile e-mail, multimedia messaging and continuous Internet access, but it does not have sufficient data transmission rates to provide the high-end of data services that are expected to emerge on 3G networks. It therefore appears that there may be an emerging market for the provision of 3G mobile data services. The position is further complicated, however, by the development of other technologies such as wireless local area network services (WLAN) that allow limited mobility within a circumscribed area ([1]). As a result, the distinction between fixed and mobile data services may break down and instead of a separate market for 3G data services, a market for broadband wireless data communications may emerge.

Competition restrictions

The Commission's analysis focuses on the two principal forms of cooperation, namely site sharing and national roaming.

Site sharing between mobile operators was found not to restrict competition in either of the cases: the cooperation extends only to basic network elements and the Parties retain independent control of their core networks including all intelligent parts of the network and the service platforms that determine the nature and range of services provided. Although more in-depth cooperation such as RAN sharing (Nodes B and RNC) could raise greater concerns, this was not specifically addressed since the Parties were not planning to implement the technology in the foreseeable future. Site sharing was also considered beneficial for environmental and health reasons.

National roaming between mobile operators was found to restrict competition at the wholesale level with potential harmful effects in downstream retail markets. ([2]) First, the extremely high if not absolute barriers to entry at the network level due to frequency scarcity, licensing requirements, and the level of investment prevent any form of new market entry. Second, roaming undermines infrastructure-based competition since it significantly limits competition on coverage, quality and transmission speeds. Third, it reduces the scope for price competition at services level since the operators face similar underlying costs and are limited to differentiating their customer offering on the basis of the services on offer, rather than on price or quality.

The Commission's analysis of the competition issues raised by network sharing is also consistent with the regulatory position adopted by the United Kingdom and German regulators in their guidance notes ([3]).

As regards other potential restrictions:

- the limited exclusivity over sites in the UK agreement does not foreclose the market for third party operators since there is no general lack of sites and for particular problem areas there was a tailor-made regulatory solution in the Framework Directive ([4]);
- the restriction in the German agreement on reselling capacity to voice MVNOs is a resale restriction which could restrict output and limit price competition.

Exemption

National roaming allows operators to provide better coverage, quality and transmission rates for their services and within a shorter timeframe. In rural and particularly in remote areas, the economic incentives to roll-out a high quality network are low and national roaming can allow 3G services to be made available more quickly and enables the new technology to be much more widely accessed. It is therefore likely to be beneficial in the majority of cases provided the Parties retain the economic incentive to build out separate networks when the market for such services takes off. In urban areas, the economic incentives to build-out separate networks are high and competition between competitors will be critical in determining the competitiveness of the market. Roaming between established operators is therefore the exception rather than the rule and can only

([1]) The highest bandwidth 3G data services may be deliverable only under conditions of optimal coverage with very low or no mobility.

([2]) In the German network sharing case, O2 Germany has lodged an application for annulment with the Court of First Instance (T-328/03), arguing inter alia that national roaming does not constitute a restriction of competition.

([3]) In the UK, Oftel published a position in May 2001, '3G Mobile Infrastructure Sharing. Note for information', available at http://www.oftel.gov.uk/publications/mobile/infrashare0501.htm. In Germany, RegTP issued its Interpretation of the UMTS Award Conditions in the light of more recent technological advance, RegTP (6 June 2001) , available at www.regtp.de.

([4]) Directive 2002/21/EC of the European Parliament and the European Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive'), OJ L 108, 24.4.2002, p. 33, Article 12.

be justified for a limited period, such as to help promote competition during the initial roll-out phase of a network and the commercial launch and early take-up of 3G services.

In the two decisions, the Commission exempts roaming in rural areas until 31 December 2008. The markets affected by the restrictions are still emerging and it was not possible to evaluate their likely effects for a period much beyond five years.

In urban areas, the Commission's position reflects the different market positions of the operators in the United Kingdom and Germany. In the United Kingdom, the Parties are both well-established operators and roaming is limited to the 'residual area' of the IBA covering less than 10% of the UK population until 31 December 2007. In Germany, O2 is the smallest operator in the 2G market with less than 10% share of the retail market and the roaming across urban areas allows it to launch better and earlier 3G services and thereby compete more effectively against the established operators. Roaming in urban areas is nonetheless to be phased out in accordance with a strict timetable by 31 December 2008.

As regards the restriction on resale of the other Party's data capacity to MVNOs in the German agreement, the Parties provided calculations which show that without this provision they would not offer each other roaming capacity at all since the possible erosion of retail prices for voice services through the use of, for example voice over IP would wipe out any gains made from the agreement. This would therefore limit the opportunity for O2 Germany to be a strong nationwide competitor. This restriction was therefore exempted in these specific circumstances for a period commensurate with the exemption for roaming.

Conclusion

The two decisions provide clear guidance on what forms of network cooperation by mobile operators are compatible with the EC competition rules and helps operators plan how best to develop powerful network capability that will allow new and innovative content and applications to be launched. It is expected that further network sharing arrangements will be entered into by other EU operators in the future.

Football: joint selling of media rights

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1. Introduction

On 23 July 2003, the Commission adopted a formal decision exempting the joint selling of the media rights of the UEFA Champions League. ([1]) The Commission concluded that the joint selling of the TV, internet and mobile telephone content rights of an international football tournament such as the UEFA Champions League was restrictive of competition as it reduced output and limited price competition. But an exemption was justified as joint selling can provide efficiencies and consumer benefits within the meaning of Article 81(3) of the Treaty, in particular by enabling the creation of a single point of sale for a league branded product. ([2])

Unlike UEFA's former joint selling arrangement notified in 1999, the new joint selling arrangement, which UEFA notified in 2002 following intensive negotiations with the Commission, ensures that all media rights are sold via a tender procedure in several separate packages for up to 3 years. The scope and length of the exclusivity granted is thereby reduced and allows more media operators to win interesting football rights.

The outcome of UEFA's tender for the 2003-6 season shows that the Commission's intervention successfully achieved this aim. During the last contract round (1999-2003) there were 14 licensees and 10 sublicensees in the EU. For 2003-2006 there are 22 licensees even though the rights have not yet been sold for all Member State. Moreover, in countries where UEFA has finished its selling process all matches will be broadcast on live free-TV or pay-TV compared to the previous position earlier where only a small number of the matches were broadcast live.

Some media rights are exploited exclusively by UEFA. If UEFA fails to sell such rights, the football clubs will then have the right to sell the rights themselves. Other media rights are exploited by both UEFA and/or the football clubs. The combination of these two elements is likely to eliminate the problem of unused rights for which there is demand. It moreover limits the scope of joint selling arrangement to areas where joint selling is demonstrably more efficient than individual selling.

UEFA's new joint selling arrangement remedies the Commission's main concerns *i.e.* that the granting of long-term exclusive contracts covering a large number of rights restricts competition in the broadcasting markets to the benefit of large incumbent broadcasters. In addition the far-reaching liberalisation of new media rights for football will provide business opportunities for nascent Internet and mobile services.

2. The background and Commission's policy

Competition in the markets for the sale of TV rights of football events is one of the Commission's priorities. Effective competition in these markets is likely to improve the functioning of broadcasting markets and give viewers access to TV services that are reasonably priced, innovative, of good quality and with a variety of offers.

There are particular types of content which significantly determine broadcasters' – and in particular pay TV broadcasters' – ability to attract subscribers and advertisers. Football content rights, in particular, but also a limited number of other sports rights as well as first run feature film rights fall into this category.

TV rights of football events which are played regularly throughout every year have unique characteristics: first, football is an ephemeral product as viewers are often only interested in live broadcasts. Next, substitution is very limited, because viewers who want to see a given football event are unlikely to be satisfied with the coverage of another event. Finally, the exclusive concentration of rights in the hands of sports federations reduces the number of sellers on the market. Availability of rights is reduced still further by the volume of TV rights contracts being concluded on an exclusive basis for a long duration and/or covering a large number of events. Only large incumbent broadcasters therefore have a realistic chance of

([1]) IP/03/1105

([2]) UEFA's joint selling arrangement also comprises the selling of sponsorship, suppliership and IPR licensing relating to the UEFA Champions League, but this activity has only played a minor role in the Commission's investigation and a negative clearance has been issued in respect of these activities.

acquiring the rights. Furthermore, new media rights are often held back to protect the value of TV rights.

The joint selling arrangement which UEFA initially notified meant that all TV rights were sold to a single free-TV broadcaster in each Member State and on an exclusive basis for periods up to four years. Some rights could be sub-licensed to a pay-TV broadcaster, subject to UEFA's prior consent and against payment of 50 % of the sublicensing fee to UEFA. Sub-licensing arrangements can do little to alleviate the restrictive effects of a joint selling arrangement. Football clubs had no access to exploit any TV rights. Neither UEFA nor the football clubs exploited Internet or mobile telephone rights. The notified arrangement thereby contained most of those negative aspects of joint selling which it is the Commission's policy to counter.

The packaging and manner of sale of football TV rights can distort the competitive process by favouring the business methods of particular broadcasters or by raising barriers to entry on the market. It is therefore the Commission's policy that the TV rights of football leagues should be sold in smaller separate packages using open tender procedures. The packages must be designed in a manner which ensures that at least some packages are within reach of most broadcasters in a Member State, so that the above distortions are reduced and rights are likely to be sold to more than one broadcaster. Where this is insufficient to avoid an elimination of competition, the Commission will have to think about alternative measures such as limiting the quantity of rights that a single broadcaster is allowed to acquire.

A properly conducted tender procedure adds fairness to the selling procedure and ensures that all interested parties are aware that the sale is taking place and on which conditions. The contracts should be no longer than three years so that there will be regular and frequent opportunities for broadcasters to compete for the rights. While sublicensing arrangements can in some circumstances help to remedy competition problems, it is preferable to have direct contractual relationships between the original rights owners rather than contractual relationships among competitors.

The scope of a joint selling arrangement should not extend further than is necessary to create a single point of sale for a league product. Football clubs should be free to exploit media rights that are most relevant for the promotion of the club brand, such as in particular Internet, mobile and archive rights. Moreover, when a joint selling body fails to sell a right within a given time, the football clubs should have an opportunity to sell the rights individually. Where appropriate there should be parallel exploitation of rights both by the joint selling body and the football clubs. Such limitation in the scope of the joint selling arrangement is likely to ensure that there will be no unused rights, which is a typical feature of traditional joint selling arrangements. Moreover, the competition between the joint selling body and the football clubs is likely to lead to further competitive innovation of the media rights.

Another important aspect for the Commission in relation to joint selling arrangements is the tendency of the joint selling bodies to hold back new media rights *i.e.* Internet and mobile rights. The Commission considers that these rights currently form separate product markets from that of the TV market and that there is no justification for the non-exploitation of those rights.

These policy considerations had to be reconciled with the arguments in UEFA's notification regarding the specific characteristics of sport and financial solidarity, which is required to maintain uncertainty as to the result of the sport competition. UEFA suggested that the Commission to adopt a lenient approach towards the restrictions of competition inherent in UEFA's joint selling arrangement *i.e.* maintain *status quo*. While the Commission understands that financial solidarity could help maintain a certain balance among the football clubs playing in a league which is likely to provide better football, the Commission insisted that competition law should be respected. The Commission has managed to reconcile these diverging interests, as it has done in other cases. ([1]) Since the Commission approved the joint selling arrangement with reference to the creation of a branded league product which is sold in packages via a single point of sale in a manner which left UEFA's solidarity mechanism untouched, it was not necessary for it to analyse the solidarity argument under Article 81(3).

3. UEFA's new joint selling arrangement

As a result of the Commission's objections, UEFA proposed a new joint selling arrangement which is operational starting with the 2003/2004-football

([1]) E.g. Commission Decision 2001/478/EC – UEFA Broadcasting Regulations regarding the prohibition against the broadcasting of football during certain blocked hours, OJ L 171, 26.6.2001, p. 12.

season. According to the new system all UEFA Champions League media rights are split into 14 different rights packages which are exploited by UEFA and/or the football clubs. The rights are awarded following a tender procedure and the rights contracts will be no longer than 3 years.

3.1. TV rights

UEFA will continue to jointly sell the rights to live transmission of the Tuesday and Wednesday matches to free- or pay-TV broadcasters. The main rights will normally be split into two separate rights packages ([1]) giving the winning broadcasters the right to pick up to the two best matches. Generally, the respective rights packages will be sold to a free-TV and a pay-TV broadcaster so that at least two different broadcasters per Member State will acquire the rights. UEFA will initially have the exclusive right to sell the remaining live rights, but, if it does not manage to do so within a certain cut-off date, the individual clubs will be able to sell the rights themselves in parallel with UEFA.

UEFA wanted to allow football clubs to sell these live TV rights only to pay-TV or pay-per-view. However, such a restriction achieved no additional benefits and was not indispensable to the joint selling arrangement. It therefore imposed a condition that football clubs should not be restricted from selling live TV rights to free-TV broadcasters where there is no reasonable offer from any pay-TV broadcaster. The Commission considers that this condition ensures that free-TV broadcasters will not be impeded from acquiring such rights.

Individual football clubs will also, for the first time, have the right to exploit TV rights on a deferred basis in parallel with UEFA one day after the last matches of the match week (Thursday midnight) and to use archive content, e.g. for the production of DVDs/videos, and therefore provide their fans with a better and more varied individualised offer. The individually sold matches must be "club branded" and must not be bundled with rights of other clubs to create an alternative UEFA Champions League branded product.

3.2. New media rights

The new joint selling system also affords opportunities to new media operators as both UEFA and the football clubs will be able to offer UEFA Champions League video content on the Internet and mobile phones (where operators are seeking to launch or boost the new generation of mobile phone services using the UMTS technology). Internet exploitation is subject to a 1½-hour embargo after the match finishes. Live streaming on the Internet does not currently permit the maintenance of a high picture quality. This will of course change over time, making it necessary to revisit the embargo in the foreseeable future. UMTS services are available within a maximum of 5 minutes; some delay is inevitable due to the need to package the content for mobile delivery. Both UEFA and the football clubs may choose to provide their services themselves or via Internet Service Providers. UEFA will offer 'competition specific' or 'UEFA branded' products whereas the football clubs will offer 'club specific' or 'club branded' products in respect of matches in which they participate.

4. The relevant markets

4.1. The market for the acquisition of TV broadcasting rights of football events played regularly throughout every year

The Commission's investigation ([2]) of the Community markets gathered evidence suggesting the existence of a separate market for the acquisition of TV broadcasting rights of football events that are played regularly throughout every year. This definition would, in practice, mainly involve matches in national league and cup events as well as the UEFA Champions League and the UEFA Cup. This conclusion represents an expansion of the conclusions reached in previous cases. ([3]) The Commission determined that a separate market might exist for such rights as they have particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is especially targeted by certain advertisers; they are able to act as a developer of a brand image

([1]) The precise format of the packages may vary depending on the structure of the TV market in the Member State in which the rights are being offered.

([2]) Some 65 European broadcasters, rights agents and advertisers received a very extensive questionnaire in 1999. Their answers enabled the commission to establish the relevant market definition.

([3]) Commission Decision 1999/242/EC – TPS, OJ L 90, 2.4.1999, p. 6. Commission Decision 2001/478/EC – UEFA Broadcasting Regulations, OJ L 171, 26.6.2001, p. 12. Commission Decision COMP/M.2483 – Canal+/RTL/GJCD/JV, (IP 01/1579). Commission Decision COMP/M.2876 – Newscorp/Telepiù, (IP/03/478).

of a channel. The TV rights of UEFA Champions League represent on average only 20% of the rights in the relevant market.

4.2. The markets for the acquisition of new media rights of football

New media markets such as Internet and mobile rights are in their infancy largely due to the fact that these technologies are currently at an early stage of development. Therefore, there is no clear empirical evidence on which to base market definitions. Since new media rights affect emerging markets, it is not yet possible to ascertain the market position of the UEFA Champions League content, but it is not likely to be more significant than its position in the traditional TV rights markets.

It is nevertheless possible to draw some conclusions which would permit a realistic appraisal of the restrictive effect of UEFA's joint selling arrangement on the new media markets. First, content rights will be necessary for the development of the new services in the same way as content rights are necessary for TV services. It is likely that new media operators will wish to acquire football content to attract advertisers and subscribers. Secondly, it is likely that each different form of exploitation will provide a specific service to specific consumers. On demand services delivered via wireless mobile devices or via the Internet will not compete with live TV broadcasting. Likewise mobile clip services will not compete with television highlights packages. ([1]) It is therefore likely that new media markets will emerge at both the upstream and downstream levels, which parallel the development of markets in the pay-TV sector.

5. The restrictions of competition

The joint selling arrangement grants UEFA the exclusive right to sell certain media rights on behalf of the football clubs participating in the UEFA Champions League, and therefore prevents the football clubs from individually marketing such rights. This prevents not only competition between the football clubs but also between UEFA and the football clubs in supplying in parallel media rights to the UEFA Champions League to interested buyers. Third parties therefore only have one single source of supply and are therefore forced to purchase the rights under conditions jointly determined by the joint selling body. The joint selling body thereby restricts competition in that it determines prices and all other trading conditions on behalf of all individual football clubs producing the UEFA Champions League content. In the absence of the joint selling agreement the football clubs would set such prices and conditions independently of one another and in competition with one another. The reduction in competition caused by the joint selling arrangement therefore leads to uniform prices compared to a situation with individual selling. UEFA's joint selling arrangement also imposes restrictions on football clubs regarding the exploitation of media rights that are sold individually or in parallel with UEFA.

5.1. Scope of the procedure – the vertical aspects

UEFA's initial notification also comprised UEFA's standard form agreements used in its vertical relationships with broadcasters, sponsors and advertisers. However, under the new joint selling arrangement the rights are no longer all offered to a single operator but are split up into a large number of rights packages. The Commission exempted this proposed packaging as being part of the horizontal agreement, but did not examine vertical contracts concluded pursuant to that agreement. The competition assessment of such contracts would require analysis of the facts of each contract and market on which it was concluded. Nor would it be possible for the Commission to ascertain in the context of that procedure whether competition would be restricted if a single operator acquired all or several packages of rights. The decision therefore does not deal with individual rights contracts. However, the Commission will do so if it in the concrete circumstances would identify problems in any given Member State under Community competition law.

6. The exemption

6.1. The creation of a single point of sale for a league branded product

The Commission found that the benefits generated by the modified joint selling arrangements outweighed the negative effects that it deploys since joint selling enables the creation of a single point of sale. A single point of sale is of particular interest for an international tournament such as the UEFA Champions League, because this tourna-

([1]) See Commission Decision Comp/JV.48 – Vodafone/Vivendi/Canal+ (Vizzavi).

ment involves a great number of football clubs from many different countries. In addition to the practical difficulties that it may create, there is moreover the issue that the ownership structures vary from Member State to Member State. Furthermore, there is varying demand from broadcasters who are likewise of different nationalities and operating in many different national markets.

Joint selling also enables the creation of a UEFA Champions League branded product ([1]), which allows media operators to provide coverage to consumers of the league as a whole and over the course of an entire season, including the most interesting matches. This would be difficult in the absence of joint selling in view of the hybrid character of the UEFA Champions League which is a combination of a league and a knock-out competition where only a limited number of football clubs reach the final stages of the competition.

No individual football club could enter into a commercial agreement, which would give a broadcaster any guarantee of being able to plan its programme schedule for the whole UEFA Champions League season right to the final round. It is conceivable that media operators could put such a package together even without joint selling. However, this would require the acquisition of significantly more rights than is currently the case, which is less efficient and puts a higher financial risk on the broadcaster. The joint selling of the rights solves this problem, as the broadcaster does not buy the rights of particular football clubs, but the right to broadcast the matches that are played on certain days.

Viewers benefit from being offered multiple forms of coverage of the UEFA Champions League. The viewer is interested in having a choice between various forms of broadcasts of the matches of a league. A viewer is likely to wish to have a choice of being able to watch a match live in its total length and also to be informed about several matches in brief on a delayed basis at several different times.

Football clubs benefit from the sale of the commercial rights via a joint selling agency as they avoid having to build up own commercial departments of the magnitude that is necessary to deal with the complexity of developing a commercial policy and executing the rights deals in a large number of countries. It is likely that it would be very difficult for many football clubs to be able to deal with such tasks. It is therefore likely that an outsourcing of such function would be necessary in any circumstances.

6.2. Football clubs individual sale of media rights

The Commission insisted that in exempting UEFA's joint selling arrangement a certain balance between joint and individual selling had to be found. The philosophy behind the Commission's insistence in giving the football clubs an opportunity for individual sale of such live TV rights and other media rights is twofold. First, the efficiencies and benefits of joint selling no longer exist where the joint selling body fails to find demand in the market for such rights. Secondly, maintaining competition between UEFA and the football clubs in bringing such rights to the market helps to avoid rights to the UEFA Champions League remaining unused, where there is demand for them.

The new joint selling arrangement therefore provides that the football clubs can sell live TV rights that are not sold by UEFA. Moreover, deferred TV rights, as well as new media rights will be exploited not only by UEFA but also by the individual clubs in parallel.

Football clubs exploiting UEFA Champions League footage individually must present the footage in a club-focused manner and relating only to matches in which they are participating. Football clubs or the broadcasters exploiting the media rights in question may not package the rights from several football clubs into a single product which would appear as an UEFA Champions League branded product.

7. The UEFA Champions League decision as a precedent for cases relating to national leagues

The Commission is currently investigating two other cases relating to the national football leagues of Germany and England. The Commission's approach to these investigations has been inspired by the UEFA Champions League case. However, the investigations are of course adapted to the specific circumstances prevailing in the countries in question.

([1]) UEFA also undertakes a number of specific tasks - including the 'dressing-up' of the stadium facilities, the recording of the match and the on-screen presentation, on-screen signage, music, etc. – to create a brand image for the UEFA Champions League, which is associated with a uniform and high quality TV coverage underpinned by a homogeneous presentation that increases the attractiveness for the broadcaster and the viewer.

The most advanced of the two investigations is the one relating to the new joint selling arrangement for the German Bundesliga. ([1]) Subject to third party comments, ([2]) the Commission is planning to exempt the new marketing system for the rights to broadcast first and second Bundesliga matches ([3]) along the principles of the UEFA Champions League decision.

8. Conclusion

The changes to the sports world and particularly its commercialisation raise many new issues for the application of Community competition law. The Commission will clarify the scope of application of Community competition rules in the context of sport through its case law. The Commission's objective is to maintain open and competitive TV markets and a level playing field for all parties. The objective is also to remove obstacles to the development of new media markets. This will be to the benefit of the consumer by increasing his or her choice. In doing so the Commission will fully take into account the particular characteristics of the sector. The UEFA Champions League decision is good example on this and will serve as a role model for future cases.

([1]) See IP/03/1106.

([2]) Before the Commission can take a final decision on the exemption of the new joint selling arrangement, it will publish a summary thereof in the Official Journal in accordance with Article 19(3) of EEC Council Regulation No 17/1962. Publication is expected to take place shortly.

([3]) The TV aspects of the new marketing system will enter into force in July 2006. All the other provisions will apply as of July 2004.

The Commission formally rejects two complaints in the electronic monitoring services field

Miguel Ángel PEÑA CASTELLOT, Directorate-General Competition, unit C-3

1. The complaints

On 19 November 2001 ('the first complaint') and 1 July 2002 ('the second complaint') respectively, the UK-based firm On Guard Plus Ltd. ("OGPL") filed complaints against the Israel-based firm Elmo-Tech Limited ("ELT") for alleged violations of Article 82 of the EC Treaty.

In the complaints, OGPL held that ELT was dominant in the EEA-wide market for the provision of field hardware for the electronic monitoring of prisoners. As described below in further detail, the only piece of evidence provided by OGPL in support of its allegation of dominance was a table compiled by it showing that ELT had a 60% market share in that market.

OGPL claimed that ELT had abused its alleged dominant position, first by engaging in predatory pricing aimed at driving other market players out of the electronic monitoring systems market (the first complaint) and, second, by refusing to supply its field hardware to OGPL (the second complaint).

2. The products

Both complaints were about electronic monitoring systems ('EMS'). These are systems that enable the non-stop monitoring of individuals by ensuring they are at a certain place during certain hours of the day. They are mainly used in the penitentiary sector where they provide an alternative for prison orders (primarily in cases of pre-trial detention and short prison sentences) and make early release possible.

EMS are composed of electronic monitoring products on the one hand, namely an electronic bracelet and an in-house monitoring unit in the offenders' homes (together the field hardware) and a central computer (the base hardware), and electronic monitoring services on the other hand, provided by both IT and control staff and by security intervention staff.

Offenders are normally monitored at their own homes. The electronic bracelet, fitted to the ankle or wrist, emits a signal that is received by the in-house monitoring unit, which is a small device plugged into the power supply and to the telephone socket outlet. The equipment alerts the control centre about any unusual movement or tampering with either the bracelet or the monitoring unit.

The information received by the in-house monitoring unit is reported to the central computer system via the telephone line, enabling control staff to check the information on the central computer. Special software installed there allows follow-up of each particular offender, in accordance with the particularities of the relevant detention regime, and produces reports and alerts.

EMS have been in use in the US since the late 1980s. Some 90% of all offenders subject to an EMS regime are in the US. The use of such systems in Europe is still in its infancy. EMS were first tried in England in 1995, followed by Sweden shortly thereafter. Many European countries are now introducing EMS. Before deploying a large-scale national EMS programme, penitentiary authorities normally first test out EMS by setting up pilot projects. Besides England and Sweden, the Netherlands, Spain, France, Italy and Scotland have launched such pilot projects. New tenders are to be launched in Europe in the near future, in particular in continental Europe (e.g. in France or Italy), and are likely to be of a much larger size than those awarded so far.

Procurement of EMS for both pilot projects and full programmes is made through open call for tenders. In general, penitentiary authorities rent or lease the necessary products and/or services. Prices are usually expressed as an amount per day/per offender. There are nevertheless differences: whereas in the UK and in the US penitentiary authorities not only rent or lease the field and base hardware but also the control and intervention staff and services from the EMS providers, in continental Europe the monitoring services are provided by the penitentiary authorities themselves.

The contractual arrangements concerning full programmes vary between countries. Sometimes (e.g. in Sweden), the contract covers an initial small batch of firm orders for field and base hardware to be supplemented, at the discretion of the penitentiary authority, by subsequent orders of field hardware units up to a maximum number specified in the contract. In other countries (e.g.

Spain), the penitentiary authority just indicates the maximum daily price per prisoner it is willing to pay and the average number of prisoners expected to be monitored on a yearly basis for the duration of the contract. Still on other occasions (e.g. Portugal), the contract merely indicates the maximum number of prisoners expected to be monitored; a figure that would be reached when the contract approaches its termination.

Pilot projects are for the rental of a fixed number of units for the duration of the contract.

In England and Scotland the winner of a tender subcontracts the provision of the field hardware to other companies. For instance, OGPL is providing field hardware to Securicor Custodial Services in one area in England. OGPL rents the field hardware from ELT or others and then rents it to Securicor Custodial Services.

In continental Europe, e.g. in Portugal, there is sometimes a contract established between the members of the winning consortia providing for the distribution of tasks. In other cases, there is no written agreement. When preparing a response to a tender, companies willing to apply for a given tender will simply verify over the phone the availability of certain manufacturers that they normally work with.

3. The issues at stake

As OGPL brought allegations under Article 82 EC against ELT, before assessing the abusive nature of the behaviour at stake, it was necessary, first, to define the relevant markets affected and, second, to verify whether ELT was actually dominant in any of them. It will be shown below that, at the end of the day, the information at the disposal of the Commission clearly showed that such dominant position did not exist.

3.1. The relevant markets

The Commission identified two relevant markets in the present cases: a downstream market for electronic monitoring systems for the constant monitoring of prisoners, the geographic scope of which would be at least the EEA, and an upstream market for the supply of field hardware, the geographic scope of which is the EEA.

It is interesting to note that whereas OGPL is active only in the downstream market, ELT is currently active in both, although it entered the downstream market only a couple of years ago.

The downstream market for electronic monitoring systems for the constant monitoring of prisoners is clearly demand-driven. Demand for EMS comes from penitentiary authorities that want to introduce such systems as an alternative to prison sentences and that procure the EMS systems through open call for tenders.

As for the upstream market for the supply of field hardware, demand comes from Companies such as OGPL, Belgacom Alert Services ([1]) or Securiton ([2]) that do not produce field hardware and need such equipment in order to apply for tenders. The Commission confirmed that there is no ready substitutable product these companies could turn to in order to fulfil that need. As regards supply side considerations, the Commission also ascertained that entry into the market in most cases is made by companies using know-how or even existing assets for the production of field hardware and not from manufacturers of other technical equipment. In other occasions, entry was made by companies active in the same product market, but in a different geographic market (i.e., the US).

3.2. Absence of dominance

The Commission found that the distinctive features of the relevant markets together with the position of ELT therein made it impossible to conclude that ELT was dominant in any of them.

As regards the upstream market, the Commission ascertained first that a substantial number of companies are currently running pilot or full EMS programmes in the EEA. In many cases, these firms were created ad hoc to tender for and then run the relevant contracts. They did not then have any previous experience in the market.

As for ELT's position in that market, out of the 10 full programmes currently operational in the EEA, ELT won 1 and is present in a further 2, none of them in England – where by far the most important current programmes in the EEA exist. As for pilots, ELT is running just 6 out of 14. On the basis of these facts, the Commission concluded that ELT's market share could not possibly exceed 30% of the downstream market.

That figure is normally not indicative of dominance. Nor was the wide diversity and abundance of firms active in the market. Furthermore, the Commission looked into two very important

([1]) The company to which the tender in Belgium was awarded.
([2]) The company running the programme in Switzerland.

distinctive features of the market, very much linked its demand-driven nature, namely: its bidding nature and the very high degree of countervailing power enjoyed by penitentiary authorities.

In bidding markets, a high market share normally is an *ex post* indicator of low prices, not an *ex ante* indicator of high prices. What really matters in such a market is the existence of a significant number of likely bidders willing to apply for tenders. In the present cases, the reality was that many inexperienced firms were running national programmes. The Commission also had evidence that it is normal that many firms apply for a given tender ([1])

The Commission also found many concrete instances of the countervailing power of penitentiary authorities being exercised.

As regards the upstream market, the Commission based its conclusion as to the absence of dominance on a number of elements.

As a preliminary issue, the Commission had many methodological concerns as regards the way OGPL had calculated the alleged 60% market share enjoyed by ELT. In particular, the Commission confirmed that the table included a significant number of field hardware units ([2]) either not manufactured and sold, and certainly not in use by September 2001 –the cutting date for the compilation of the data included in the table- or belonging to tenders not even awarded by that date. On that basis, the 'real' market share of ELT as calculated by OGPL should in fact have been below 45%.

Such a figure is not sufficient in itself for a finding of dominance. On top of that, the Commission found that OGPL had significantly underestimated the real importance of actual competitors in the EEA. In fact, if the actual competitive constraints posed by such competitors were taken into account, ELT's market share in the last two years and a half could not be significantly above 30%. By the same token, OGPL had also underestimated the real importance of potential competitors –most currently active in the US- that could enter in force in the near future once the size of tenders in the EEA grow.

It is worth noting that the Commission was able to support its assessment of the importance of competitors with a number of internal documents and e-mails of OGPL.

The same pieces of evidence clearly showed that, until recently, OGPL considered ELT as a fragile competitor the survival of which was far from granted. It is interesting to note that the market shares attributed by OGPL to ELT for the same period were largely over 90%.

Finally, even if ELT's market share in the upstream market would have been close to the figure alleged by OGPL, competitive conditions in the downstream market were, in the opinion of the Commission, largely sufficient to exclude the existence of any dominant position that ELT could abuse in the downstream market.

The opportunities for ELT to exercise its alleged market power in a way incompatible with Article 82 EC will be limited to the relatively rare occasions when tenders are organized and severely hampered if not totally impeded by the countervailing power of penitentiary authorities.

It has to be added, that ELT (as any other manufacturer) has no control on the decisions about the organization and award of tenders. In addition, the abundance of competitors in the downstream market is clearly at odds with the type of exclusionary practices alleged by OGPL. What is more, the expected rapid growth of the downstream and, consequently, of the upstream markets in the near future in the EEA made any finding of dominance even more unlikely.

4. Conclusion

As described above, the evidence at the disposal of the Commission did not support the alleged dominance of ELT on either of the two relevant markets considered.

In the absence of a dominant position, it was, of course, not necessary to assess the allegedly abusive practices by ELT as set out in the complaints. Nor was it necessary to assess whether trade between Member States was affected.

OGPL was informed of the above analysis and conclusions by means of a formal rejection decision signed by Commissioner Monti on behalf of the Commission.

([1]) In one national programme, 7 firms – most ad hoc consortia – replied to the tender. 3 out of the 7 were allowed to present final offers.
([2]) The proxy used to measure market shares.

Commission settles allegations of abuse and clears patent pools in the CD market

Miguel Ángel PEÑA CASTELLOT, Directorate-General Competition, unit C-3

1. The complaints

Several manufacturers of pre-recorded CD discs ([1]) (that is CD discs that include already content – music or software – provided by content-owners) lodged complaints against Philips and Sony a number of years after both companies had agreed on a joint licensing program for different CD formats.

Three complaints were made, bringing together a total of 20 complainants ([2]). A common assessment was made for all three complaints.

The complaints alleged that Philips and Sony had violated Articles 81 and 82 of the Treaty by setting up a patent pool which included non-essential and expired intellectual property and fixed royalties at an unfair level.

2. The products

Philips and Sony had engaged in joint research and development (R&D) in the field of optical data storage technology since the 1970s, resulting in joint inventions protected by patents in many EEA countries as well as in other parts of the world. In the early 1980s, at a time when vinyl discs and magnetic tapes were the prevailing audio storage media on the market, both companies jointly developed the CD system standard specifications as part of an innovation program regarding digital audio recording initiated by the Electronics Industry Association of Japan. At that time, the CD system was but one among several systems presented by the participants in this program, although the CD system prevailed over time.

The first format launched by Philips and Sony was the highly successful CD-Audio. A CD-Audio is a disc comprising audio information encoded in digital form, which is optically readable by a CD-Audio player. It was launched in 1982 and quickly replaced the analogue sound reproduction owing in particular to its high audio specifications, large storage capacity and durability. At that time Philips and Sony published the System Description Compact Disc Digital Audio ('Red Book'). In 1987 the International Electrotechnical Commission ('IEC') adopted the Red Book as the basis for its international standard for CD digital audio systems. In 1992, this standard was also adopted by the European Committee for Electrotechnical Standardisation.

In 1984 Philips and Sony developed the CD-ROM disc, i.e., a read-only storage medium for personal computers. CD-ROM has been widely adopted by the computer industry and has replaced the floppy disk as the magnetic storage media of choice for the publishing of large databases and distribution of software. Philips and Sony set a specification for CD-ROM discs in the System Description Compact Disc Read Only Memory ('Yellow Book'), which was adopted by the IEC and the International Organisation for Standardisation in 1989.

The CD system specifications and the licenses offered were subsequently extended to newly developed formats, such as CD-I, CD-V and CD-Extra, but none of these additional formats was as successful as the previous two.

The CD system is also the technological basis for recordable discs (CD-R and CD-RW) and DVDs.

3. The preliminary analysis by DG Competition

3.1. Market for the licensing of the CD technology

In the horizontal guidelines ([3]), it is stated *that '[w]hen rights to intellectual property are marketed separately from the products concerned to which they relate, the relevant technology market has to be defined as well. Technology markets consist of the intellectual property that is licensed and its close substitutes, i.e. other technologies which customers could use as a substitute'.*

([1]) That type of manufacturers are known in the industry by the generic term 'replicators'.

([2]) These 20 complainants represented close to 25% of all EEA licensees.

([3]) Guidelines on the applicability of Article 81 to horizontal co-operation agreements OJ C 3, 6.1.2001, p. 2. At point 47.

In the present case, it was clear that Philips and Sony licence their intellectual property rights which provide a licensing revenue, verifiable in their respective annual accounts. In addition, both organise their respective licensing activities as a separate business activity within their organisations:

- The licensing activity of Philips takes place through a dedicated website (http://www.licensing.philips.com/). Philips' patents and copyrights concerning CD systems, DVD systems, Blue ray systems, etc are on offer on that website.
- Within the Sony Corporation, the Licensing Department is part of the Intellectual Property Division. The staff members in the Licensing Department are in charge of the licensing activity of Sony Corporation.

From this starting point, the analysis of demand and supply conditions led to the definition of a relevant market for the licensing of the CD technology. The geographic scope of such market would at least be the EEA.

3.2. Likely joint dominance by Philips and Sony

The following step was to assess whether Philips and Sony could be held to be jointly dominant in the relevant market.

A first important element was the tight structural links developed over time between Philips and Sony in the CD field. These links were later extended to many other areas. On 20 September 1979, Philips and Sony signed a first cross-licence agreement to co-operate in the design and development of optical audio disk players and their related apparatus as well as record media. That agreement was replaced, extended and/or superseded by a series of cross-licence agreements and side letters concluded subsequently. The most recent one, a patent cross licence agreement dated 1 January 1999, widens the field of co-operation between the two firms significantly beyond the CD field.

As a consequence of the above agreements, Philips and Sony launched in 1982 a world-wide joint CD Disc Licensing Program to be managed by Philips. Sony granted Philips an exclusive, sub-licensable licence on (i) joint inventions and (ii) other patents held by Sony regarding Compact Disc Digital Audio System enabling Philips to grant licences. The licence has been extended over the years to the additional formats introduced on the market. A standard licence agreement ('SLA') was set up and offered to potential licensees. Many different version of the SLA have been used over the years.

In addition, as indicated above, Philips and Sony jointly set the specifications for CD-Audio and CD-ROM discs. These later became the internationally adopted standards.

The presence of a standard may give the intellectual property rights holders a dominant position on the market for the technology in question. This depends not only on the general acceptance of the standard, but also on the existence of alternative technologies for compliance with it.

In the present case, it is without doubt that the CD technology has been an immense success -at least as regards CD Audio and CD ROM applications. They have entirely or largely replaced previous storage media, such as vinyl discs, music cassettes or floppy discs.

Furthermore, no alternative set of specifications is available to comply with the relevant standards other that those covered by Philips' and Sony's patents.

On the basis of these elements, it was possible to arrive at the preliminary conclusion that Philips and Sony had to be considered jointly dominant in the relevant market.

3.3. Possible instances of abusive behavior under Article 82(a) of the Treaty

Before going any further a couple of preliminary considerations should be kept in mind:

- The analysis did not question the validity of Philips' and Sony's intellectual property rights in respect of the CD technology. However, the assessment of the essentiality of the relevant CD Audio and CD-ROM patents by an independent expert was only concluded in November 2002. By that time, all CD Audio patents had expired in the majority of countries where they were ever granted.
- Philips' and Sony's right to seek a royalty to recover their respective investments in the relevant technology, and to subsequently profit from them, was not questioned either.

With these provisos in mind, it should be pointed out that a number of doubtful practices in the administration of the joint licensing program were identified.

- Until 2000 patent lists attached to the SLA did not include any list of countries for which each patent was granted nor their respective expiry

dates. It was found, however, that far more detailed patent lists were internally available well before 2000 but were not attached to the SLA.

- Again, until 2000 expired or useless patents were not systematically deleted from the list of patents. As the same list was used for several years, the result was that lists of patents attached to the SLA often contained patents that had expired several years before.
- The assessment of the essentiality of patents made by an independent expert concluded that only 4 patents for CD-Audio (out of 44 included for instance in the 1996 list) were essential for the manufacture of those discs. Hence, it is evident that until June 2001 – date at which, following the expiration of the two most relevant patents for that format in the majority of countries where they were granted, Philips and Sony stopped charging royalties in respect of any remaining CD Audio patent for those same countries- the lists of patents included many non-essential or irrelevant patents, in addition to those for which the right had already expired.
- Licensees were not informed of changes introduced into later versions of the SLA. Some complainants indicated that they did not even receive a list of patents at all when they entered into their respective SLA.
- Finally, until very recently, CD ROM discs were presented as a single format; when, in fact, there are different modes of CD-ROM discs and patent protection varies per mode and across countries.

The result of the above practices was that the administration of the program lacked transparency and created confusion among licensees –most of which are very small independent firms– in ways that could amount to the imposition of unfair trading conditions in the sense of Article 82 (a) of the Treaty.

4. The solution

After discussing the preliminary analysis as presented above with Philips' and Sony's representatives, in view of the type of alleged abusive behaviour and the co-operative attitude of complainants, and with the agreement of Commissioner Monti, a two step solution was envisaged.

As a first stage, complainants and complainees were to be given a limited window of opportunity to agree a settlement satisfactory to both sides. During that time, the instruction of the case would be put on hold. Once a settlement was reached, the second stage would involve the removal of any remaining restrictions contained in the SLA following appropriate discussions between DG Competition's services and Philips and Sony.

In mid-June 2003, all complainants but one informed DG Competition that they were withdrawing their complaints. At this point steps were taking to move to the second stage mentioned above.

5. The notification of the new standard license agreement

Shortly after the withdrawal of the complaints, Philips and Sony formally notified their bilateral agreements establishing the world-wide Philips/Sony joint CD Disc Licensing Program and the 2003 SLA to be offered by Philips to third parties under the remaining enforceable patents of Philips, Sony as well as those based on the companies' joint inventions.

DG Competition's Services reviewed these agreements and come to the following conclusions:

- First, agreements establishing the joint CD Disc Licensing Program were covered by the block exemption regulation concerning certain categories of technology transfer agreements (TTBE). Although the agreements between the members of a patent pool are normally excluded from the Regulation, Article 5.2(2) of the TTBE brings within its scope patent pools concluded between only two parties without any territorial restrictions within the EEA.
- Second, the new 2003 SLA did not appreciably restrict competition within the meaning of Article 81(1). Only essential patents are now licensed. Licensees can opt to take the joint license or individual licenses from Philips or Sony and to use them within or outside the standard specifications. In addition, the 2003 SLA does not contain any of the restrictions referred to in Articles 2, 3 and 4 of the TTBE.

Consequently, a comfort letter was sent in late July 2003 to Philips and Sony.

The contents of the 2003 SLA can be summarised as follows:

- It explicitly recognises Philips' and Sony's right to license their respective patents separately and to give non-assertion undertakings with regard to jointly owned patents, whether within or outside the standard specifications of the different types of CD discs.

- It provides for options to any Licensee as to the different types of CD discs manufactured.
- It specifies the essential patents required for the manufacturing of each type of CD discs.
- The different patent lists attached to the 2003 SLA include only essential patents. An independent patent expert has confirmed the essentiality of such patents.
- Philips and Sony have one essential patent each or at least a joint essential patent for each type of CD disc in different EEA countries.
- It has to be noted that the independent expert has yet to conclude the assessment of the essentiality of two patents for the CD Extra and CD Text formats respectively. The 2003 SLA states that should the independent expert conclude that any patent is not essential, the patent will be deleted from the relevant annex. As the agreement will terminate at the date of expiration of the last essential patent in the territory for the type(s) of CD discs selected by licensee, it could be the case that the effective duration of the licence will be shortened in case any of the pending patents is finally considered not essential.
- In addition, Sony has two further pending applications, for which patents have not been granted yet, concerning the CD Extra format. Should these patents be granted and should the independent expert consider them essential, they will be included in the relevant patent annex. However, such inclusion will have no effects on the royalty, the duration of the licence or the grant back provision.
- Under the grant-back provision, licensees are obliged to license back to Philips and Sony, and to other licensees having selected the same type of CD disc, only patents essential for the type(s) of CD discs they have selected.
- Royalty payment obligations have been clarified to reflect the territorial scope and duration of the licensed patents. Furthermore, licensees will only be obliged to provide information in respect of royalty bearing CD discs produced and sold.
- Conditions for access to the existing reduced compliance royalty rate have been clarified and made more attractive. In particular:
  - — all EEA licensees will be offered a one time only credit on royalty payments up to a maximum amount of 25,000 USD, for the specific costs incurred by an audit confirming compliance during the last three years, required to benefit from the reduced compliance royalty rate.
  - — In addition, compliant licensees that send the above audit before 1 December 2003 can apply the reduced compliance royalty rate retroactively with effect as from 1 July 2002.
  - — Finally, compliant licensees that have produced less than 5 million CD discs in the preceding year will be exempted from the obligation to present yearly audits in order to show continued compliance for that year. A statement signed by a duly authorised officer of the licensee will be enough.
- As indicated above, the 2003 SLA will terminate at the date of expiration of the last essential patent in the Territory for the type(s) of CD discs selected by Licensee. The patent lists establish definitive cut off dates per type of CD discs for each EEA country.
- The 2003 SLA can be entered into by all existing Licensees in lieu of their existing license agreements. Of course, such a switching will be free of charge for existing licensees.

Philips Licensing website (www.licensing.philips.com) provides now clear information as to the Licensing Program, the patents involved and the essential character thereof, as well as a software tool freely downloadable for Licensees, to differentiate between different types of CD-ROM discs. Philips has undertaken to keep its website constantly updated.

Finally, Philips has informed the Commission that it intends to inform each EEA licensee in writing about the contents of the 2003 SLA. As part of that letter, Philips will grant to each EEA licensee a one-time credit of 10,000 USD on royalties due.

6. Conclusion

The cases discussed in this article shows that DG Competition is open to propose and accept pragmatic solutions when the likely result will be equivalent to that obtained by conducting formal proceedings. The suitability of such an approach necessarily depends on the nature of the infringement in question; on considerations related to the efficient use of Commission resources; on the position of all companies involved on the relevant markets; and on the parties' cooperative attitude.

Notwithstanding these conditions, the above cases certainly add to the growing corpus of cases dealt with by the European Commission in the field of patent pools.

Insurance Network: the ECN sectoral group on insurance

Elena CAPRIOLI, Directorate-General Competition, unit D-1

Objectives

Earlier this year, Directorate-General for Competition took the initiative to create an expert group dedicated to insurance matters. The aim is to improve information-sharing on insurance issues within the framework of the European Competition Network (ECN).

The 'Insurance Network' is a group of experts from the National Competition Authorities of existing and new Member States with specialist knowledge of the insurance industry.

The new forum will make it easier for the EU's Competition Authorities to exchange information and best practices on practical competition issues regarding the EU insurance sector, as well as sharing experiences on developments in national markets and market monitoring.

In addition, the Network will contribute to monitoring the effects of the new block exemption Regulation for the insurance sector, which came into force in April this year.

The first meeting

The first meeting of the Insurance Network took place on 26 June 2003 in Brussels.

The meeting confirmed the importance of regular discussions between the competition authorities on specific sectoral issues.

The agenda included presentations from DG Competition and National Competition Authorities, which provided input from a national perspective. There was a lively and interesting exchange of views after each presentation.

The discussions made clear that the Commission and National Authorities share many areas of common concern and that future co-operation can contribute to promote a coherent enforcement of competition law in the EU.

As for working methods, the Network uses a secured electronic forum.

The way forward

Delegates welcomed this Commission initiative, particularly since the creation of this group has allowed its members to establish personal contacts and has set the framework for a continuous exchange of communication between the Network's members.

One of the main conclusions of the meeting was to organise the Network's future activities within three main axes:

— structural characteristics of insurance markets;

— sharing of methodologies for market monitoring;

— specific sector related issues.

This new initiative is very much in keeping with the aims of the new antitrust Regulation 1/2003, which provides for closer co-operation between National Competition Authorities and the Commission.

This co-operation is of particular importance in the complex and diverse field of EU insurance markets where we face a common challenge: to enable consumers and businesses to benefit from greater competition.

Commission fines Yamaha for restrictions of trade and resale price maintenance in Europe

Elodie CLERC, Directorate-General Competition, unit F-1

On 16 July 2003, the Commission adopted a decision finding that Yamaha Corporation Japan, Yamaha Europa GmbH, Yamaha Musica Italia s.p.a., Yamaha Musique France S.A. and Yamaha Scandinavia AB have infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement and imposed a 2.56 million Euro fine ([1]) on them. Yamaha distributes under a selective distribution system a whole range of traditional as well as electronic musical instruments and electronic equipment to generate, amplify and modify sounds. Yamaha is the market leader in most of the relevant markets for musical instruments in Europe. The Yamaha world-wide sales of musical instruments for the fiscal year 2003 (April 1, 2002 to March 31, 2003) amounted to 2.1 billions Euro.

The case was initiated by the Commission and is based on information gathered via requests for information sent in October 2000 to the European subsidiaries of Yamaha and to several dealers. From the copies of the contracts submitted to the Commission, it became evident that Yamaha, at least since the 1970's, had been infringing the European competition rules. Following the Commission's intervention, Yamaha has sent circular letters to the dealers concerned to clarify and/or amend the relevant provisions. Yamaha also notified a new pan-European Agreement in March 2002.

Distinct product markets have been proposed for acoustic pianos, home digital pianos, electronic organs, portable keyboards, high tech electronic musical products, pro audio products, drums, guitars and wind instruments. With regard to the geographic market definition, national markets have been assumed.

Yamaha's European subsidiaries and their official distributors have implemented various agreements and/or concerted practices which have as their object the restriction of competition in different Member States and EEA contracting parties (Germany, Italy, France, Austria, Belgium, The Netherlands, Denmark and Iceland) within the meaning of Article 81(1) EC and 53(1) EEA. The restrictions, which consisted of market partitioning and resale price maintenance and which were mainly contained in the distribution contracts, are the following: i) obligations on official dealers to sell only to final customers in Germany, Italy and France; ii) obligations on official dealers to purchase exclusively from the Yamaha national subsidiary in France and Italy; iii) obligations on official dealers to supply solely dealers authorised by the national subsidiary of Yamaha in France, Austria, Belgium, and in The Netherlands; iv) restrictions on exports via the internet in Austria, Belgium and Germany; v) territorial protection concerning the manufacturers guarantees in Germany, Belgium and Denmark; vi) direct restrictions of parallel trade in Iceland; vii) resale price maintenance in The Netherlands, Italy and Austria.

Territorial protection shelters distributors from intra-brand competition and deprives consumers of the benefits of an integrated market. It artificially reinforces different price levels between Member States. The agreements and/or concerted practices, by restricting sales outside the territories and limiting the dealer's ability to determine its resale prices, were complementary and could have had the same object of artificially maintaining different price levels in different countries.

Such agreements are by their very nature capable of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty intended to bring about. On account of Yamaha's position in affected markets and by the very nature of the restrictions involving territorial market protection and price restrictions, the potential effects on trade between Member States were appreciable.

The block exemption under Commission Regulation N° 2790/99 did not apply. For several markets, Yamaha's market share considerably exceeds 30% which, according to Article 3 of that Regulation, rules out the application of the exemption. Even if the relevant market is taken to be those markets for musical instruments in the EEA where Yamaha's share of total sales is below 30%, Regulation N° 2790/99 would not apply because all the above-mentioned restrictions are consid-

([1]) IP/03/1028, 16.7.2003.

ered as hardcore restrictions, pursuant to Article 4(a), (b) and (d) of that Regulation.

No individual exemption under Article 81(3) was possible as the agreements in question were not notified. Even if such agreements were notified, they could not be exempted individually from the application of Article 81(1) EC Treaty and Article 53(1) EEA Agreement, since the conditions necessary for granting an exemption were not met due to the restrictions of competition identified above.

In fixing the amount of the fine under Article 15(2) of Regulation No 17, the Commission has to take account of all relevant circumstances, and in particular the gravity and the duration of the infringement. In determining the gravity of the infringement, the Commission takes account of the nature of the infringement, its actual effects on the market, in so far these can be measured, and the size of the relevant geographic market. Agreements and/or restrictive practices partitioning the national markets and fixing resale prices are, according to an extensive body of precedent of case law, contrary to the objectives of the Community. The infringement was therefore qualified as serious. However, some elements of the infringement applied to a limited number of dealers or only to some products, were not systematically included in all Yamaha agreements throughout the EEA and have not been simultaneously implemented.

The fact that Yamaha terminated a majority of the restrictions as soon as the Commission intervened was considered as a mitigating circumstance.

Merger control: main developments between 1st May and 31st August 2003

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Recent cases – Introductory remarks

In the period from 1 May to 31 August, the Commission received 75 notifications, an increase of 12% over the 67 received in the previous four-month period. In the same period, the Commission took 83 final decisions, of which 73 were clearances in Phase I. Of these 5 were conditional clearances pursuant to Art. 6(2) and 36 were decisions adopted in accordance with the simplified procedure. While there were no prohibitions (pursuant to Art. 8(3)) in the period, there were three decisions adopted pursuant to Art. 8 (2). Of these two were adopted pursuant to conditions and obligations and one was granted unconditionally. In addition the Commission took two referral decisions pursuant to Article 9 of the Merger Regulation. Finally three new in-depth investigations were opened during the period.

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

Celanese/Degussa

On 11 June the Commission approved the proposed creation of a Joint Venture between the German chemical producers Celanese and Degussa. The parties will contribute most of their oxo chemicals businesses to the Joint Venture. The Commission was initially concerned about the parties' strong position in several markets. But after an in-depth analysis it concluded that the presence of competitors with important spare capacities would exert sufficient competitive pressure on the Joint Venture.

Celanese and Degussa propose to contribute most of their oxo chemicals business to a newly created Joint Venture company, to be called European Oxo Chemicals ('EOC'). Celanese AG is a chemicals firm operating worldwide with core business in basic chemicals, acetates, technical synthetic fibres, polypropylene foil and food additives. The oxo-chemicals to be contributed to the JV are oxo-alcohols, plasticisers and solvents and are intermediate products used in processing synthetic fibres, in the varnish and paint industries and in cosmetics and pharmaceuticals.

EOC will be active in the production of a number of oxo chemicals: butyraldehyde, butanol, 2-ethylhexanol (2-EH), di-octyl phthalate (DOP), butyl acetate, and carboxylic acids. Butyric aldehyde is produced from propylene and synthetic gas and is the first chemical step in the oxo-C3 chemistry to produce these products.

The Commission had opened an in-depth investigation because the concentration will lead to high market shares in several markets. However, the investigation revealed that the creation of the Joint Venture would not lead to the creation or strengthening of a dominant position. Market shares in these markets are not a reliable indicator of market strength, given the fact that most of the output is used internally, and only a small part of the production is sold on the merchant market. The behaviour of the market participants is thus not driven by their activities on the merchant market. This is especially true for the market for butyraldehyde, where only 3% of the production is sold on the market.

In addition, there are several competitors active on the relevant markets, including BASF (Germany), Atofina (France), Perstorp (Sweden), and Zaklady (Poland). These competitors have sufficient spare capacity to increase their sales and thus counteract any price increases or output reductions made by the parties.

Further competitive pressure is exerted by producers from outside the EEA, Zaklady (Poland) or other producers from Eastern Europe or the USA. These producers could increase their sales in the EEA, should the parties or the JV try to increase prices. This is especially true for Zaklady, which already competes on several of the markets concerned.

Verbund/EnergieAllianz

On 11 June the Commission also approved a link-up between the Austrian power company Österreichische Elektrizitätswirtschafts-AG (Verbund) and five Austrian regional power suppliers grouped together as EnergieAllianz, subject to conditions and obligations. The initial plan (known as the 'Austrian power solution' or ÖSL in German) would have created or strengthened dominant positions held by Verbund and EnergieAllianz, especially on the market for the supply of electricity to large customers. But the parties entered into significant commitments that fully resolve the Commission's concerns. One of these commitments: the sale of Verbund's controlling stake in APC, its distributor for large customers, must be completed before the merger can take place.

Under the terms of the deal notified to the Commission for regulatory clearance on 20 December, EnergieAllianz and Verbund will combine their activities in electricity trade and supply to large industrial customers with an annual consumption exceeding four gigawatt-hour (GWh). The parties will supply electricity via two newly created joint ventures, APT and E&S. The new operation will be roughly the 10th largest player in the European Union's electricity market.

After a detailed inquiry, the Commission concluded that the deal would create or strengthen dominant positions held by EnergieAllianz and Verbund in the markets for the supply of electricity to large customers, small distributors and small customers in Austria.

Whilst it is true that the liberalisation of the energy market in Austria already covers all categories of customers and that there is no shortage of capacity on the interconnectors with Germany, the Commission concluded that the relevant geographic product markets did not extend beyond Austria's borders and that there was no guarantee that this situation would change in the near future.

Foreign competitors in Austria have so far only secured market shares of less than 5%, excepting some foreign holdings in Austrian regional suppliers. The geographic market is isolated because electricity prices to final consumers (excluding through-transmission and other charges) are lower in Austria than in Germany due to established customer relations and to marketing and cost advantages conferred on Austrian companies by their access to domestic production capacity, especially cheap, clean hydroelectric power. These factors act as barriers to foreign competitors wishing to enter the Austrian market.

Another major obstacle to entry is the cost of balancing energy for new entrants. Balancing energy is used to make up the difference between planned consumption and actual consumption in power supply control areas. At present 'balancing energy' cannot be supplied in sufficient volume from one control area to another. The control area relevant in this transaction comprises all of Austria with the exception of the two westernmost *Länder*, Vorarlberg and the Tyrol. In the absence of appropriate commitments, the planned transaction would lead to a higher cost risk to competitors, a substantial increase in balancing energy costs, and ultimately higher prices for consumers.

The parties' combined share of these markets is high: depending on the class of consumer, it ranges from 50% to 75%. The situation would have been further worsened by the disappearance of Verbund as EnergieAllianz's most important existing and potential competitor, by the parties' leading position in power generation, and by existing links with competitors.

To overcome the Commission's objections, Verbund and EnergieAllianz entered into the following commitments:

- Verbund will sell its 55% shareholding in APC, a company that deals with large customers and has a share of around 10 to 15% of the Austrian market. The effectiveness of this key commitment will be safeguarded by the conclusion of a power supply contract for three terawatt-hours (TWh) a year for at least four years - enough to cover the bulk of APC's electricity requirements. The buyer will also be able to make short-term adjustments to its demand profile. Only once this sale is effective, and the Commission has approved the buyer found for APC, can the transaction be completed.

  This commitment means that one of the independent firms already operating in Austria may be able to expand its business significantly by buying APC and thus provide an important counterweight to the parties' market power. The same effect would also be achieved if an active foreign competitor were to enter the market by buying APC.

- until the end of 2007, Verbund undertakes not to exercise important voting rights it holds in the Styrian regional supplier Steweag-Steg, which is controlled jointly by EdF and the *Land* of Styria. Energie AG Oberösterreich, which belongs to EnergieAllianz, will likewise refrain until the end of 2007 from exercising its voting rights in the Salzburg regional supplier SAG; Energie AG Oberösterreich's share in SAG is to

be transferred to a trustee until then. The parties' large customers will also have the unilateral right to cancel their contracts once the merger has taken place and if they so wish.

- a volume of electricity totalling 450 gigawatt-hours, structured in line with the consumption profile of small Austrian customers, and including 50% hydroelectricity, is to be auctioned each year until July 2008. This is intended to increase liquidity, so as to encourage entry to and expansion on the Austrian small customers market and to improve the range of sources open to small distributors. The Commission has taken note of Verbund's undertaking to sell the shares it still holds in the new suppliers in the area of small customers, MyElectric and Unsere Wasserkraft.
- To deal with the problem of balancing energy the parties submitted a package of commitments, which sets a price cap for a transitional period until an integrated cross-border market in balancing energy is achieved. This reduces the price risk to competitors and encourages the mutual integration of the markets in balancing energy in Austria and the neighbouring countries.

In assessing those commitments which are limited in time, the Commission took account of the fact that in the medium term, given the existing conditions in Austria with regard to the degree of market liberalisation and the adequate interconnection capacity to and from Germany, the scheduled entry into force of the new Electricity Market Directive and the Regulation on cross-border trade in energy can be expected to produce a lowering of the barriers to entry. This legislation is to become effective between 2004 and 2007, and among other things provides for advances in respect of the removal of charges for cross-border electricity supplies and with regard to unbundling.

The Commission took note of the fact that the Austrian Minister for Economic Affairs and Labour indicated that he was willing to implement the provisions of the Energy Market Directive concerning legal unbundling immediately. It also took note of the parties' commitment to remove the existing bottlenecks in the Austrian high-voltage network as soon as the necessary permits have been granted, and to proceed with the development of interconnectors to Italy and Slovenia. Taken together, these measures will improve the scope for entry to the Austrian market.

The Commission acted in close and fruitful contact with the Austrian federal competition authority and the Austrian energy regulator, E-Control. The regulator will supervise the implementation of sections of the commitment package, especially with regard to balancing energy and energy auctions.

DSM/Roche

On 23 July 2003, the European Commission cleared the proposed acquisition of the Vitamins and Fine Chemicals division of Swiss company Roche by Dutch-based company DSM after a detailed investigation. The Commission had identified competition concerns in the market for feed enzymes, which are animal feed additives. DSM submitted a package of undertakings aimed at terminating its alliance with German fine chemicals company, BASF, for the production and distribution of feed enzymes and transferring its activities in the production of feed enzymes to a purchaser to be approved by the Commission. After careful evaluation of the commitments package, the Commission concluded that the remedies removed its competition concerns and to restore effective competition.

DSM and RV&FC are active in a broad range of product areas, however, the only overlaps are in feed enzymes, in particular non-starch polysaccharide degrading enzymes (NSP degrading enzymes) and phytase. NSP-degrading enzymes help animals release nutrients in their feed. Phytase is an enzyme used to increase the amount of digestible phosphorus in animal feed and to limit pollution by reducing the amount of phosphate in animal manure.

DSM and RV&FC belong to two different vertical alliances. DSM has an alliance with BASF and RV&FC with Novozymes, a Danish producer of industrial enzymes. In their respective alliances DSM and Novozymes are mainly responsible for research and development and production whilst BASF and RV&FC are mainly responsible for sales and distribution. Both alliances provide for a high level of economic integration and mutual interdependence.

The acquisition of RV&FC by DSM would have created a structural link between the two alliances and led to near monopolies on the market for phytase at both the levels of production and distribution.

In the course of the first-phase review of the case, DSM offered undertakings to terminate the DSM/BASF alliance and to divest its production and R&D activities in the field of feed enzymes. The Commission was not able to determine in a clear-cut manner, whether that solution would fully

restore effective competition. A second phase inquiry was therefore launched.

The review revealed that the commitments, as subsequently amended, enabled full transfer of production and R&D capability, including intellectual property rights and all other necessary assets from DSM to a suitable purchaser to be approved by the Commission. This will create an independent and viable competitor on the feed enzymes market.

The Commission co-operated closely with the US Federal Trade Commission, which also reviewed the operation.

B – Summaries of decisions taken under Article 6 of Council Regulation (EEC) No 4064/89

Konica/Minolta

On 11 July the Commission decided to clear the proposed acquisition of Minolta by Konica, two Japanese manufacturers of cameras, photocopiers and other imaging products. Both Konica and Minolta develop and manufacture imaging products and equipment, including cameras, photocopiers and photometers. Konica's main business in the latter field consists in its shareholding in the Japanese firm Sekonic.

The acquisition was notified to the Commission, at the end of May, for regulatory approval under the Merger Regulation because both companies do significant business in the European Union. The Commission's investigation showed that the activities of Konica and Minolta are largely complementary although they overlap in several product markets, photocopiers, compact cameras, digital cameras and photometers. Photometers are devices used by professional photographers to measure light intensity.

The Commission did not have concerns as regards the effects of the merger on competition in the market for photocopiers and cameras, since it considered that the merged entity would still lag behind market leaders Ricoh and Canon (photocopiers) and Olympus (cameras).

However the Commission did have concerns as regards the effects of the merger on the market for photometers where the acquisition might have led to the creation of a dominant position in this market. However since Konica offered to divest its approximately 40% stake in Sekonic, a Japanese manufacturer of photometers the Commission took the view that this removed the competition concerns.

The Commission's investigation was carried out in close co-operation with that of the US Department of Justice.

Caemi/CVRD

In July the Commission authorised CVRD's proposed acquisition of sole control of Caemi, currently controlled by the Japanese iron ore trader Mitsui and CVRD. CVRD acquired joint control of Caemi as a result of a transaction that the Commission had cleared subject to conditions in October 2001. The Commission concluded that the change from joint to sole control did not give rise to new competition concerns.

CVRD (Companhia Vale do Rio Doce) and Caemi are Brazilian-based mining companies active in the production and selling of iron ore, kaolin and bauxite. Since CVRD already had controlling shareholding in the target company, this transaction gave rise to a change from joint to sole control. The acquisition of joint control by CVRD and Mitsui took place within the framework of a previous operation cleared by the Commission in October 2001 ('the first transaction'), following a second-phase investigation which identified serious competition concerns in the seaborne (world-wide) iron ore markets for pellets, DR pellets and the combination of DR pellets and DR lump.

In line with the approach adopted by the Commission when clearing the first transaction, the analysis focused on the markets for the production and sale of iron ore which were the only affected markets. The market investigation showed that the division of iron ore into three distinct relevant product markets, i.e. fines, lump and pellets, remained valid. Furthermore a large majority of respondents had confirmed that despite a significant increase in demand from the Chinese market the geographic scope of the iron ore markets continued to comprise all seaborne customers areas, that is to say, world-wide regions fully or partly dependent on seaborne supplies. Basically, most suppliers of iron ore still sell in both Pacific and Atlantic areas and most major customers continue to purchase from Australia, Brazilian and other producers.

The results of the Commission's enquiry showed that the market dynamics (contractual practice, price settling and discounts policy) had not changed significantly since the original transaction was authorised and that CVRD's competitive

position had remained substantially stable in the previous 18 months.

The Commission also considered that the existing links between the notifying party and the target should also be taken into consideration when assessing the competitive impact of the operation. CVRD already exercised decisive influence and played a predominant role in determining Caemi's market strategy. It was therefore reasonable to expect that Caemi's commercial strategy would not be substantially changed as a result of CVRD's acquisition of sole control.

The Commission concluded that the notified operation had no significant impact on the relevant markets, as it did not alter the existing competitive situation resulting from the first transaction and because no additional competition concerns had been identified.

As the remedy attached to the decision authorising the first transaction, the sale of Caemi's interest in Québec Cartier Mining Company (QCM), had not yet been implemented, CVRD undertook to assume responsibility for complying with this commitment. This is consistent with the Commission's previous practice in such cases.

Candover/Cinven/ BertelsmannSpringer

On 29 July the Commission decided to authorise the acquisition of joint control by the investment companies Candover and Cinven of the German-based academic and professional publisher BertelsmannSpringer. The transaction created links between BertelsmannSpringer and the Dutch publisher Kluwer Academic Publishers which had been acquired by Candover and Cinven in 2002. It also led to the creation of links between BertelmannSpringer's business and that of the French professional publisher MediMedia that is co-controlled by Cinven.

Both BertelsmannSpringer and Kluwer Academic Publishers are active in the global market for academic publishing with a special focus on scientific, technical and medical ("STM") journals, which are almost all exclusively published in English. This market deals with access to the latest developments in academic research. It exhibits some specific features: a main feature is the "must have" characteristic of certain journals. Universities depend on the information provided in such journals and cannot afford to cancel subscriptions without losing access to the most recent subjects of discussion in the academic community. A further significant feature of this market is the considerable rise in subscription prices, which has occurred over the past decade.

The Commission's investigation found that BertelsmannSpringer and Kluwer Academic Publishers would as a result of the merger become the number two player in the market albeit lagging well behind the market leader Elsevier Science. Given the heterogeneity of journals and books published in different scientific disciplines and the heterogeneous nature of these books and journals even if published within a discipline, the Commission found no indication that a collective dominant position could have been created as a result of the merger.

BertelsmannSpringer and MediMedia are both active in the French and German markets for professional medical publishing. These markets comprise newspapers, magazines and drug directories mainly addressed to doctors and financed by advertising. Whereas the transaction did not raise competition concerns in relation to the German market the Commission's investigation showed that the operation would lead to a dominant position on the French market. Candover and Cinven removed these competition concerns by offering to divest BertelsmannSpringer's French business in the market for professional medical publishing known under the name 'Groupe Impact Médicine'.

Procter & Gamble/Wella

On 30 July the Commission cleared the proposed acquisition by the American corporation Procter & Gamble of the German company Wella AG subject to a package of commitments. Procter & Gamble is an international group of companies engaged in the production of baby, feminine and family care products, fabric and home care products, beauty and health care products, snacks and beverages. Wella is an internationally active manufacturer of cosmetics focusing on hair care products for consumers and hair salons, hair salon furniture and equipment, training programs for hair salons, cosmetics and fragrances.

On 16 June 2003 the Procter & Gamble Company (P&G) notified the Commission of an agreement pursuant to which P&G proposed to acquire sole control of Wella AG (Wella). Both P&G and Wella are active in the markets for hair care products, fragrances and colour cosmetics. The proposed transaction did not raise competition concerns in the markets for fragrances and colour cosmetics.

With respect to haircare, only Wella is active in the markets for professional hair care products (hairdresser channel) whereas the parties have overlaps

in the markets for retail haircare products. The Commission considered that the operation as notified would be likely to create a dominant position for the whole range of hair care products (shampoo, conditioners, treatments, styling products and colorants) in Ireland, and in some hair care markets in Norway and Sweden.

In order to restore effective competition in the markets for hair care products, P&G undertook to grant an exclusive 5 year licence, followed by a 3 year black-out (non-use) period of: (i) the P&G hair care brand 'Herbal Essences' for the whole range of hair care products in Ireland, Norway and Sweden; (ii) the P&G colorant brands 'Loving Care', 'Lasting Color', 'Glints', 'Borne Blonde' and 'Highlights' and the Wella styling brand 'Silvikrin' in Ireland; and (iii) the Wella styling brand 'Catzy' in Norway. The Commission considers the remedy package consisting of the licensing of these brands together with certain other assets offered by the parties removed its concerns as regards the effects of the transaction in the hair care markets in Ireland, Norway and Sweden.

Teijin/Zeon

On 13 August the Commission approved the proposed creation of a joint venture bringing together the DCPD RIM (dicyclopentadiene reaction injection moulding) activities of Zeon and Teijin.

On 30 June Zeon and Teijin notified to the Commission their intention to combine the bulk of their world-wide activities in the production of DCPD RIM formulations and DCPD mouldings in a new joint venture company. In relation to plastic mouldings these products (which include septic tanks and truck parts) are bulky and difficult to transport. The joint venture company RIMTEC will produce moulded products in Japan only. Both companies supply DCPD RIM formulations in Europe.

Zeon is a Japanese company that is active in the design, manufacturing and distribution of synthetic rubbers, synthetic latex, chemicals, medical equipment, environmental and civil engineering materials. Zeon is also active in the DCPD RIM business and its subsidiary Zeon RIM manufactures mouldings. A second subsidiary Zeon Chemical Yonezawa manufactures the DCPD RIM formulation.

Teijin is a Japanese company that is the ultimate parent company of a group of undertakings active in developing and marketing fibres. With regard to DCPD RIM products, Teijin operates in this sector through its wholly owned subsidiary, Teijin Metton. Teijin Metton holds 60% of the shares in MTN Chemicals, one of the parents of the Metton America Incorporated (MAI) joint venture, which is also active in the DCPD RIM business. MTN Chemicals holds 60% of the shares in MAI. Teijin Metton also directly holds 25% of MAI's shares.

Zeon and Teijin are the only suppliers of DCPD RIM formulations in Europe. The combination of their activities in this area therefore would have given rise to serious competition concerns. The parties however undertook to divest Teijin's controlling interest in MAI to an independent and viable third party. As this divestment would remove the entire increment in market share resulting from the transaction the Commission decided to clear the operation subject to the implementation of this condition.

The Japanese Fair Trade Commission had previously approved the transaction.

C – Summaries of Decisions taken under Article 9 of the ECMR

Arla/Express Dairies

The European Commission decided, 10 June 2003, to refer part of the proposed merger between Danish-based dairy products company Arla Foods and Britain's Express Dairies to the UK competition authorities, which then assessed the competitive impact in the markets for the supply of processed fresh milk and fresh cream in Britain. On the same day the Commission cleared the operation for the remaining product and geographical markets.

On 16 April, the Commission received notification of an operation whereby the dairy co-operative, Arla Foods amba, would acquire control of Express Dairies plc, thereby combining two of the four largest dairies in the UK. The United Kingdom asked the Commission on 15 May to refer the examination of certain parts of the case to its competition authorities, namely: (i) the market for the procurement of raw milk in the UK, (ii) the market for the supply of fresh processed milk in Great Britain and (iii) the market for the supply of fresh potted cream (non-bulk cream) in the UK. On these markets the UK argued that the transaction would create significant competition concerns and that its competition authorities were better placed to deal with these aspects of the case. The UK authorities also asked for the market for bottled milk (primarily supplied to milkmen) in

certain areas in England, where they considered that the transaction might affect competition.

The Commission considered that the operation would raise potential competition concerns which will be better dealt with by the British competition authorities on the markets for the supply of fresh milk, fresh non-bulk cream and for the supply of bottled milk.

However, the Commission did not identify any competition concerns on the market for the procurement of raw milk, on the basis of single or collective dominance. Therefore, the Commission rejected this part of the request and cleared the proposed transaction with regard to this market and the markets for which no referral had been requested. The Commission took great care to establish that the impact of the merger on the markets subject of a referral request was limited to the UK and, therefore, that the one-stop shop principle provided by the European merger control rules was respected.

Lagardère/Natexis/VUP

On 14 May 2003, the French authorities lodged an application asking that the planned acquisition of Vivendi Universal Publishing (VUP) by the French conglomerate Lagardère be referred to them under Article 9 of the Merger Regulation. The operation, which involves the two largest publishers in France, had been notified to the Commission on 14 April 2003.

The French authorities consider that the transaction threatens to create dominant positions in France on a number of markets forming part of the 'book chain' (markets in the acquisition of authors' rights, publishing and distribution); they therefore requested a partial referral of the merger so as to be able to analyse the impact of the transaction in France on these various markets.

Following a detailed examination of the markets to which the French authorities' request related, the Commission concluded that most of them are of supranational geographical dimension, covering the whole of the French-speaking area in Europe. Since one of the conditions for referral (i.e. the existence of separate geographic markets within the Member State) is not met, these markets could not be subject to referral.

As far as the markets for the sale of school books and other text books are concerned, the Commission found that the first of these two markets was a separate national market, as the French authorities claimed (notably because of the existence of national educational programmes); however, the Commission was unable to decide on the geographical dimension of the second of the two markets. Given the substantial overlap between these two markets and all the other activities forming part of the parties' operations in the book chain, the Commission took the view that a single authority should examine the impact of the transaction on all the relevant markets. It also took account in reaching its decision of the Lagardère group's preference for dealing with a single competition authority, particularly if only the market for the sale of school books was referred to the French authorities. Lastly, the Belgian authorities informed the Commission that they preferred the case to be dealt with at Community level. The Commission therefore adopted a decision, 23 July 2003, refusing the request of the French authorities for the partial referral of the case.

D – Summaries of judgements of Court of First Instance in competition cases.

Judgement of 3 April 2003 in Case T-342/00 – Petrolessence SA, Société de Gestion de Restauration Routière SA (SG2R) v. Commission

This judgement finds that the Commission did not go beyond the limits of its discretionary power in assessing whether the applicants could be accepted as buyers of certain assets in the course of divestitures on which a decision to allow a merger was conditioned. The refusal to accept the applicants as buyers was therefore upheld by the Court of First Instance (CFI).

By a decision adopted 9 February 2000 the Commission approved the proposed merger between TotalFina and Elf pursuant to Article 8(2) ECMR on condition that certain commitments submitted by the parties to the merger be fulfilled.

In its decision of 9 February 2000 the Commission had found that demand for fuel on motorways is distinct and different from off-motorway demand and that the supply of fuels on motorways is not constrained by the supply of fuels off motorways. The significant and persistent price differences between fuels sold on and off motorways confirmed this and the relevant product market was therefore that for the sale of fuels on motorways. The current competitive situation on the market for motorway fuel stations was close to being one of dominance exercised either solely by

TotalFina or else jointly with TotalFina in the role of leader.

The Commission found that the merger in question would lead to the creation of a dominant position on the market for motorway sales in France and that after the merger TotalFina Elf would have strong incentives to raise its prices or reduce its services. The proposed commitments aimed to overcome the competition problems identified by the Commission. In particular given that the merger raised substantial competition concerns inter alia on the sale of petrol on French motorways, the merged entity undertook to divest 70 French petrol stations to viable operators, potentially or actively present on the relevant market and capable of maintaining or developing effective competition. This divestment was to take place within a specified time-limit.

In order to comply with the commitment TotalFina lodged with the Commission on 12 August 2000 a request for approval of purchasers for all 70 of the stations which it had undertook to divest. By decision of 13 September 2000 notified to TotalFina the Commission rejected the request for approval. This rejection argued in particular that Petrolessence (the applicant), the proposed buyer of 6 stations, did not have the capacity to maintain and develop effective competition particularly with TotalFina Elf as it was a 'new entrant without recent experience of the market for the retail sale of fuels...'. Petrolessence S.A. contested this decision on the grounds inter alia that the text of the commitments did not require the purchasers to be active in the petroleum sector.

The Court found that review by Community courts of complex economic assessments made by the Commission in exercising the discretion conferred on it by Regulation 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power.

The Court found that the Commission had not exceeded its margin of discretion when evaluating the applicants' candidacy. The Court also found that the applicants had not shown that the Commission had made a manifest error of assessment in taking the view that the applicants would not have been able to maintain or develop effective competition in the market as required by the commitments.

The CFI therefore rejected the appeal as unfounded and ordered the applicants to bear the costs (including those of the procedure for interim relief).

Judgement of 8 July 2003 in case T-374/00 – Verband der freien Rohrwerke e. a. v. Commission)

On 8 July 2003, the Court of First Instance (CFI) rejected an appeal brought by third parties against two phase I Commission decisions clearing German steel maker Salzgitter AG's acquisition of Mannesmannröhren-Werke AG (MRW), the tube business of former Mannesmann AG of Germany (now part of Vodafone).

The Commission Decisions

The Commission cleared the proposed acquisition by Salzgitter of MRW by way of two decisions, one of 5 September 2000 adopted under Article 6(1)b of the Merger Regulation and the other of 14 September 2000 taken under Article 66 of the ECSC Treaty ([1]).

Salzgitter is an integrated steel producer which makes a wide range of products, including large diameter spirally welded pipe. MRW is engaged in the production of steel tubes and pipes. Jointly with Dillingerhütte (DH), a subsidiary of France's Usinor, MRW controls Europipe, a company which combines the former large diameter longitudinally welded pipe (LDLWP) interests of MRW and the former LDLWP and spiral welded pipe operations of Usinor. MRW also controls Hüttenwerke Krupp Mannesmann (HKM) jointly with Thyssen Krupp Stahl (TKS). HKM produces semi-finished products for its parents.

The Commission found that there were no competition problems in areas where the operation gave rise to overlaps, having regard to the parties' relatively low share of the EEA-wide steel and tube markets and existing over-capacity in these industries. Nevertheless, in order to allay fears expressed by a number of smaller manufacturers of large diameter tubes who purchase raw materials from Salzgitter that after the operation this source of supply might no longer be available to them on competitive terms, Salzgitter made a declaration that it will continue to provide quarto plate and hot rolled wide strip on non-discriminatory terms. The ECSC decision took note of this declaration.

([1]) Cases COMP/M.2045 and COMP/ECSC.1336.

The Appeal

The appeal was filed by a trade association, Verband der freien Rohrwerke e.V. and two small German tube manufacturers, Eisen- und Metallwerke Ferndorf GmbH (Ferndorf) and Rudolf Flender GmbH & Co. KG (Flender). The applicants submitted that the Commission's decision did not address the vertical issues raised by the concentration adequately. In particular, Salzgitter would after the operation have the means and the incentive to discriminate against independent tube manufacturers with regard to their requirements for quarto plate and hot rolled wide strip (the raw materials necessary to make tubes) so as to favour MRW's and Europipe's tube production.

The Judgement

The Court rejected the appeal against the ECSC decision as inadmissible on formal grounds. With regard to the Merger Regulation decision, it discussed the applicants' arguments that the Commission had wrongly assessed the effects of the concentration on the markets for large and small diameter pipes, that it had not adequately taken into account the vertical integration of Salzgitter, Europipe and HKM resulting from the operation, and that it had not sufficiently motivated its decision. In doing so, the Court confirmed, referring to the case law in France v. Commission ([1]), Gencor ([2]) and Endemol ([3]), that in applying the Merger Regulation, the Commission enjoys a certain discretionary power, notably when making assessments of an economic nature.

The Court rejected the applicants' argument that the merged entity's market share of 30.5% on the market for large diameter pipes ([4]) would create a dominant position, and that the Commission had wrongly calculated the market shares. With regard to the vertical effects, the Court held that given Salzgitter's market shares of below 10% on the EEA-wide market for quarto plate (the raw material for LDLWP) and of considerably below 25% on the EEA-wide market for hot rolled wide strip (the raw material for spiral welded pipes), the Commission did not have any ground for serious doubts.

The Court rejected the applicants' argument that Salzgitter would be part of a dominant oligopoly in the market for quarto plate, since no evidence was provided as to whether the criteria for collective dominance ([5]) were fulfilled. The Court also noted that the Commission had discussed the effects of Salzgitter's position as a supplier of quarto plate to independent tube makers in its ECSC decision, stating that the legality of the EC decision has to be assessed in its factual and legal context, of which the ECSC decision formed part. The Court also dismissed the applicants' view that the product market for hot rolled wide strip should be defined narrowly to include only the output used for tube production, and that the geographic market should be national rather than EEA-wide. In fact, the Commission was able to show that hot rolled wide strip is interchangeable regardless of its final use, even though it may need further processing for some purposes, and that even under a narrower market definition, Salzgitter's market share would not be such as to create a possible vertical competition problem. With regard to the geographic market, the applicants had not provided any evidence to rebut the Commission's analysis leading to an EEA-wide market, which is also the Commission's standard practice.

Since the Commission did not commit any manifest error in assessing the effects of the concentration on the market for large diameter pipes, the Court did not discuss whether Salzgitter's commitment was sufficient to exclude any discrimination. This confirms that 'take note' commitments given by notifying parties in the absence of a competition problem do not have any legal relevance.

With regard to the market for small diameter pipes, the Court rejected the applicants' claim that the Commission had not sufficiently analysed the effects of the concentration on this market, since there was neither a horizontal overlap nor a significant position of the merged entity on the upstream market for hot rolled wide strip.

The applicants further submitted that the Commission should have examined the effects on the relevant markets of the fact that Salzgitter, as a result of the operation, jointly with Usinor / DH controls Europipe, a manufacturer of large diameter pipes made from quarto plate and hot rolled wide strip, and jointly with TKS controls HKM, a producer of crude steel, slabs and quarto plate.

([1]) ECJ, judgement of 31 March 1998, joint cases C-68/94 and C-30/95, France e.a. v. Commission.

([2]) CFI, judgement of 25 March 1999, case T-102/96, Gencor v. Commission.

([3]) CFI, judgement of 28 April 1999, case T-221/95, Endemol v. Commission.

([4]) This market comprises both large diameter longitudinally welded and spiral welded pipes. Whereas large diameter longitudinally welded pipes are made from quarto plate, large diameter spiral welded pipes are made from hot rolled wide strip.

([5]) See CFI, judgement of 6 June 2002, case T-342/99, Airtours v. Commission.

First of all, the Court, referring to the Matra judgement ([1]), stated that since the operation had been notified to the Commission under the Merger Regulation, and in the absence of any evidence of possible co-ordination between the parent companies of both Europipe and HKM, the Commission was under no obligation to analyse such effects under Article 81 EC. It furthermore held that there were no elements indicating that the links between Salzgitter, on the one hand, and Usinor / DH or TKS, on the other hand, would give rise to competition concerns relevant under the Merger Regulation, referring to evidence spelled out in the ECSC decision that Salzgitter's exit as a supplier of quarto plate from the market would not have any significant impact, that there was no incentive for Usinor not to supply independent tube makers with quarto plate, and that in any event both the capacity utilisation rate of European steelworks producing quarto plate and entry barriers are low.

With regard to the claim that the Commission had not sufficiently motivated its decision, the Court, quoting the Air France case ([2]), held that the Commission must clearly state the reasons for which it is convinced that the notified operation does not give rise to serious doubts with regard to its compatibility with the Common Market. However, it is not under an obligation to discuss on its assessment every single legal or factual element that could be possibly linked to the notified operation and/or was submitted to it in the administrative procedure, notably in view of the necessity to quickly review cases under the Merger Regulation.

Conclusion

In this case, as in case T-342/00 00 – Petrolessence SA, Société de Gestion de Restauration Routière SA (SG2R) v. Commission discussed above, the Court expressly confirmed the Commission's discretion in making economic assessments when applying the Merger Regulation. If the contested decision is based on clear and convincing reasoning, the Court may accept that reasoning without examining the arguments brought against it in every detail. Furthermore, Commission decisions are to be interpreted in their factual and legal context, so the Commission does not need to discuss in its decision every possible legal aspect, provided that its reasoning explains clearly the grounds on which the decision is based.

([1]) ECJ, judgement of 15 June 1993, case C-225/91, Matra v. Commission.
([2]) CFI, judgement of 15 May 1994, case T-2/93, Air France v. Commission.

Commission launches formal investigation procedure into restructuring aid in favour of British Energy plc

Anne FORT, Directorate-General Competition, unit H-4 and Brice ALLIBERT, Directorate-General Competition, unit G-2

British Energy plc (BE) is one of the most important suppliers of electricity in the UK. It supplies about 20% of the electricity consumed in Great Britain, and accounts for 14% of the generation capacity, with its six nuclear power stations in England and two nuclear power plants in Scotland, together with a coal fired plant in England. BE, which was privatised in 1996, is the only private operator of nuclear plants in the UK, and one of the few private electricity generator in the world relying mainly on nuclear power. It supplies electricity on the wholesale market and to certain large industrial and commercial customers. It does not serve households.

Decrease in electricity wholesale prices which followed the introduction of a new electricity trading system in England and Wales in 2001 has severely reduced the cash-flow BE could generate with the supply of its nuclear energy. As of September 2002, it appeared that the company was facing bankruptcy. It then turned to the United Kingdom Government for support. The UK Government decided to grant British Energy a rescue aid package in order to keep it afloat during the time necessary for the elaboration of a restructuring plan. The rescue aid package was authorised by the Commission on 11 November 2002.

Since then, a restructuring plan was established for British Energy. As this restructuring plan also contains State aid, the plan was notified to the Commission on 7 March 2003. The plan aims at restoring BE's long term viability, in particular by renegotiating its debt with its main creditors and relieving it from a number of liabilities linked to its nuclear operations.

The restructuring plan contains seven measures:

A. The undertaking by the UK Government to assume the funding of historic nuclear liabilities, in particular with respect to the management of fuel loaded prior to the restructuring and to the decommissioning of BE's nuclear plants. The benefit of this measure for BE is estimated to 3 298 million GBP.

B. The renegotiation of fuel supply and spent fuel management contracts with British Nuclear Fuel Limited (BNFL), leading to a decrease of prices charged by BNFL to BE for these services. The benefit of this measure for BE is very hard to estimate. It may range from a few hundred million GBP to more than 1 billion GBP.

C. The achievement of a standstill on BE's debts towards its major creditors, including BNFL, plus the possibility that part of these debts be finally waived. The cash saved by BE through the standstill is estimated to £642m.

D. A number of financial restructuring arrangements with major creditors.

E. The introduction of a new trading strategy for BE, aimed at improving its hedging against wholesale electricity prices fluctuations.

F. The disposal of assets in North America to generate cash.

G. A 3 month deferral of about £4m business rates by local authorities.

In its analysis of the file, the Commission has first noticed that the restructuring plan conferred BE a selective competitive advantage in a sector where there is intracommunity trade. As measures A and G directly involve the UK central or local authorities' budgets, which are State resources, the Commission concluded that they were State aid within the meaning of Article 87(1) of the EC Treaty.

The Commission also noted that it was possible that Measure B, and, at least partly, Measure C, involve State resources, to the extent that the publicly owned company BNFL would have acted contrarily to the private investor in a market economy principle. In this case, these measures too would be State aid within the meaning of Article 87(1) of the EC Treaty.

The Commission then analysed the aid in the light of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty ([1]).

([1]) OJ C 288, 9.10.1999, p. 2.

This analysis has led the Commission to express doubts as regards the compatibility of the aid with the common market, in particular as regards the following points:

- The Commission has doubts as to whether the plan will result in a restoration of BE's viability in a reasonable timeframe. Indeed, some of the measures have a very long time span (until at least 2086). Furthermore, the improvement of BE's position would seem to be only due to external support conceded by the Government and major creditors, rather than from physical internal restructuring. Besides, should it be State aid, the renegociation of fuel supply and spent fuel management prices with BNFL could be viewed as a life long operating aid for nuclear stations, which would be incompatible with the requirement that BE faces the market with its own forces alone after the restructuring is over, and to the polluter pays principle.

- The Commission has doubts as to whether the aid can be authorised without any compensatory measure being offered in order to offset the impact of the aid on competitors. In this respect, the Commission acknowledges that it is likely that there is no or very small structural overcapacity on the relevant market. However, the Commission considers that, in view of the highly competitive nature of this market and of the important amount of the aid, compensatory measures are likely to be necessary for the aid to be considered compatible with the common market.

- The Commission has doubts as to whether the aid is restricted to the minimum. In this respect, the Commission notes that the plan provides for a mechanism by which BE will participate to the restructuring costs via a percentage of its free cash flow. However, in view in particular of the large uncertainties as to the amounts of aid to be granted, the Commission is not in the position to assess whether this aid is limited to the minimum at this stage.

- The Commission has doubts as to whether the aid may be necessary to fulfil objectives of the EURATOM Treaty such as security of supply or nuclear safety, or, if it is, whether it will be limited to the amount necessary to fulfil these objectives.

For all these reasons, the Commission decided to open the procedure laid down in article 88(2) of the EC Treaty while together requiring the UK authorities to provide all necessary information to analyse the necessity of the measures for achieving the EURATOM Treaty objectives.

The decision to initiate the procedure does not prejudge the final outcome of the in-depth examination. It allows competitors and other interested parties to express their views on the effect of the aid, which will in turn allow the Commission to make a sound decision on its compatibility with the common market.

State aid and eco-taxes: bundling of eco-taxes for State aid assessment ([1])

Johan LANNERING and Brigitta RENNER-LOQUENZ, Directorate-General Competition, unit G-2

Eco-taxes in the European Union

Several Member States have introduced taxes on energy products in order to create an incentive to reduce the consumption of energy, and thereby also the emissions of greenhouse gases into the atmosphere. These so-called eco-taxes are often levied on certain types of emissions such as CO_2 or on the consumption of energy.

Many Member States have found it necessary to introduce a tax relief for the most energy intensive consumers, notably the manufacturing industry, in order to protect their competitiveness.

These exemptions usually give rise to state aid issues since they relieve energy intensive undertakings from a tax burden, which other companies have to bear. Some Member states have however designed tax exemptions as general measures whereby they fall outside the scope of the state aid rules. This possibility has however been limited. In its decision in the case Adria-Wien Pipeline GmbH ([2]), the Court clarified the criteria of selectivity in the context of energy taxation, confirming Commission practice. The ruling demonstrated that special tax treatments targeting energy intensive companies are always selective if the service sector is excluded.

The exemptions that do not qualify as general measures have to be assessed and approved under the environmental guidelines ([3]), which set out several options for such aid to be compatible with Article 87(3)(c) of the Treaty. All of them aim at maintaining an incentive on beneficiaries for reducing their emissions targeted by the tax, respectively their energy consumption. This can be achieved by environmental agreements between companies and the State or by a mechanism ensuring that undertakings receiving a tax reduction still pay a significant proportion of the tax.

The Swedish eco-taxes

The Commission started to investigate the core of the Swedish energy tax system after taking a decision in December 2002 on a CO_2 tax reduction ([4]). During the investigation the Commission found that the CO_2 tax only constituted one part of the Swedish energy tax system and that a broader investigation had to be carried out in order to assess the compatibility of a number of exemptions with the Treaty.

The cornerstones of the Swedish environmental energy tax system are the CO_2 tax and the energy tax, both of which are levied on fossil fuels. Apart from the tax levied on fossil fuels, the energy tax is also levied on electricity. There are also several other taxes, which have an environmental objective but which are aimed at reducing certain distinct types of emissions such as sulphur.

As many other Member States Sweden found it necessary to introduce exemptions from the eco-taxes to certain energy intensive consumers. The current exemption from the energy tax was introduced in 1993 and gives a full exemption from the energy tax used for heating in production processes to companies in the manufacturing sector. Since the same year, the manufacturing industry also benefits from a 75% reduction from the CO_2 tax for fuels used in production processes.

The Commission's assessment

A priori the construction of the Swedish energy tax would not comply with the community rules on state aid. The Swedish companies have neither entered into environmental agreements nor do they pay a significant proportion since they pay no energy tax at all.

However, the Commission accepted the Swedish argument that the CO_2 tax and the energy tax and counterparts given by the benefiting companies should be seen as one.

([1]) State aid NN 3/B/2002.
([2]) C 143/99 European Court Reports [2001] page I-08365.
([3]) Community Guidelines on State aid for environmental protection, OJ C 37, 3.2.2001, p. 6.
([4]) NN 3/A/2001 and NN 4/A/2001 – Sweden, OJ C 104, 30.4.2003, p. 9.

The energy and CO_2 taxes are both being levied on fossil fuels used for heating purposes. Since the two taxes are levied on the same basis, they are in practice functioning as one tax with two components. The provisions for collection and chargeability as well as the control provisions are identical and both taxes are presented together to the taxpayers for the purposes of their tax return.

Not only the CO_2 tax, but also the energy tax, has an environmental steering effect on the consumption of fuels. Therefore both taxes are to be regarded as economic instruments for achieving environmental protection objectives and in particular CO_2 reduction ([1]). In order to achieve the desired steering effect, the Swedish Government, over the years, has adjusted the tax levels of either the energy tax or the CO_2 tax.

Further, the Commission noted that the adding of all taxes levied on a fuel was in line with EU policy in the field of energy tax. Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duties on mineral oils ([2]), which allows Member States to add all the different taxes levied on a fuel. In addition, Article 4(2) of the new Energy Tax Directive ([3]) allows member states to add all indirect taxes levied on the quantity of energy products.

By adding the two taxes Sweden complied with point 51(1) b, second indent in the environmental guidelines since the undertakings would still pay a significant proportion of the taxes. Thus, the undertakings will still have an incentive to reduce their energy consumption.

Conclusion

This case clearly sets out the difficulty in assessing exemptions from eco-taxes especially in the context of the wider system of energy taxation in a Member State. It has indeed to be considered that some Member States may have introduced for national reasons parallel taxes and exemptions thereof forming components of one tax for the same purpose. However, this reasoning has to be strictly limited to cases of strong evidence. Similar cases will probably be rare, given the multi-purpose nature of most national taxation systems.

The Swedish case itself shows already the limits of applicability of the above described reasoning. Indeed, the Commission opened proceedings as regards the full exemption of the Swedish electricity tax for the manufacturing industry. The Swedish argument to apply the same reasoning as for the CO_2 and energy taxes has not been accepted, first because the taxes do not cover the same commodities, second because the taxes pursue different purposes.

Over the last years, a growing number of energy tax exemptions underwent State aid scrutiny. This field may gain a new momentum since the new directive on energy products is adopted. This directive will lead to the introduction of energy taxes in some countries and to partial overhaul of established energy taxation systems in other Member States. While the directive will contribute to reduce tax competition in this field, state aid control will not be superfluous in the future. The directive grants a number of possibilities for tax exemptions which will in many cases constitute State aid.

([1]) The CO_2 tax rates depend on the CO_2 content of the fuel. The energy tax rates are not directly related to the CO_2 content of a fuel, but the Commission considers in the Swedish circumstances that there is a strong direct relation between fuel use and CO_2 emissions.

([2]) OJ L 316, 31.10.1992, p. 19.

([3]) Directive 2003/96/EC of the Council of 27.10.2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L 283, 30.10.2003.

Emission trading – why State aid is involved: NOx trading scheme

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In January 2003 the Dutch authorities notified the Commission of a legal framework for an emission trading scheme for the atmospheric pollutant NOx. The measure was authorised under State aid notification rules by the Commission by decision dated 24 June 2003. As the legal framework sets up a trading mechanism with mostly private provisions, it is interesting to see how and why the State aid rules are applicable.

Description of the measure

The Netherlands has a national emission ceiling for NOx at 260 kilotons in 2010 ([1]). On the basis of this national target, the Dutch authorities have set a target of 55 kilotons of NOx emission by 2010 for its large industrial facilities. Present instruments, like emission permit requirements and legislation on emission limits, are not sufficient to meet this target for 2010 or could incur excessive compliance costs. Therefore the Dutch authorities developed a NOx credit trading regime for large industrial facilities, which will enter into force in 2004. The system will cover all industrial facilities with installed total thermal capacity above 20 MWth (approximately 250 large companies). In 2000, these companies emitted 90 kilotons of NOx.

The Dutch trading regime will be laid down in national legislation, which will include an uniform NOx emission standard for each industrial facility. The NOx emission standard for 2010 for large industrial facilities is defined by their absolute emission target of 55 kilotons in 2010 divided by their total estimated absolute energy consumption in 2010 (1100 PJ). Herewith, the NOx emission standard reflects the maximum allowable gram of NOx per unit of energy (50 g/GJ). This is a relative emission standard, instead of an absolute emission standard like an annual allowance or permit. The relative emission standard (called Performance Standard Rate) is flexible so if economic growth would lead to an increase in absolute emissions above expected calculation, the authorities can tighten the PSR, ensuring that the 2010 target can be achieved.

The key feature of the system is that it offers a choice to facilities subject to the mandatory legislation. They can comply with the NOx emissions standard set for them either by taking measures to reduce NOx in their own facility, or by buying emission reductions (kilograms of NOx) that have been or will be achieved elsewhere, or by a combination of both.

Various emission trading systems

The notified emission trading system differs from another basic variant of emissions trading systems, the so-called 'cap and trade' system, whereby an absolute ceiling is set for each facility. Under a 'cap and trade' system, emission allowances are allocated among facilities, e.g. by means of auction or 'grandfathering'. In a cap-and-trade system, in which the emission ceiling assigned previously determines the permitted level of future emissions, new companies or existing companies which expand their activities must always first acquire the required quantity of allowances. This system is the basis of the EC proposal for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC ([2]).

Under the Dutch NOx emissions trading system, new companies or companies wishing to expand do not have to acquire allowances. They just need to comply with the relative emission standard. This feature ensures that new companies, among which are also non-Dutch companies operating within the geographical limits of the Netherlands, are able to participate in the scheme. The Dutch authorities therefore refer to their system as a 'dynamic cap' system, instead of a 'cap and trade' system. The advantage of a 'cap and trade' system is that there is certainty of the environmental outcome. The design of the trading system is fairly simple ensuring low administrative costs for the authorities and participants. In a 'dynamic cap' system, the environmental outcome is more uncer-

([1]) On the basis of Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ L 309, 27.11.2001, p. 22.

([2]) COM(2001) 581 final of 23.10.2001; the Council (Environment) reached political agreement on 9 December 2002, 2001/0245 (COD).

tain and the trading system can be rather complicated.

In the absence of Community provisions in the area of NOx emission trading, and without prejudice to the Commission's right of initiative in proposing such provisions, it is for each Member State to formulate the policies, measures and instruments on the reduction of NOx emission.

The system is not voluntary; each facility must comply with the emission standard. Trading however, is optional. Emission reductions in the form of NOx credits will be offered in the "emission market" by facilities whose emissions are below the emission standard. A facility's total NOx emission in a year, adjusted for any NOx credits bought or sold, must be compatible with the allowed emission, which is based on the uniform emission standard set for that year and the amount of energy used by that facility. Thus, the absolute allowed annual emission is calculated using the relative emission standard and the amount of energy used by the facility. The Dutch authorities check at the end of each year whether the facility has met the required absolute emission. In the course of each year NOx credits can be bought, sold, saved or lent for future periods. Each facility decides for itself whether, and to what extent, it is worthwhile exchanging emission reductions for the given year or a future year. When a facility would fail to meet its obligation, the Dutch authorities will put a penalty on the facility.

Existence of State aid in emission trading schemes

Can the notified measure be characterised as a State aid measure within the meaning of Article 87(1) of the EC Treaty? The Commission has already taken various decisions on emission or pollution trading schemes that are related to the notified scheme. In these systems a variety of tradable emission or pollution documents are used, like quotas, allowances, certificates and credits. The Commission considers the tradable emission documents as intangible assets provided by the authorities to the recipients. As regards State aid assessment, there are two kinds of trade systems:

(1) Systems where a tradable emission or pollution document is considered as intangible asset representing a market value which the authorities could have sold or auctioned as well, leading to foregone revenues (or a loss of state resources), hence State aid within the meaning of Article 87(1) of the EC Treaty ([1]);

(2) Systems where a tradable emission or pollution document is considered as authorised proof of a certain production that can not be sold or auctioned to the recipient, hence no foregone revenues, therefore no state resources and no State aid within the meaning of Article 87(1) of the EC Treaty ([2]).

The difference between the two systems is whether the public authorities have an alternative option to sell or auction the intangible asset to the recipient. In the first kind of system there is a rationale for the public authorities to sell or auction the emission or pollution document to the producer of that emission or pollution, as the tradable emission or pollution document will give him the right to emit or pollute (directly or indirectly). In the second kind of system the tradable emission or pollution document has no value to the recipient in relationship to the state and it will merely serve as an authorised proof of certain production or emission. Hence, there is no rationale for the public authorities to sell or auction it to the producer of that emission or pollution document ([3]).

The fact that there will be a market for trading emission or pollution documents is a sign of the value of the asset being allocated. The fact that undertakings will have to have expenses in order to realise the value of the tradable emission or pollution documents does not change the existence of an advantage, but can be considered a positive element in the assessment of the compatibility of the scheme concerned.

The emission scheme notified by the Dutch authorities is based on tradable emission credits. These credits do not represent direct permits (or allowances) as in other emission schemes, nor do they solely represent an authorised proof. The annual allowed absolute emission per facility will be calculated on the basis of the general PSR and the energy use of that facility in the year at hand. When the producer would exceed this absolute emission ceiling, he has the obligation to buy NOx credits, to borrow the credits of his obligation in the following year or, ultimately, he is fined. The

([1]) See for instance Commission decision of 29.3.2000, Case N 653/1999, Denmark - *CO2-quota system* (OJ C 322, 11.11.2000, p. 9) and Commission decision of 28.11.2001, Case N 416/2001, United Kingdom - *Emission trading scheme* (OJ C 88, 12.4.2002, p. 16).

([2]) See for instance Commission decision of 25.7.2001, Case N 550/2000, Belgium, *Green Electricity Certificates* (OJ C 330, 24.11.2001, p. 3).

([3]) The fact that a tradable emission or pollution document has a value to the recipient in relationship to third parties (like the distributors or consumers in green electricity certificates) is of other importance in this respect.

tradable NOx credits will thus contribute directly to the absolute emission standard imposed by the state. Therefore, the Commission considers the notified NOx emission trade system comparable to a direct NOx emission allowance allocation.

Secondly, it is the producer himself who is obliged to meet his emission standard. The producer has an incentive to pay for the tradable emission documents, as long as the price of that tradable emission document is lower than the costs of reducing his own emission or when the price of that tradable emission document is lower than the penalty. In the notified scheme the producer emitting NOx is penalised when he does not meet his emission standard. The same producer will also be a recipient of tradable emission documents (NOx credits). The issued tradable emission document to the recipient will therefore represent a value as regards his obligation to meet his absolute emission ceiling imposed by the state.

Thirdly, the Dutch authorities do have an option to sell or auction the emission standards. As the emission of NOx is an environmentally harmful activity (pollution) it would be possible for the State to receive revenues through a permit system or for instance through an auction of emission allowances. The Dutch authorities provide the NOx credits as free intangible assets, thus suffering foregone revenues. Therefore, these private systems constitute State resources within the meaning of Article 87(1) of the EC Treaty.

The beneficiaries of the scheme are the recipients of the NOx credits, which are a selective groups of large industrial undertakings, who are active in trade between Member States. Therefore the Commission has decided that the notified scheme constitutes State aid within the meaning of Article 87(1) of the EC Treaty.

Compliance with the Treaty

The Commission has assessed the notified NOx emission trading scheme directly under Article 87(3)(c) of the EC Treaty (the Community guidelines on state aid for environmental protection ([1]), usually used for environmental measures do not provide clear criteria for emission trading of air pollutants).

The Commission acknowledges that the reduction of emission of atmospheric pollutants is a priority of environmental policy of the European Union and the Dutch initiative is an additional effort before rules at the Community level are established. This scheme is the first multisectoral emission trading scheme in the European Union concerning conventional air pollution and it will provide valuable insight in the functioning of a NOx emission trading market for the benefit of any later initiatives at EU or at national level. The notified scheme rewards undertakings going beyond existing standards and achieves a net environmental benefit.

In order to capitalise the potential aid from the free allocation of NOx credits, undertakings concerned have to reduce emissions further than their target levels. This can be considered as a counterpart, in line with the spirit of the aforementioned environmental guidelines. Therefore the Commission decided that the aid can be authorised under Article 87(3)(c) of the EC Treaty.

([1]) OJ C 37, 3.2.2001, p. 3.

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European Commission Directorate-General Competition

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Competition and Regulation in the new Framework – Mario MONTI – Public Workshop on the 'Electronic Communications Consultation Mechanism' Provided for by Art. 7 of the Framework Directive 2002/21/EC – Brussels, Belgium – 15.07.2003

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New challenges for State Aid policy – Mario MONTI – European State Aid Law Forum – Brussels, Belgium – 19.06.2003

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Les entreprises publiques et les règles communautaires relatives à la concurrence – Mario MONTI – Commission d'enquête de l'Assemblée Nationale sur la gestion des entreprises publiques – Paris, France – 10.06.2003

Contribution of competition policy to competitiveness of European business – Mario MONTI – Institute of European Affairs – Dublin, Ireland – 26.05.2003

Speeches and articles, Directorate-General Competition staff, 1 May – 31 August 2003

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Competition Policy of the European Commission: In the Interest of Consumers? – Sven NORBERG – The Leuven Center for a common law of Europe – Leuven, Belgium – 20.06.2003

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Application of competition law to rights management in the music market, Some orientations – Herbert UNGERER – Independent Music Companies Association (IMPALA) – Brussels, Belgium – 11.06.2003

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Community Publications on Competition

New publications and publications coming up shortly

- ***XXXIInd report on Competition policy – 2002***
- ***Competition studies 1 – Market definition in the media sector: Economic issues***
- ***Competition studies 2 – Market definition in the media sector: Comparative legal analysis (European Union, volume 1)***
- ***Competition policy newsletter, 2004, Number 1 – Spring 2004***

Information about our other publications can be found on the on the DG Competition web site:

The annual report is available through the Office for Official Publications of the European Communities or its sales offices. Please refer to the catalogue number when ordering. Requests for free publications should be addressed to the representations of the European Commission in the Member states or to the delegations of the European Commission in other countries.

Most publications, including this newsletter, are available in PDF format on the web site.

Press releases
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All texts are available from the Commission's press release database RAPID at: http://europa.eu.int/rapid/start/ Enter the reference (e.g. IP/03/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.

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