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Competition policy and the crisis – the Commission's approach to banking and beyond.

Commissioner Neelie Kroes ⁽¹⁾

While the crisis has been an extended one and recovery from it uneven, one of the few positive things we can take away from the experience is the general maintenance of competitive markets.

Unlike the Great Depression, and in defiance of many vocal opponents, competition in Europe remain largely unaltered by what are, by comparison, massive crisis policy measures. This is not to say that there are not threats to competition, and nor is it to pretend that financial sector aid especially has had no impact on the affected markets. However, there is strong support for the view that the competition policy architecture needs to be maintained. Supporters of the view that competition breeds competitiveness, and that European consumers and businesses benefit from a level playing field, have effectively won the argument.

Competition policy may not be loved by all governments and competitors, but the need for it to act as the backbone of the EU Single Market remains substantially unchallenged. And so, while we can never drop our defences against protectionism, we can declare that that competition policy and competition enforcers played an important role in avoiding far worse outcomes from this crisis.

Indeed, the case for a continuing level playing field in Europe is stronger than ever. In this article I hope to outline my perspective on why this outcome has been achieved, and discuss in some detail the mechanisms and politics that have been called upon to get us there. Dealing with the crisis, it must also be noted, has been about more than one element of state aid (banking aid) and instead touches upon all aspects of European competition policy enforcement. From the idea of crisis cartels, to failing firms merger applications, to tendencies of many parties to demand that financial-sector aid possibilities be extended to them.

Let me also note that the past two years have been a very challenging time for policymakers. We have had to increase our work, learn many new skills on the job, and quickly develop relationships (for example between competition authorities and central banks) that have not previously existed, and which it is now clear should have existed. These changes have been

made in a highly politically pressured environment, the sort that is not normally conducive to lasting and effective policy making.

Together the various European Institutions have done much to increase confidence, deliver stability and generate more economic activity – whether via the direct stimulus of the European Economic Recovery Plan or via new state aid possibilities under the Temporary Framework for State Aid. Specifically, I am pleased to conclude that the Directorate-General for Competition stepped up to the mark as part of wider Commission efforts to minimise the impact of the crisis, even if that meant working round the clock and in temporary offices in shipping containers for large parts of 2008-9.

Early stages of the crisis

My services and I were fortunate – if that is the word – to have been involved from a very early stage in dealing with the crisis. Our first awareness of the problems to come came with the difficulties of Northern Rock and several of the German Landesbanken in 2007. This entrée into the risky behaviours and stubborn defiance of the sector helped us to ready us for massive influx of aid demands that flooded in after the collapse of Lehman Brothers in September 2008.

Knowing that banks in other Member States were likely to face problems at some point, and knowing also that the situation would be quite different from Member State to Member State, we were left with the clear impression that there would need to be common rules and a liberal use of common sense if and when the credit crisis spread.

In September 2008 the crisis not only spread, it rapidly invaded many of the key financial markets, bringing them to a standstill and the financial system to the brink of collapse. Throughout those first weeks after the collapse of Lehman Brothers, the Commission faced great pressure to set aside the competition rules on State aid, in order to allow EU Member States freedom to implement financial sector rescue measures as they saw fit. This scenario, we believed, would be the first step towards repeating a Great Depression. To avoid this fate we set out to argue the case for continued application of not only state aid control but all competition rules. We promoted this as the way to maintain a level playing field in the EU and avoid large scale movements of

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funds between Member States by investors in search of the highest level of protection. In other words, we wanted to stop a subsidy war.

A key element of our attempt to mobilise an intellectual and policy consensus around competition enforcement was a conference called for 13 October 2008 in Brussels. Here I set out my belief that competition policy was part of the solution to the crisis, not part of the problem.

Calling on examples from across the world and across Europe's 50 years of competition enforcement, I explained how consumers needed us in this crisis and how competition drives total factor productivity growth – the productivity that comes from technical progress and organisational innovation. Giving up on competition was therefore the surest way to waste state aid funds and hurt consumers as they began to hurt from job losses, home foreclosures and the general economic malaise they would likely soon face. Giving up on the single market would cause productivity to fall by an average of 13 percent, and allow companies to raise prices and to restrict output which, in turn, would further deepen the recession.

Above all, I warned that we had to pull together as a European family and rise above the impulse for unilateral responses to what was clearly a shared problem.

The crisis moves into second gear

It is one thing to open up various sectors of the economy to competition in times of economic growth. It is quite another to assume that cheaper flights and phone calls will calm citizens and leaders in a period of great uncertainty. New ideas to help the real economy and new proof of positive action in bank rescues would be needed to keep the trust of Europeans and unlock the paralysis in our financial markets.

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

Starting with Guidelines on Recapitalisation issued in October 2008, we soon realised what a mammoth task we faced. Setting the price of recapitalising a bank must surely be one of the hardest policy tasks of all. There can be many types of capital, for banks with many different risk profiles. Understanding that risk profile was virtually impossible, especially as the banks themselves clearly misunderstood their own risk profiles. Furthermore, the scheme needed

to work for banks not in need of capital but who may have been asked to join industry-wide schemes. Our dialogue with the European Central Bank and Member States were invaluable in this process.

In November attention began to turn to the real economy and, precisely, to saving jobs. The European Economic Recovery Plan launched on 26 November 2008 rested on two pillars:

- a boost to purchasing power which would increase demand and confidence and
- immediate actions to boost long-term competitiveness such as investments in green technology.

Some of the measures in the plan were sure to involve State Aid. My message to Member States was two-fold. In the case of the 26 categories of aid covered by the General Block Exemption Regulation, I borrowed the famous tagline: 'just do it!' For other types of aid, in recognition of the need to maintain a human face to competition policy, we created a Temporary Framework for State Aid that would maximise what Member States could squeeze out of the system without fundamentally altering it.

When our Real Economy communication was delivered on 8 December 2008 its measures were based on Article 87.3(b) and justified due to the exceptional difficulties of raising finance at the time. It took account of the fact that in this next stage of the crisis financially sound banks may have needed state capital not to survive, but to provide enough loans to companies in the rest of the economy. Where state capital was to be provided, we insisted on safeguards:

- That the money go to real economy lending, not bank expansion plans.
- That the money be offered with incentives to encourage banks to end their reliance on state support as quickly as possible.
- That the money be offered in a way that did not wreck the level playing field between Member States.

By December 2008 – even with only around 50 experts dealing with the banking cases – we had built up a good track record. Instead of taking weeks or months, decisions to approve the rescue of troubled banks were delivered in as little as 24 hours in the case of Bradford and Bingley. Cases such as Dexia and Fortis required three-state solutions: complex cross-border solutions for cross-border banks. The solutions ranged from guarantee schemes to asset purchase schemes and individual recapitalisations. In some Member States, notably the UK and Germany, holistic schemes were introduced to cover all potential problems. In all cases the Commission worked

with Member States to transform their plans into reality.

We succeeded up to this point because we were flexible and transparent – the only way to gain trust, build new relationships, absorb new thinking and get to the heart of the market conditions confronting us. This precedent has indeed set very high standards for the Competition Directorate-General to live up to in the future, but the pain was worth the gain.

This approach to the crisis also enabled us to see its changing shape – including new demands for further clarity and transparency about how troubled banks would be handled.

In that light, we issued in December 2008 detailed guidance on how the Commission would assess recently approved bank recapitalization rescue schemes, complementing the October 13 guidelines. In particular, the *Recapitalisation Communication* established the principles that the price of capital injections should be linked to the risk profile of a given bank, and that the banks needed a strong incentive to pay back the aid and get off state support.

To address continued uncertainty about the value and location of impaired assets held by banks, the Commission also adopted Communication on the treatment of impaired assets on February 25, 2009. Transparency and Europe-wide cooperation were the key themes of this document. While wishing to make impaired asset measures available, the undoubted complexity of such valuations did eventually mean that relatively few asset measures were approved, bringing the total number of banking aid decisions to more than 70.

It was in February and March that I began stressing that restructurings would necessarily follow the various bank rescues that had been carried out, and that alongside those structural changes there would also need to be cultural changes in the banking sector. If a single phrase summed up my conclusion, it would be that ‘business as usual’ was no longer an option – a point made even clearer when restructuring decisions were announced from May 2009.

Indeed, the *Restructuring Communication* stipulates that a successful restructuring plan is viewed as one whereby the bank in question can demonstrate strategies to achieve long-term viability under adverse economic conditions. The banks need to undergo rigorous stress tests to prove this. Divestments would nearly always follow in due course to deliver that viability and/or balance out the negative competition impact aid had created; but the Commission is also realistic about finding buyers. Those buyers may or may not be non-aided banks, who separately but rightly want to know what the Commission is doing to protect their right to a level playing field.

Taxpayers and national government also want to make sure they are not paying the bills of others.

It is therefore obvious that we need restructurings that deliver banks viable without state support, and not a threat to the system, minimal taxpayer bills, a fair chance for non-aided banks to keep succeeding

Speaking of specific cases, the various problems of the German Landesbanken were plain to see in advance of our first restructuring decisions. Less expected, perhaps, was the tough approach we took to the UK banking sector.

However, when one looks at the numbers it is impossible to disagree with the need for the Commission to act. According to the Bank of England, the UK financial sector has been propped up by more than £1 trillion of government support. The sector has accumulated losses of £250bn since the collapse of Lehman Brothers - far outweighing fresh capital, and is home to the two worst-performing banks in Europe. This has generated a funding gap of £800 billion pounds, a gap between loans and deposits that grew four-fold since 2001. Banks such as the old HBOS pursued loan to deposit ratios of nearly 180%, ratios that were clearly not sustainable and which, thankfully, or no longer even possible because of the failure of the wholesale funding model they relied on.

One merciful consequence of the crisis is a renewed understanding that banks need a strong retail deposit base and to be anchored in the real economy. This was clearly not the case with the former Royal Bank of Scotland business model, which saw RBS tripling its balance sheet in just two years from 2006. At its height, the £2.4 trillion pound balance sheet of RBS made it larger than all but the economies of the United States, Japan, Germany and China. The bank then went on to record the largest trading loss in history, of US\$60bn in one year, forcing a Government take-over in order to save it. This bank was not merely too big to fail, it was too big to supervise and operate.

The sheer scale of the bad risks taken by banks such as RBS and the finger-pointing engaged in (publicly and privately) by leading figures in the industry gave me great pause for thought as we undertook banking restructuring negotiations. It served as a constant reminder of the value of applying the Commission’s tried and tested state aid rules. And it helped me develop a healthy respect of those like Jan Hommen of ING when he set ING on a “back to basics” strategy.

Of course such initiatives never swayed the Commission as it made objective, tailored decisions on restructurings as quickly as the parties allowed.

But while some have viewed our decisions as too simplistic, I point to cases such as the KBC plan as proof that we are neither the *bancassurance* model or complex cross-border operations. I have never suggested that the finance sector should be only about simple deposits and small loans. But banks do need to offer products and services they actually understand, instead of racking up massive leverage on the back of opaque alphabet soup products. It is not simplistic to hold this view, and when one turns down the self-interested noise of the financial sector and thinks clearly for a moment, it is obvious that this approach enjoys the support of a wide range of economic and public voices.

The Commission can be proud of its work to shape stronger banks out of weak ones, and in giving a fair opportunity for prudent and strong banks to do even better.

Wider regulatory reform and culture change in the financial sector

Mistakes in regulation haunt us – we are often stuck dealing with problems the regulators don't see or can't fix. For me key elements of new regulation must involve greater transparency and better supervision. Self-regulation didn't work.

If there must be a trade-off between liquidity and profits, then liquidity must win. Sensible choices like that are amongst the reasons why most of the world's AA-rated banks now come from Canada and Australia: their more prudent regulatory approaches took better account of the system's long-term needs. And each of these banks remains profitable, despite the different regulation.

What was better understood by regulators and bankers alike in those jurisdictions is that banking is more than an industry – it is also a profession. And in exchange for the freedoms we grant professions, we demand trust and high standards in return. Shirking responsibility and cost is not part of the deal – you simply have to live up to high standards. The world does not owe bankers a living; bankers are not better or smarter than the rest of us. These facts must be remembered in the face of hard lobbying against change.

Other sectors have greatly improved their executive culture to recognise the benefits of competition and the need to operate fairly and transparently. Banking should use the crisis to follow this path,

Beyond banking aid

Beyond the financial sector the Commission consistently maintained that while aid was distributed at the national level it needed to be implemented within a coordinated framework. This horizontal approach

works in times of growth and recession. And in the case of the Temporary Framework delivered support measures such as interest rate reductions on loans to finance SME investments.

Non-state aid elements of competition policy have proved well equipped to withstand the crisis. In some cases—such as the Lloyds/HBOS merger in the United Kingdom and the Commerzbank/Dresdner merger in Germany—this is because merger activities do not involve the Commission and are dealt with instead at the national, rather than pan-European, level. Yet robustness and flexibility of the EC Merger Regulation is evidenced by the Commission's ability and willingness to adopt its authorization decision two weeks before the normal deadline in the BNP Paribas/ Fortis case in December 2008. We did not extend such flexibilities to wider considerations, such as employment, because experience clearly shows the EC Merger Regulation is most effective when it is directed to one single objective. Employment concerns need to be addressed through other instruments. We have been equally firm that “crisis cartels” aren't a long-term benefit to anyone – not the companies involved, or consumers – and that consumers must remain protected against the short-term damage that a cartel inflicts on their purchasing power and options. Likewise, allowing a company to abuse a dominant market position is never a good idea.

In short, while the Commission has gone and will continue to go to great lengths to be sympathetic to new ideas and ways of working, its core strategy for recovery has a robust and rigorous competition policy at its heart.

Conclusions

In my time as Competition Commissioner, I met with dozens of bank CEOs and it depressed me. It suggested to me that they were on a long learning curve – and that public policy-makers would have to watch and guide this learning. Why? Quite simply there is no money for a second bail-out and, in any case, we have other parts of the single market to improve – like the online single market. We can't spend the next decade debating whether bankers deserve a different set of rules to the rest of us. So the bottom line is, for competition professionals, for banks, and anyone else involved in these issues: we have to continue to address this crisis together.

That must mean a clear role for competition enforcers as virtually all markets need referees of one kind or another – and none more so than the largest market in the world, the EU. This is a message I have passed repeatedly to forums of all kinds over my five years as Competition Commissioner. In particular, I have stressed that companies that do the right thing have nothing to fear from either our antitrust and

cartel enforcement, or our state aid control activities – we want only to act transparently and predictably in the interests of competition and consumers.

Indeed, far from wanting to target companies, I think all of us - from kitchen tables to board-room tables - played a role in the crisis and must take responsibility where it is appropriate. Investors wanted too much from the system; consumers took the credit and interest earnings without wondering why things were suddenly so easy.

Now that we are living in the great shadows of public debt and high unemployment, we must defend

the Single Market in practice and in principle and use it to pull ourselves back to growth. We don't need reckless banks or reckless aid to jeopardise this. There is no room for giants that can only stand on their feet because of taxpayers' money; instead we need streamlined banks that are fit and healthy and can support the growth of the real economy.

I am proud of the role I and my services have played in 2008-9 and the first weeks of 2010 in bringing about that post-crisis future.

Neelie Kroes, February 2010

Commission adopts new block exemption regulation for liner shipping consortia

Antje Prisker ⁽¹⁾

On 28 September 2009 the Commission adopted Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (the ‘Consortia Regulation’) ⁽²⁾, which will enter into force on 26 April 2010 and will apply until 25 April 2015. The Consortia Regulation extends, subject to a number of amendments, the block exemption granted to liner shipping consortia currently provided by Regulation No 823/2000 ⁽³⁾ for another five years.

1. General remarks

1.1. Introduction

Consortia are forms of operational cooperation between liner shipping companies with a view to providing a joint maritime cargo transport service. Liner shipping carriers transport cargo, in practice mostly by container, on a regular basis and on the basis of advertised timetables to ports on a particular geographic route. The cooperation within a liner shipping consortium must be limited to operational cooperation (notably sharing space on their respective vessels). The consortium members therefore market and price their services individually.

Council Regulation (EC) No 246/2009 (the ‘Council Enabling Regulation’) empowers the Commission to adopt a block exemption regulation for such cooperation within a liner shipping consortium ⁽⁴⁾. Carriers in a consortium cooperate on various competition parameters, notably on the capacity offered on

a given market. As capacity is the key competition parameter which drives prices on the market, such consortia are generally found to restrict competition. However, it is generally acknowledged that such liner shipping consortia, which have been covered by a specific Commission block exemption regulation since 1995, may help to improve the productivity and quality of available liner shipping services. Due to the high number of vessels required to operate a regular liner shipping service on a route, consortia allow the rationalisation of their members’ activities, economies of scale, and more efficient use of vessel capacity. Consortia thus help to improve the service that would be offered individually by each of the members. Customers receive a benefit from such cooperation, in terms of services provided (higher, more regular, frequencies, wider coverage of ports), as long as the consortium is subject to effective competition. The Consortia Regulation sets out the conditions — in particular a market share threshold — that liner shipping companies organised in consortia need to fulfil in order to benefit from an exemption from the prohibition enshrined in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) ⁽⁵⁾. The current block exemption regulation — Regulation No 823/2000 — expires on 25 April 2010. The Commission considers that the justification for a block exemption for liner shipping consortia is still valid and thus renews the exemption for five more years until 25 April 2015.

The general objective of a block exemption regulation is to provide legal certainty: there is a presumption that consortium agreements that comply with the conditions of the Consortia Regulation — in particular remain below the market share threshold — fulfil the four conditions laid down in Article 101(3) TFEU. As clarified in recital 4 of the Consortia Regulation, this does not mean that agreements that fall outside the scope of the block exemption regulation are by nature prohibited. It simply means that they do not benefit from the safe harbour provided by the block exemption regulation but an

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

⁽²⁾ OJ L 256, 29.9.2009, p. 31.

⁽³⁾ Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 100, 20.4.2000, p. 24, as last amended by Commission Regulation (EC) No 611/2005, OJ L 101, 21.4.2005, p. 10.

⁽⁴⁾ Council Regulation (EC) No 246/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ L 79, 25.3.2009, p. 1. This Regulation is the codified version of former Council Regulation (EEC) 479/92 of 25 February 1992, OJ L 55, 29.2.1992, p. 3.

⁽⁵⁾ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate.

individual assessment needs to be made as to their compatibility with Article 101 TFEU. An agreement not covered by the Regulation might well not even infringe Article 101(1) TFEU or, if it does infringe Article 101(1) TFEU, there is no presumption that such an agreement would not fulfil the cumulative conditions of Article 101(3) TFEU. In this respect the Consortia Regulation also clarifies that when conducting a self-assessment specific features may be taken into account, such as markets with small volumes carried or situations where the market share is only exceeded as a result of the presence of a small carrier without important resources in the consortium and whose increment to the overall market share of the consortium is only insignificant.

1.2. The revision process

In summer 2007, the Directorate-General for Competition started the process of revising Regulation No 823/2000 by launching a comprehensive market investigation and sent questionnaires to all major shipping lines as well as to transport users (shippers and freight forwarders). The market investigation aimed to ascertain how the Regulation was being applied in practice and the extent to which transport users benefit from the cooperation between shipping lines in consortia. Information was received from a number of the carriers operating in consortia to and from Europe, transport users and their respective representative organisations. The Regulation was revised based on the outcome of the market investigation and published for consultation in October 2008. The Commission received 19 submissions from carriers and transport users as well as from some Member States⁽⁶⁾. The Commission also consulted Member States twice in Advisory Committee meetings on draft versions of the Regulation.

1.3. Objectives of the revision

The Consortia Regulation comprises significant changes compared to the Regulation currently in force. The revision was more comprehensive than it had been in 2005 and the Regulation was revised, simplified and shortened significantly. However, substantive changes remain limited. In short, the review process pursued three main objectives:

1.3.1. Taking account of the current regulatory framework

The Consortia Regulation reflects the end of the liner conference block exemption regulation, which

was repealed by the Council in September 2006⁽⁷⁾. Therefore, any explicit or implicit reference to liner conferences and to the practices allowed under a price fixing conference system are deleted from the Consortia Regulation.

It was also necessary to take account of Regulation No 1/2003⁽⁸⁾ and the fact that maritime transport is now entirely under the enforcement framework of that Regulation. As a result, some provisions had become either inconsistent or redundant. This concerns in particular the obligation to demonstrate compliance with the Regulation (Article 9(5) Regulation No 823/2000), the provision on professional secrecy (Article 11 Regulation No 823/2000) or the withdrawal provision (Article 12 Regulation No 823/2000). The latter two provisions are now covered by Regulation No 1/2003 and have been deleted as there is no longer any need to provide for parallel provisions in the Consortia Regulation itself.

1.3.2. Greater convergence between the Consortia Regulation and other horizontal block exemption regulations

The Consortia Regulation aims to achieve greater convergence with other block exemption regulations for horizontal cooperation such as the block exemption regulation on specialisation agreements, on research and development agreements or on technology transfer agreements⁽⁹⁾. It is a legitimate aim of the Commission to have consistent rules in horizontal as well as in sector-specific antitrust legislation such as the Consortia Regulation. It has therefore been part of DG Competition's general policy over the last few years to subject the transport sector to the same rules that apply to other sectors. For instance, in line with the approach in other horizontal block exemption regulations, a new article on hard-

⁽⁷⁾ Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services, OJ L 269, 28.9.2006, p. 1.

⁽⁸⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

⁽⁹⁾ Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L 304, 5.12.2000, p. 3; Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, Official Journal L 304, 5.12.2000, p. 7; Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, OJ L 123, 27.4.2004, p. 11.

⁽⁶⁾ The non-confidential versions of all submissions received during the public consultation are published on DG Competition's website (see: http://ec.europa.eu/competition/consultations/2008_consortia/index.html).

core restrictions (Article 4 Consortia Regulation) provides that the most severe antitrust infringements such as price or capacity fixing and customer or market allocation will take away the benefit of the block exemption. The aim to bring the market share threshold closer to the thresholds applied in other block exemption regulations for horizontal cooperation described in more detail below is also a step in this direction.

1.3.3. Amendments reflecting current market practices in liner shipping

Markets change and evolve constantly and block exemption regulations therefore have to be reviewed periodically. The Commission has to ensure that the scope of the block exemption regulation and the conditions under which undertakings may benefit from it still reflect the current market environment and practice.

The list of consortium activities exempted by the Regulation has been revised since the market investigation revealed that some of these activities were simply not carried out by consortia in practice. Similarly the Consortia Regulation no longer provides for an obligation on the consortium members to consult with transport users (Article 9 Regulation 832/2000). This obligation was deleted in view of the fact that such joint consultation between the consortium members and their transport users was never implemented in practice and that individual contacts between a consortium member and its customer are the adequate forum for discussions on the conditions and quality of the liner service.

2. The major substantive changes

2.1 Market share condition

The amendment most discussed during the public consultation was the revision of the market share condition. The block exemption, as is commonly the case in block exemption regulations, only applies to consortia which do not exceed a given market share threshold in the relevant market where they operate. Regulation No 823/2000 sets a threshold of 30 % for consortia that operate within a liner conference and 35 % for all other ones. After the end of the liner conference system to and from Europe, the new uniform market share threshold of the Consortia Regulation is 30 % for all consortia and thus represents a reduction of the upper limit. However, in practice this reduction will not affect the majority of existing consortia currently covered by Regulation No 823/2000, as most consortia have already been subject to the lower 30 % market share threshold in the past — since their members operated until recently within a conference.

When assessing the market share condition, liner carriers must first define the relevant product and geographic market or markets where the consortium operates. The Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (the ‘Maritime Guidelines’)⁽¹⁰⁾ published in July 2008 provide carriers with more guidance in this respect.

Article 5(1) of the Consortia Regulation clarifies that the market share of a consortium is the sum of the individual market shares of the consortium members. In fact, this merely codifies the Commission’s reading of Regulation No 823/2000. The individual market share of a consortium member includes all volumes carried by that member, whether within the consortium in question or outside that consortium — be it on the member’s own vessels or on its behalf on third party vessels on the basis of a slot charter agreement or any other cooperation agreement (Article 5(2) Consortia Regulation). The rationale behind this approach is that a consortium member cannot really be expected to compete with itself. The market power of a consortium may well be underestimated if one looks only at the volumes carried by the consortium members in the consortium. Once the market share of each of the consortium members has been calculated on that basis, they need to be added up to verify whether jointly they remain under the market share threshold of 30 % for the application of the Regulation.

The market investigation showed that links between consortia have become more and more common as carriers are often a party to several consortium agreements on the same relevant market. Such links between several consortia on the same relevant market through common membership are relevant for the competitive assessment although they sometimes might arguably be rather indirect and remote through various contractual agreements. This situation may be captured in a block exemption regulation in two ways: either upfront, by including in the market share of a given consortium the market shares of other consortia on the same relevant market which are interlinked through common membership (this would have the effect that fewer consortia could benefit from the safe harbour of the block exemption regulation); or by withdrawing the benefit of the block exemption in an individual case where the existence of interlinked consortia leads to anti-competitive effects on a given market. As illustrated in recital 12, the Consortia Regulation follows the latter approach — in line with the approach taken in the horizontal block exemption regulations.

⁽¹⁰⁾ OJ C 245, 26.9.2008, p. 2. See also Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

2.2 Definition of a consortium

The Consortia Regulation clarifies the definition of a consortium in two ways. First, a consortium can consist of either one agreement or ‘a set of inter-linked agreements’. This amendment better reflects market reality. Second, the definition of a consortium now extends to all international liner shipping services of cargo, whether or not such services are provided ‘chiefly by container’. The Council Enabling Regulation did not provide for a limitation on containerised cargo as previously laid down by Article 2 Regulation No 823/2000. However, in order to qualify as a consortium, the joint service must meet all the characteristics of a liner shipping service as defined by Article 2(2) of the Consortia Regulation. As in practice most liner shipping services concern containerised cargo, the impact will be limited to some exceptional non-containerised services which meet all these criteria.

To resolve some ambiguities which emerged during the public consultation, recital 21 of Regulation No 823/2000 on agreements between consortia or consortia members and a third party was deleted. An agreement between a consortium member and a third party can qualify as a consortium and benefit from the block exemption as long as all conditions of the Regulation are fulfilled, notably the market share threshold.

2.3 Exempted activities

The Consortia Regulation provides for a list of exempted activities which are generally considered indispensable for the provision of a joint liner shipping service, such as coordination and joint fixing of timetables, determination of the ports of call, pooling of vessels or exchange of space.

The revised list of exempted activities in Article 3 of the Consortia Regulation is simpler. The following activities are removed from the current list: (i) activities that are not carried out in practice, in particular as the carriers market their service individually; (ii) activities related to price fixing conferences; and (iii) activities which are not indispensable for the provision of a joint service. Such is the case of the use of a joint documentation system, participation in cargo, revenue or net revenue pools, as well as joint marketing structures and the issuance of a joint bill of lading. As none of the submissions during the public consultation called for the addition of any new type of indispensable activities, no new activities were added to the list during the revision.

Article 3 of the Consortia Regulation clarifies also what types of capacity reductions are exempted, a key issue in a consortium cooperation. The wording was changed from ‘temporary capacity adjustments’,

which was considered not fully accurate, to ‘capacity adjustments in response to fluctuations in supply and demand’. This article thus clarifies the reason for reducing capacity, i.e. a response to fluctuations in supply and demand, to limit such restriction to what is indispensable for the provision of an improved joint service. The creation of a consortium as a vehicle to mainly jointly reduce capacity would arguably not be covered by the block exemption regulation.

As other block exemption regulations, the Consortia Regulation does not apply where the consortium contains hardcore restrictions. Such hardcore restrictions include the restrictions usually found in block exemptions on horizontal cooperation: price fixing, capacity or sale limitations, or market or customer allocation. Article 4 of the Consortia Regulation is rather a clarification than a substantively new provision in this respect, as these prohibitions already resulted, directly or indirectly, from Regulation No 823/2000.

2.4 Extension of lock-in clauses/ notice periods

Regulation No 823/2000 exempts consortium agreements on condition that members can withdraw from the consortium. But due to consortium-specific investment decisions of the members it accepts that such withdrawal may not take place before the expiry of an initial period (the ‘lock-in period’) and that the withdrawal of a member may be subject to a notice period. In order to safeguard a sufficient degree of flexibility for a consortium member wanting to leave a consortium, the Regulation determines upper limits for these periods.

The Consortia Regulation simplifies the provision on exit clauses and lock-in periods. The public consultation revealed that the current provision, which was revised *inter alia* in 2005, is sometimes difficult to apply in practice. The Consortium Regulation therefore now only provides for two sets of deadlines. First, the right to withdraw from a consortium is subject to a maximum notice period of 6 months or, in the case of highly integrated consortia, 12 months. Second, this right may be granted only after a lock-in period of a maximum duration of 24 months or 36 months in the case of highly integrated consortia. The lock-in period starts running from the date of entry into force of the consortium agreement or, if it is later, the date of commencement of the service. Longer notice and lock-in periods apply for highly integrated consortia due to the higher investments undertaken to set them up and the resulting more extensive reorganisation entailed in the event of a member leaving.

3. Conclusion

In recent years the Commission has significantly revised and modernised the framework of the EU competition rules applicable to the maritime transport sector. After the repeal of the block exemption for liner shipping conferences (which allowed for price- and capacity-fixing arrangements), and the adoption of the Maritime Guidelines providing the industry with guidance on the application of Article 101 TFEU in the maritime sector, the adoption of the Consortia Regulation was the last step in this review process.

The Consortia Regulation provides a safe harbour for the operation of liner shipping consortia which fulfil all the conditions of the block exemption regulation, not least that they do not contain any hardcore restrictions and they meet the new reduced market share condition of 30 %. In accordance with Article 2 of the Council Enabling Regulation, the Consortia Regulation will apply for five years as of 25 April 2010.

The state of ECN leniency convergence

Vita Juknevičiūtė, Jeroen Capiu ⁽¹⁾

1. What was the rationale for convergence and what is the state of play?

On 13 October 2009, the heads of the national competition authorities making up the European Competition Network (ECN) endorsed a Report assessing convergence in the field of leniency ⁽²⁾. The report reviews the state of convergence of ECN members' leniency programmes with regard to the provisions of the ECN Model Leniency Programme.

On 29 September 2006, the ECN Model Leniency Programme ⁽³⁾ (the 'Model Programme') was endorsed by the ECN members. The Model Programme is a unique document providing a basis for 'soft harmonisation' of members' leniency programmes. It is not legally binding; however, the national competition authorities made a political commitment to use their best efforts to align their leniency programmes with it or, if they did not have any, to introduce aligned programmes ⁽⁴⁾.

The Model Programme was an important step towards a harmonised leniency system within the European Union. The nature, content and political endorsement of the Model Programme went far beyond what was achieved through more traditional forms of international cooperation.

Such harmonisation is based on the premise that EU leniency programmes are interdependent and that their overall success depends on the ECN. Leniency instruments operate in the system of parallel competences in which national competition authorities are active enforcers of Articles 101 and 102 TFEU alongside the Commission. A logical consequence of such a system is that leniency programmes may apply in parallel and the applicant may need to file

an application with more than one authority ⁽⁵⁾. In such a system, harmonisation of the key elements of leniency policies and a joint response to alleviate the burden of multiple filings through the instrument of summary applications ⁽⁶⁾ enhances the attractiveness of leniency programmes. On the other hand, leniency programmes must properly serve authorities in their efforts to detect and terminate cartels and to punish cartel participants.

As an integral part of the Model Programme ⁽⁷⁾, it was agreed that the state of convergence of ECN leniency programmes was to be assessed no later than at the end of the second year after the publication of the Model Programme. In the course of 2006-2009, a significant process of alignment with the Model Programme took place. Just three years after the endorsement of the Model Programme, the report assesses the state of convergence and concludes that work within the ECN has encouraged leniency convergence. The report reviews in detail textual convergence on provisions of the Model Programme. Before reviewing those findings, this article briefly recapitulates the content of the Model Programme.

2. The content of the Model Programme ⁽⁸⁾

The Model Programme was designed to address problems arising from the co-existence of different leniency programmes in a system of parallel competences within the EU ⁽⁹⁾. To ensure that such a system fosters efficient enforcement against cartels, discrepancies among different leniency programmes would require a certain degree of harmonisation. The Model Programme was designed with a two-fold purpose. First, to remove certain discrepancies between various programmes concerning the treatment which potential applicants can anticipate from

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

⁽²⁾ The report is available at <http://ec.europa.eu/competition/ecn/documents.html>. The 'ECN' is the Network of Competition Authorities of the European Union, i.e. national competition authorities and the European Commission.

⁽³⁾ Available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

⁽⁴⁾ The Model Programme explicitly recognises that not all national competition authorities have the power to implement changes in their national leniency programmes as this power is held by other bodies; see point 9 of the Explanatory Notes to the Model Programme.

⁽⁵⁾ As explained in paragraph 38 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43 (the 'Network Notice'), it is for the applicant to decide whether it wants to protect itself under more than one leniency programme.

⁽⁶⁾ See section 2 of this article.

⁽⁷⁾ See point 31 of the Model Programme.

⁽⁸⁾ See also C. Gauer and M. Jaspers, ECN Model Leniency Programme — a first step towards a harmonised leniency policy in the EU, CPN Spring 2007, pp. 35-38.

⁽⁹⁾ Detailed Explanatory Notes accompany the Model Programme and provide more detailed guidance on the various provisions.

ECN authorities. Second, to alleviate the burden of multiple filings in cases where the Commission is ‘particularly well placed’ to deal with a case through the introduction of the uniform summary application system.

The Model Programme was drafted as a document setting out the essential procedural and substantive elements that the ECN members believe every leniency programme should contain. However, the Model Programme is not a programme as such under which applicants could apply for leniency. It endorses the political commitment of the ECN members to implement those rules in their leniency programmes⁽¹⁰⁾.

The Model Programme sets out principles concerning a number of substantive issues including the scope of leniency programmes, the exclusion of certain applicants from immunity, the type of information immunity applicants should provide and a coherent set of duties of leniency applicants. It also contains certain procedural conditions covering, for instance, anonymous guidance, the introduction of a marker system, the time and manner for competition authorities to take a position on applications and the availability of oral applications.

The Model Programme also introduced an innovative system of summary applications in order to alleviate the burden for the applicant in filing parallel immunity applications with the Commission and several national authorities and for the national authorities in processing them. This form of application is only available for so-called ‘type 1A’ immunity in cases where the Commission is ‘particularly well placed’ to deal with the case⁽¹¹⁾. It allows undertakings to file a full immunity application with the Commission and summary applications with the national competition authorities. The summary application works as an indefinite marker protecting the position of the applicant as the first in the leniency queue with the national competition authorities concerned. National authorities will not process the application but only confirm that the applicant is the first to file with them, if this is the case. If a national competition authority decided to take action, it would give the applicant a certain period to complete its application. The Model Programme also contains detailed rules on the information re-

quired in a summary application in order to achieve a uniform standard.

3. Main findings of the report

3.1. Concept of ‘convergence’

For the purpose of the Model Programme and the Report, convergent provisions are not only those which are identical or equivalent to the Model Programme. Programmes with more favourable or more detailed provisions are also considered convergent with the Model Programme. Such specific features should, however, be without prejudice to the principal objectives of the Model Programme.

3.2. Overall state of convergence

The report reviews the state of convergence and concludes that the work within the ECN was a major catalyst in encouraging Member States to introduce leniency programmes and in promoting convergence between them. At the date of the report, 25 Member States (all except Malta and Slovenia) and the European Commission operated leniency programmes⁽¹²⁾. The first Slovenian leniency programme started operating on 1 January 2010; the Maltese competition authority is considering introducing a leniency programme in the near future. During the reporting period, a significant process of alignment with the Model Programme took place. ECN members essentially followed the key features of the Model Programme: defining the scope of application of programmes, thresholds for leniency, introducing a marker system, the possibility of summary applications and of oral submissions as well as introducing aligned conditions for leniency. There still appeared to be some divergences in the ECN concerning certain aspects of the Model Programme. At the time the report came out the efforts towards convergence were still on-going however.

The report observes that the convergence of leniency programmes is a tool to enhance the effectiveness of leniency programmes within the Network. In this context, convergence of certain elements plays a crucial role, while other elements serve to facilitate the functioning of programmes. In particular, incentives for filing immunity applications, the obligation to grant immunity automatically if the established

⁽¹⁰⁾ See footnote 3 above.

⁽¹¹⁾ Type 1A immunity refers to situations where the undertaking is the first to submit evidence which in the authority’s view enables it to carry out targeted inspections provided that at the time of submission the authority did not have sufficient evidence to initiate an inspection. Concerning the criterion where the Commission is ‘particularly well placed’ to deal with the case, see paragraph 14 of the Network Notice.

⁽¹²⁾ In the report, Estonian laws were not assessed. At that date, the Estonian Code of Criminal Procedure contained a provision of a general nature that allowed lenient treatment for any kind of criminal offence, including participation in a cartel, but did not lay down detailed specific rules. On 20 January 2010, a law was adopted amending the Competition Act, the Penal Code and the Criminal Procedure Code. The amending law came into force on 27 February 2010. This law introduces a specific detailed leniency programme in Estonia.

conditions are met, the narrow scope of exclusions from immunity, conditions for the immunity marker, and the oral procedure are pertinent elements. As regards the system of summary applications, in order to optimally achieve its aim of alleviating the burden of multiple filings, the uniform and widespread functioning of this system is essential.

3.3. Substantial findings

The Model Programme concerns secret cartels. These are difficult to detect by other means. The report finds that all leniency programmes in the ECN cover secret cartels. A few programmes apply to a wider range of infringements⁽¹³⁾.

The Model Programme stipulates that coercers of a cartel are excluded from immunity (but not from a reduction in fines). The scope of this exclusion is narrow, so as to avoid creating uncertainty for potential applicants⁽¹⁴⁾. The report finds that about half of the programmes have convergent provisions and exclude coercers from immunity without excluding additional types of immunity applications. However, several programmes exclude more applications from immunity than provided for in the Model Programme. Two programmes are more favourable in this respect: immunity is also available to coercers⁽¹⁵⁾.

Most leniency programmes contain an equivalent evidential threshold for immunity to that stipulated in the Model Programme. Most of the programmes also contain equivalent conditions for leniency. The Model Programme stipulates among other leniency conditions that the applicant must end its involvement in the alleged cartel immediately following its application save to the extent that its continued involvement would, in the authority's view, be reasonably necessary to preserve the integrity of the au-

thority's inspections⁽¹⁶⁾. Equivalent requirements are applicable under 18 assessed leniency programmes. According to five leniency programmes, however, the applicant must end its involvement in the cartel following the application without the exception stipulated in the Model Programme⁽¹⁷⁾.

3.4. Procedural findings

The Report also reviews the state of convergence concerning the set of procedural rules stipulated in the Model Programme. It finds that 20 leniency programmes provide for a marker system. Most leniency programmes (16 of them) introduced a discretionary marker system, as provided for in the Model Programme. Full leniency applications are accepted orally under 19 leniency programmes while oral summary applications are accepted under 17 programmes. Most programmes provide for the necessity to make an explicit application for leniency and stipulate that immunity will be granted or rejected in writing. Nearly all programmes also provide that the applicant for a reduction in fines will be informed in writing of the authority's intention to apply such a reduction.

Importantly, on the date of the report summary applications were accepted under 23 leniency programmes, of which 20 required equivalent information to that stipulated in the Model Programme⁽¹⁸⁾.

4. Conclusion

The report shows that the work within the ECN has been a major driving force in promoting convergence between members' leniency programmes. The report highlights the achievements in the field of leniency convergence; its findings should serve as a basis for reflections as to whether any further convergence is needed.

⁽¹³⁾ In particular, 13 programmes do not limit their scope to 'secret' cartels but cover all cartels: BE, ES, FI, FR, HU, LT, LU, LV, NL, PL, RO, SE, UK. The Luxembourg Competition Council has discretion as to whether or not to grant leniency to non-secret cartels on a case-by-case basis. See paragraphs 15-16 of the Report.

⁽¹⁴⁾ See point 22 of the Explanatory Notes to the Model Programme.

⁽¹⁵⁾ The Finnish and Italian programmes. However, there is a legislative reform pending in Finland to exclude coercers from immunity.

⁽¹⁶⁾ See point 13 of the Model Programme.

⁽¹⁷⁾ The Czech, Greek, Finnish, Luxembourg and Polish programmes; see point 41 of the report and in particular footnote 44. In Greece, Finland and Luxembourg, there are legislative proposals pending concerning this condition.

⁽¹⁸⁾ When this article was drafted, summary applications were available under 24 leniency programmes: from 1 January 2010, the Slovenian leniency programme becomes operational and it includes inter alia the possibility to submit a summary application for immunity, see the article 'Slovenia: Leniency Programme starts functioning from 1 January 2010' in the first edition of the ECN Brief, available at <http://ec.europa.eu/competition/ecn/brief/index.html>. A list of national competition authorities accepting summary applications is available at http://ec.europa.eu/competition/ecn/list_of_authorities.pdf.

State aid for training: criteria for compatibility analysis in notifiable cases

Juergen Foecking and Justyna Majcher-Williams ⁽¹⁾

1. Background

Training usually has a positive impact on society as a whole because it increases the pool of skilled workers from which firms can draw. So it improves the competitiveness of the economy and promotes a knowledge society capable of embracing more innovative developments.

However, employees are free to change employers. A company's training efforts may then end up benefitting one of its rivals. This is particularly true of training in skills that are transferable between firms. Employers may therefore be reluctant to provide the socially desirable level of training. State aid may step in here and help to create additional incentives for employers to provide training.

The Commission is therefore generally in favour of training aid. This is reflected in the General Block Exemption Regulation ⁽²⁾, which exempts the vast majority of State aid for training from prior notification to Commission, as long as the training measures fulfil a number of clearly defined conditions. This means that these measures can be implemented by Member States immediately, i.e. without awaiting clearance by the Commission.

However, larger aid amounts usually create a bigger threat to competition and trade within the common market. The Commission reserves the right to carry out an in depth-assessment for such cases and they must therefore be notified. For these cases the Communication on '*Criteria for the compatibility analysis of training state aid cases subject to individual notification*' (referred to below as the '*Communication*') outlines the conditions under which the Commission investigates such aid.

2. Scope of the Communication and notification threshold

The General Block Exemption Regulation ⁽³⁾ sets the notification threshold for training aid at € 2 million. This means that any individual aid, whether granted ad hoc or on the basis of a scheme, with a grant equivalent exceeding € 2 million per training project, will be subject to individual notification to the Commission.

Below the notification threshold of € 2 million, an aid measure is normally exempted from notification. However, this exemption is only valid for aid schemes (regardless of the size of the firms benefiting from the scheme) and individual aid to small and medium-sized companies. Ad-hoc training aid to a large firm is never covered by the General Block Exemption Regulation, even if it is below the threshold of € 2 million. For such aid the Commission will apply the same principles *mutatis mutandis* as set out in the Communication, though normally in a less detailed manner, as the sums are still modest.

3. Assessment criteria

The assessment criteria in the Communication reflect the 'refined economic approach', introduced by the Commission's State Aid Action Plan in 2005. ⁽⁴⁾ The core element of the refined economic approach is the 'balancing test' which has already been translated into guidelines on other types of horizontal aid ⁽⁵⁾.

The idea behind the balancing test is to disentangle the positive and negative effects resulting from aid, evaluate them and then balance them. That means first looking at the purpose of State aid and asking whether there is a market failure that needs to be corrected (see point 3.1 below). Furthermore the test looks at the design of the aid: State aid should be an appropriate instrument to remedy the problem (point 3.2), induce a change of behaviour in the aid recipient (point 3.3) and be proportionate

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

⁽²⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

⁽³⁾ Article 6.1.g of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

⁽⁴⁾ See para. 22 of the State Aid Action Plan, COM (2005) 107 final of 7.6.2005.

⁽⁵⁾ See for instance, the detailed assessment in the Research, Development and Innovation Framework, OJ C 323, 30.12.2006, p. 1.

(point 3.4). These positive effects must then be balanced against any negative effects the aid might have (points 3.5 and 3.6).

The criteria set out in the Communication are not applied mechanically. The level of the Commission's assessment and the kind of information it will require will depend on the risks of distortion of competition and thus on the nature of each particular case.

3.1 Existence of a market failure

Skilled workers increase a firm's productivity and competitiveness. Therefore it is in the interest of all employers to train their employees. Nevertheless, employers may under-invest in training for a number of reasons.

First, an employer may be concerned that, once trained, an employee will leave the firm before this investment in human capital can be recouped. This concern is even more pronounced when the investments only pay off over a longer period or when the training skills are not specific to the needs of the company and thus could be beneficial for any other potential employer. In contrast, specific training (i.e. training that is tailored to the needs of the company) only yields productivity gains for this specific firm and can normally be fully justified.

From a socio-economic viewpoint underinvestment in training may even occur when firms can fully recoup their investment, but the private benefits are smaller than the benefits for society as a whole. Such positive external effects of training may arise in particular if training improves transferable skills; i.e. skills that can be used in more than one firm. Here again, the scope for positive external effects is less pronounced for specific training than for general training.

State aid can help to remedy this market failure that leads to an underinvestment in training. It can provide employers with an incentive to step up their training efforts. For small training sums, the existence of such market failure is assumed and they are therefore covered by the General Block Exemption Regulation. However, for larger projects falling under the Communication, a Member State should demonstrate that there is indeed a market failure justifying the aid.

Obviously, a crucial element of the Commission's analysis is the nature of the training: General training will normally bring more positive external effects, as the skills acquired could benefit a wider range of the economy as a whole. Specific training, on the other hand, is more tailored to towards the specific needs of the employer and the general benefits are therefore less pronounced. In most cases, a training project consists of a mix of specific and general measures.

The definitions of 'specific training' and 'general training' are laid down in the General Block Exemption

Regulation⁽⁶⁾ and are also applicable for evaluating training aid that is subject to individual notification:

- 'specific training' means training involving tuition directly and principally applicable to the employee's present or future position in the undertaking and providing qualifications which are not, or are only to a limited extent, transferable to other undertakings or fields of work;
- 'general training' means training involving tuition which is not applicable only or principally to the employee's present or future position in the undertaking, but which provides qualifications that are largely transferable to other undertakings or fields of work.

In this context, the Commission will assess the transferability of the skills acquired during the training: The more transferable the skills, the higher the likelihood of positive external effects. An indicator of transferable skills could be if a training project is jointly organised by several independent companies, or if employees from different companies can take part in the training. Another indicator would be if the training is certified, leads to a recognised diploma or is accredited by public authorities or institutions.

3.2 Appropriateness

State aid is not the only policy instrument available to Member States to encourage training. In fact, most training is provided through education systems (e.g. universities, schools, vocational training carried out or sponsored by State authorities).

Therefore the Commission will assess whether in a given case, State aid is an appropriate mean to achieve the EU objective. Normally, as long as the Member State has considered other policy options, and decided on the advantages of a selective instrument such as State aid, it is considered appropriate. The Commission will take particular account of any impact assessment the Member State may have made for the proposed measure.

3.3 Incentive effect

State aid for training must result in aid beneficiaries changing their behaviour so that they provide more and/or better training than would have been the case without the aid. In other words there must be an incentive effect.

Incentive effect is identified by 'counterfactual analysis', i.e. we compare the levels of intended

⁽⁶⁾ Article 38 of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

training with aid and without aid. This is a crucial question, as most employers need to train their workforce simply to ensure proper functioning of their companies. It cannot therefore be presumed that State support for training, especially for specific training, is always needed. The aid would just subsidise training activities which the employer would have undertaken anyway.

To demonstrate an incentive effect, the beneficiary must have submitted an aid application to the Member State concerned before starting the training project. Furthermore, the Member State should demonstrate that State aid will lead to an increase in the training project size, quality, scope or participants, compared with a situation without aid. The additional amount of training offered with aid can be shown, for example, by a higher number of training hours, by a higher number of participants or by a shift from company-specific to general training.

To verify that there is an incentive effect, the Commission will examine internal documents on training costs, budgets, participants, content and scheduling. It will also assess whether there is a legal obligation for employers to provide a certain type of training (e.g. security): if such an obligation exists, the Commission will normally conclude that there is no incentive effect.

The relationship between the training programme and the business activities of the aid beneficiary is also of particular interest: the closer the relationship, the less likely the incentive effect. For instance, training on the introduction of new technology in a specific sector is unlikely to have an incentive effect, since firms have no choice but to train their workforce on the newly introduced technology.

3.4 Proportionality of the aid

To assess proportionality, the Commission looks at whether the amount of aid is kept to the minimum required.

As the first step, the eligible costs of the project have to be defined. This calculation is based on the cost categories set out in the General Block Exemption Regulation.⁽⁷⁾ They comprise costs such as expenses for trainers, for trainers' and trainees' travel and accommodation expenses, depreciation of tools and equipment (to the extent that they are used exclusively for the training project) and trainees' personnel costs (only the hours during which the trainees actually participate in the training).

⁽⁷⁾ Article 39.4 of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

For cases subject to individual notification, the eligible costs are limited to the costs arising from training activities which would not be undertaken without aid. This means that not all costs arising from the training project can be taken into account, but only the *extra costs*, that are generated by the *extra training activity* (which in turn is triggered by State support).⁽⁸⁾

Once the extra costs have been established, it is necessary to assess how much of these extra costs can accrue to the company. We thus arrive at 'net extra costs' equalling the part of the extra costs of the training that the company cannot recover by benefiting directly from the skills acquired by its employees during the training. These net extra costs can then be covered by State aid.

For many cases it will be difficult to calculate the exact amount of 'net extra costs'. The Communication therefore points out that aid intensities (i.e. aid amount as a percentage of extra costs) must never exceed those defined in the General Block Exemption Regulation.⁽⁹⁾ They are set at 60 % for general training projects and 25 % for specific training projects.

3.5 Negative effects of the aid

If all the conditions mentioned above are met, the negative effects of the aid are likely to be limited and an analysis of negative effects may not be necessary. However, in some cases, even where aid is necessary and proportionate for a specific undertaking to increase the amount of training provided, the aid may still result in a change in behaviour of the beneficiary which significantly distorts competition. In these cases the Commission will conduct a thorough analysis of distortions of competition.

In certain cases training aid may lead to the following distortions of competition:

Product entry and exit: In a competitive market, firms sell products that bring profits. By altering costs, State aid alters profitability, and can therefore affect the firm's decision to offer a product or not. For example, State aid that reduces the costs of production (such as staff training) would enable products with otherwise poor commercial prospects to enter a market, to the detriment of the product portfolio of rivals not receiving aid. Alternatively, the avail-

⁽⁸⁾ See also current case practice, e.g. C 35/2007, *Training aid to Volvo Cars in Gent* (OJ C 265, 7.11.2007), N 227/2006 DHL Leipzig Halle, (OJ C 48, 02.03.2007), C 14/2006, *Training aid to General Motors Antwerp*, (OJ C 210, 1.09.2006).

⁽⁹⁾ Article 39.2 of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

ability of State aid may affect a firm's decision to withdraw a product from the market: State aid for training could reduce the size of losses and enable the product to stay in the market for longer — which may mean that the products of other, more efficient firms not receiving aid are forced to exit instead.

Effect on trade flows: State aid for training may result in some territories benefitting from more favourable production conditions. This may result in the displacement of trade flows in favour of the regions where such aid is given.

Crowding out of training investment: To survive in the marketplace and maximise profits, firms have incentives to invest in training of staff. The optimal amount of investment in training which each firm is willing to make also depends on how much its competitors invest. Firms which are subsidised by the State may reduce their own investment. Alternatively, if the aid induces the recipient to invest more, competitors may react by cutting their own training expenditure. If, to achieve the same objective, aid beneficiaries or their

competitors end up spending less in the presence of aid than in its absence, their private investment in staff training is crowded out by aid.

3.6 Balancing

The last step in the analysis is to evaluate to what extent the positive effects of the aid outweigh its negative effects. This exercise will be carried out on a case-by-case basis. Unless quantitative information is readily available the Commission will use qualitative information for assessment purposes.

4. Conclusion

By adopting the '*Communication on criteria for the compatibility analysis of training state aid cases subject to individual notification*', the Commission filled a gap in its legal framework, as it provides guidance on the assessment of large training aid cases which are not covered by the General Block Exemption Regulation. The provisions reflect the experience the Commission has gathered with such cases over the past few years and thus codifies existing case-law in this field.

State aid for disabled and disadvantaged workers: compatibility criteria for big cases

Justyna Majcher-Williams and Juergen Foecking ⁽¹⁾

1. Background

Unemployment, especially structural unemployment, is still a major problem in some parts of the European Union. Certain categories of workers still have difficulty getting onto the labour market. State aid in the form of wage subsidies ⁽²⁾ can provide additional incentives for companies to employ more disadvantaged and disabled workers. The objective of the aid is thus to boost demand by employers for the target categories of workers.

Member States may give wage subsidies for these target categories without prior notification to the Commission as long as they comply with the conditions and notification thresholds laid out in the General Block Exemption Regulation ⁽³⁾. But when individual aid measures involve large sums, they may entail a higher risk of distorting competition. So notifications and detailed assessments are still required for such measures.

For that reason the Commission adopted in July 2009 the Communication on ‘*Criteria for the compatibility analysis of State aid to disadvantaged and disabled workers subject to individual notification*’ (referred to below as the ‘*Communication*’), which outlines the conditions under which the Commission will authorise such aid. It provides guidance on the kind of information the Commission requires and the assessment methodology it would follow.

2. Scope of the Communication and notification threshold

The Communication applies to wage subsidies for workers considered to be disadvantaged or disabled. Workers who do not comply with the definitions below cannot receive wage subsidies.

A worker is considered disadvantaged if she or he (a) has not been in regular paid employment for the previous 6 months; or (b) has not attained an upper secondary educational or vocational qualification; or (c) is over the age of 50; or (d) lives as a single adult with one or more dependents; or (e) works in a sector or profession in a Member State where the gender imbalance is at least 25 % higher than the average gender imbalance across all economic sectors in that Member State, and belongs to the under-represented gender group; or (f) is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment. Severely disadvantaged worker means any person who has been unemployed for 24 months or more. ⁽⁴⁾

A disabled worker has to be recognised as disabled under national law, or to have a recognised limitation resulting from physical, mental or psychological impairment. ⁽⁵⁾

The General Block Exemption Regulation sets a notification threshold of € 5 million per undertaking per year for disadvantaged workers and € 10 million per undertaking per year for disabled workers. This means that there has to be an individual notification to the Commission ⁽⁶⁾ of any individual aid, whether granted ad hoc or as part of a scheme, where the grant equivalent exceeds € 5 million for disadvantaged workers or € 10 million for disabled workers per undertaking per year. It will then be assessed under the criteria laid out in the Communication.

Below the notification threshold of € 5 or € 10 million, an aid measure is normally exempted from notification. However, this exemption is only valid for aid schemes (for all sizes of firm) and ad-hoc aid to small and medium-sized companies. Ad-hoc wage subsidies for large firms are never covered by the

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

⁽²⁾ Subsidies to wage costs where wage cost means the total amount actually payable by the beneficiary of the aid in respect of the employment concerned, comprising: (a) the gross wage, before tax, and (b) the compulsory contributions, such as social security charges; and (c) child care and parent care costs.

⁽³⁾ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

⁽⁴⁾ See Article 2.18 to 2.19 of the Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

⁽⁵⁾ See Article 2.20 of the Commission Regulation (EC) No 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

⁽⁶⁾ Article 6.1.h-i of the Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214, 9.8.2008, p. 3-47.

General Block Exemption Regulation, even if aid is below the threshold of € 5 or € 10 million. For such aid the Commission will apply the same principles *mutatis mutandis* as in the Communication, though normally in a less detailed manner, as the sums are still modest.

3. Assessment criteria

The assessment criteria in the Communication reflect the 'refined economic approach', introduced by the Commission's State Aid Action Plan in 2005.⁽⁷⁾ The core element of the refined economic approach is the 'balancing test'. First the Commission looks at the purpose of State aid: Is the objective to improve fairness by changing an efficient but undesirable market outcome? Second, the test looks at the design of the aid measure: Is State aid an appropriate policy instrument? Does it induce a change of behaviour from the aid recipient? Is it proportionate? Finally, these positive effects have to be balanced against any negative effects caused by distortions of competition or trade that the aid might bring about.

The criteria set out in the Communication are not applied mechanically. The level of the Commission's assessment and the kind of information it will require from Member States will depend on the risks of distortion of competition and on the nature of each case notified.

3.1 Existence of an equity objective

Certain categories of worker experience particular difficulty in finding jobs, because employers consider them to be less productive or have prejudices against them. This perceived or real lower productivity may be due either to lack of recent work experience (for example, young workers or long-term unemployed) or to a permanent disability. The lower productivity of these workers reduces the financial advantage for the firm and they are likely to be excluded from the labour market unless employers are offered compensation for employing them.

It is socially desirable for all categories of workers to be integrated in the labour market. State aid in the form of wage subsidies for these target categories can help to improve social justice. Member States should demonstrate that the aid will indeed address this objective. In its analysis, the Commission will examine the following factors:

- Number and categories of workers concerned;
- Employment rates of the categories of workers concerned at national and/or regional level and in the undertaking(s) concerned;

- Unemployment rates for the categories of workers concerned at national and/or regional level.
- Particularly marginalised sub-groups of disabled and disadvantaged workers.

3.2 Appropriateness

State aid in the form of wage subsidies is not the only policy instrument available to Member States to promote employment of disadvantaged and disabled workers. They can also use general measures such as reducing taxation of labour and social costs, boosting investment in education and training, providing guidance, counselling, assistance and training for the unemployed and improving labour law.

Measures for which the Member State has considered other policy options, and the advantages of using wage subsidies for a specific company, are considered appropriate.

3.3 Incentive effect: necessity and proportionality of aid

State aid for employing disadvantaged and disabled workers must lead to a net increase in the number of such employees in the undertaking concerned. Newly recruited disadvantaged or disabled employees should only fill newly created posts or posts freed up by voluntary departure, invalidity, retirement on grounds of age, voluntary reduction of working time or lawful dismissal for misconduct. Posts resulting from redundancy must not be filled by subsidised disadvantaged or disabled workers. State aid cannot be used to replace subsidised workers whose subsidies have ended and have consequently been dismissed.

Member States should provide the Commission with proof of the net increase in the target categories of workers and the necessity of the aid. First, the aid beneficiary must meet the formal requirement of having applied for aid from their Member State before the target groups were employed. Second, the Member State must demonstrate that the wage subsidy is paid for a disadvantaged or disabled worker in a firm where the recruitment would have not occurred without the aid.

The Commission's analysis will focus on:

- Internal documents from the aid beneficiary on employment costs and target workers in two scenarios: with aid and without aid;
- Existing or past wage subsidies in the undertaking concerned: categories and number of workers subject to subsidies;

⁽⁷⁾ See para. 22 of the State Aid Action Plan, COM (2005) 107 final of 7.6.2005.

- Annual turnover of categories of workers concerned by the measure.

The aid amount must not exceed the net additional costs of employing the target categories of disadvantaged or disabled workers compared to the costs of employing non-disadvantaged or non-disabled workers. These extra costs include costs arising from employing disadvantaged or disabled workers (for example, due to lower productivity) and benefits which the aid recipient derives from such employment (for example, improving the image of the company). Aid must never exceed 50 % of wage costs for disadvantaged workers and 75 % of wage costs for disabled workers.

3.4 How can wage subsidies lead to distortions of competition?

In spite of the improved social justice and higher numbers of certain categories of workers in the labour market, high levels of aid create a higher risk of distorting competition.

The extent to which competition is distorted can vary, depending on the design of aid and the characteristics of the markets affected. For example, a scheme for subsidised wages designed to encourage most firms to employ more disadvantaged or disabled workers is likely to have a different effect on the market than a large amount of aid given to a single firm to boost its employment of a certain category of workers. The latter is likely to distort competition more significantly, as the aid recipient's competitors become less able to compete. The distortion will be even greater if the beneficiary's labour costs account for a high share of total costs. In addition, the fewer the firms, and the larger their share of the market, the less competition one would expect to observe. If the affected market is concentrated, with high entry barriers, and the aid recipient is a major player on it, then it is more likely that competitors will have to alter their behaviour in response to the aid. For example, they may have to postpone or abandon the introduction of a new product or technology, or leave the market altogether. Sectoral specificities can also affect the outcome of the analysis. For example, the presence of overcapacity or of mature markets in an industry may increase the risk of aid leading to inefficiency and output being displaced in firms which have no subsidised workers. Finally, each case will be assessed in the light of the labour market situation in the aid recipient's area (i.e. unemployment and employment rates, wage levels, and labour law).

Wage subsidies may also lead to distortions of competition in particular cases. For example, wage subsidies may lead to a substitution effect, where jobs given to a certain category of workers simply replace

jobs for other categories. Wage subsidies can cause a reduction of jobs elsewhere in the economy when a firm with subsidised workers increases output, but displaces output by firms which have no subsidised workers, with the result that the aid crowds out unsubsidised employment.

Furthermore, wage subsidies may enable firms with otherwise poor commercial prospects to enter the market or introduce new products, to the detriment of their more efficient rivals. The availability of aid will also affect a firm's decision to leave a market where it is already operating. Subsidised wages could reduce the size of losses and enable a firm to stay in the market for longer — with possible negative effects on more efficient rivals.

In the markets where wage subsidies are granted, firms are discouraged from competing and may reduce their investments and attempts to increase efficiency and innovation. There may be delays in the aid recipients' introduction of new, less labour-intensive technologies due to changes in the relative costs of labour-intensive and technology-intensive production methods. Rivals with competing or complementary products may decrease or delay investment as well. As a consequence, overall investment levels in the industry concerned will decline.

The last step in the analysis is to evaluate to what extent the positive effects of the aid outweigh its negative effects. This exercise will be carried out on a case-by-case basis. In order to balance the positive and negative effects, the Commission will measure them and make an overall assessment of their impact on producers and consumers in each of the markets affected.

4. Conclusion

The Communication is a useful and practical tool to help public authorities and companies to understand how best to achieve a rapid approval of aid for disabled or disadvantaged workers. It also strengthens the Commission's commitment to employment policy in the European Union and complements the Commission's Communication to the European Council on a shared commitment to employment.⁽⁶⁾

⁽⁶⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A Shared Commitment for Employment, COM(2009) 257, 3.6.2009.

European Court of Justice confirms Commission's approach on parental liability ⁽¹⁾

Frédérique Wenner and Bertus Van Barlingen ⁽²⁾

1. The 2004 Commission Decision

The case concerns a cartel which operated in the 1990s between the main European producers (and initially US producers) of choline chloride, also known as vitamin B4, a feed additive used in the animal feed industry. The European members of the cartel agreed between themselves on prices and price increases, both in general, for particular national markets and for individual customers. They also allocated individual customers and market shares between themselves and agreed to control distributors and converters of the product, to avoid outside competition. The Commission started an investigation after receiving a leniency application. In its Decision of 9 December 2004 ⁽³⁾, the Commission considered the cartel a very serious infringement of Article 81 of the Treaty and imposed fines worth € 66.34 million on the European members of the cartel, Akzo Nobel, BASF and UCB. The US producers participating in the cartel were not fined as they had stopped participating in the cartel more than five years before the Commission's investigation began.

Akzo Nobel had been fined € 20.99 million. The level of the fine for Akzo Nobel in the Decision was set to take account of the economic strength of the whole undertaking, rather than just of the four subsidiaries that were directly involved in the cartel (one of them through legal succession). In its consideration of liability for the infringement ⁽⁴⁾, the Commission noted that the subject of Community and EEA competition rules is 'the undertaking', a concept that is not identical to the notion of corporate legal person in national commercial or tax law. The Commission considered that the 'undertaking' that committed the infringement was therefore not necessarily the same as the precise legal entities within a group of companies whose representatives actually took part in the cartel meetings. Existing case law described 'undertakings' as 'economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a

specific economic aim on a long-term basis and can contribute to the commission of an infringement ...' ⁽⁵⁾.

In the Statement of Objections the Commission had found that Akzo Nobel NV, the ultimate parent company of the Akzo Nobel group, owned directly or indirectly 100 % of the shares in the four subsidiaries in question. In the view of the Commission, this created a rebuttable presumption that Akzo Nobel NV exercised decisive influence over the commercial policy of those subsidiaries and that Akzo Nobel NV could therefore be held liable for the infringement. In its reply to the Statement of Objections, Akzo Nobel tried to rebut this presumption. In the Decision, the Commission considered that Akzo Nobel had not succeeded in rebutting the presumption. On the contrary, the available evidence indicated that the four legal entities concerned did form a single economic unit with Akzo Nobel NV and that the latter was responsible for the operation of the undertaking at the time of the infringement. Firstly, the only ownership link between the subsidiaries in question, which together operated Akzo Nobel's choline chloride business in Europe, was the fact that they were all directly or indirectly owned by Akzo Nobel NV. Secondly, as ultimate parent company, Akzo Nobel functioned as the 'corporate centre' of the group, coordinating 'the main activities with regard to the general strategy of the group, finances, legal affairs and human resources'. Thirdly, the lack of commercial autonomy of the operating companies or business units within the Akzo Nobel group was, in the view of the Commission, also clear from the 'Authority Schedules' that governed decision-making powers within the Akzo Nobel group ⁽⁶⁾.

The consequence of the liability of Akzo Nobel NV for the fine was that, in order to ensure sufficient deterrence of the fine, the Commission took account of the worldwide turnover of the Akzo Nobel group and multiplied the starting amount of

⁽¹⁾ In Case C-97/08 *Akzo Nobel NV and Others v Commission*.

⁽²⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽³⁾ Commission Decision of 9 December 2004, Case COMP/37.533 — *Choline chloride*.

⁽⁴⁾ See recitals 167 to 176 of the Decision.

⁽⁵⁾ See for instance Case T-11/89 *Shell International Chemical Company v Commission* [1992] ECR II-757, at paragraph 311.

⁽⁶⁾ For reasons of confidentiality, the details thereof could not be indicated in the published Decision.

the fine for Akzo Nobel by a factor of 1.5⁽⁷⁾. Also, the large size of this turnover meant that the fine did not exceed the legal maximum of 10 % of total turnover of the undertaking in the business year preceding the Decision⁽⁸⁾.

2. The judgment of the Court of First Instance

In its appeal to the Court of First Instance, Akzo Nobel NV argued that it had in fact succeeded in rebutting the presumption of liability created by its 100 % shareholdings in the four subsidiaries. According to Akzo Nobel NV, the decisive influence which a parent company must exercise in order to be considered liable for the activities of its subsidiary must relate to the subsidiary's 'commercial policy in the strict sense'⁽⁹⁾. Akzo Nobel NV observed that within the Akzo Nobel group decisions on pricing, price increases and distribution are in principle taken either within each subsidiary or at the level of the business sub-unit or unit responsible for the relevant product. Akzo Nobel NV itself only dealt with major strategic decisions which, according to Akzo Nobel NV, did not fall within the concept of 'commercial policy'.

In its judgment of 12 December 2007 in Case T-112/05 *Akzo Nobel NV and Others v Commission*, the Court, like the Commission, started its reason-

ing from the concept of 'undertaking' in Article 81 of the Treaty. The Court held that it is sufficient for the Commission to show 100 % ownership to create a legal presumption that the parent company exercises decisive influence over the subsidiary and that they therefore constitute a single undertaking. The Commission does not have to adduce any other circumstances than the 100 % shareholding to create the presumption, which it is then for the other side to rebut. Secondly, the Court rejected the applicant's argument that in order to rebut the presumption of liability, it would be sufficient to show that a subsidiary or business (sub-)unit is autonomous with respect to pricing and distribution, i.e. with respect to commercial policy in a narrow sense. On the contrary, the Court considered that it was for the parent company to put before the Court 'any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity'⁽¹⁰⁾. The Court then made a detailed analysis of, in particular, the Authority Schedules of the Akzo Nobel group and concluded that the management of Akzo Nobel NV 'play a significant role in several aspects of the strategy of the subsidiaries in question and reserve the power of final decision with respect to a range of matters that define their course of conduct on the market'⁽¹¹⁾. As a result, the applicants had not succeeded in refuting the presumption that Akzo Nobel NV exercised decisive influence over its subsidiaries' policies. Akzo Nobel NV therefore constituted, together with those subsidiaries, an undertaking for the purposes of Article 81.

3. The judgment of the European Court of Justice

In its appeal from the judgment of the Court of First Instance (CFI) to the European Court of Justice, Akzo Nobel NV put forward two arguments: firstly, the CFI had been wrong to consider that a 100 % shareholding was sufficient to create a presumption of liability for the parent company. Akzo Nobel NV quoted the CFI's *Bolloré* judgment of April 2007 as stating that a 100 % shareholding 'is not in itself sufficient'⁽¹²⁾. Secondly, the CFI had defined the concept of commercial policy of the subsidiary too broadly. Autonomy was only required with respect to commercial conduct on the market.

The European Court of Justice issued its judgment in Case C-97/08 *Akzo Nobel NV and Others v Commission* on 10 September 2009. With respect to the

⁽⁷⁾ See point (1) A of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (the 1998 Guidelines on Fines, OJ C 9, 14.1.1998, applicable at the time): 'It will also be necessary to take account of the effective economic capacity of offenders to cause significant economic damage to other operators — in particular consumers — and to set the fine at a level which ensures that it has a sufficiently deterrent effect.' Currently applicable is point 30 of the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(a) of Regulation No 1/2003 (the 2006 Guidelines on Fines, OJ C 21, 1.9.2006): 'The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.'

⁽⁸⁾ See Article 15(2) of Regulation No 17, OJ L 13, 21.2.1962. See also point (5)(a) of the 1998 Guidelines on Fines: 'It goes without saying that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10 % of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17'. Currently applicable are Article 23(2) of Regulation No 1/2003 (OJ L 1, 4.1.2003): 'For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year', and points 32 and 33 of the 2006 Guidelines on Fines.

⁽⁹⁾ For Akzo Nobel's arguments, see paragraphs 33 to 46 of the judgment. For the concept of commercial policy, Akzo Nobel referred, inter alia, to Case T-354/94 *Stora v Commission* [1998] ECR II-2111, paragraph 80.

⁽¹⁰⁾ See paragraph 65 of the judgment.

⁽¹¹⁾ See paragraph 82 of the judgment.

⁽¹²⁾ See Joined Cases T-109/02 etc. *Bolloré and Others v Commission*, judgment of 26 April 2007, paragraph 132.

first argument, the Court, like the Court of First Instance and the Commission before it, started its reasoning from the fact that Community competition law refers to the activities of undertakings, understood as economic units, even if in law such an economic unit may consist of several legal persons. According to the Court, '[w]hen such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement' ⁽¹³⁾. Fines necessarily have to be imposed on legal entities. But 'the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement' ⁽¹⁴⁾. Then, in answer to Akzo Nobel's first argument, the Court stated: '... it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary' ⁽¹⁵⁾. Although previous case law had sometimes mentioned other circumstances indicating the exercise of influence by the parent company over the subsidiary, this had, in the view of the Court, not been done to make the application of the presumption subject to the production of additional evidence relating to the actual exercise of influence by the parent company.

With respect to the second argument of Akzo Nobel NV, regarding the definition of the concept of commercial policy, the Court, endorsing the

Opinion of Advocate General Kokott ⁽¹⁶⁾ and again drawing from the notion of undertaking, remarked that 'the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit' ⁽¹⁷⁾. In order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken 'of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company' ⁽¹⁸⁾.

Against this approach, Akzo Nobel NV had argued that it would lead to a regime of strict liability of the parent company of a group for the cartel offences of its subsidiaries. Such a regime of strict liability would conflict with the principle of personal responsibility. The Court clarified in this respect that 'Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement [i.e. the undertaking]. If the parent company is part of that economic unit ..., the parent company is regarded as jointly and severally liable with the other

⁽¹⁶⁾ The Advocate General had given as her opinion that 'In quite general terms, attribution of conduct as between parent and subsidiary is always possible where both form one economic entity, that is, where they are to be regarded as a single undertaking; in other words, responsibility under antitrust law is attributed to the parent company "in view of the unity of the group thus formed". ...

A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. Thus, a single commercial policy within a group may also be inferred indirectly from the totality of the economic and legal links between the parent company and its subsidiaries. Conversely, the absence of such a single commercial policy as between a parent company and its subsidiary can be established only on the basis of an assessment of the totality of all the economic and legal links existing between them.

For example, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group. Moreover, as the Commission correctly points out, even a company's mere membership of a group may influence its market conduct, in relation, for example, to the question of with whom that company should actively compete.

In the end, the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit.' Opinion of Advocate General Kokott in Case C-97/08 *Akzo Nobel NV and Others v Commission*, delivered on 23 April 2009, paragraphs 88 to 93.

⁽¹⁷⁾ See paragraph 73 of the judgment.

⁽¹⁸⁾ See paragraph 74 of the judgment.

⁽¹³⁾ See paragraph 56 of the judgment.

⁽¹⁴⁾ See paragraph 59 of the judgment.

⁽¹⁵⁾ See paragraph 61 of the judgment.

legal persons making up that unit for infringements of competition law’⁽¹⁹⁾.

The appeal was dismissed in its entirety as unfounded.

4. Conclusion

Through this judgment, the European Court of Justice has provided considerable clarity in the debate on parental liability that has been going on for many years between parent companies that have been addressees of Commission Decisions imposing fines, especially in cartel cases, and the Commission.

The first issue on which clarity has been provided concerns the question of the elements the Commission must show to create a rebuttable presumption of liability of the parent company. In the Statement of Objections the Commission had only indicated that Akzo Nobel NV directly or indirectly controlled the entire capital of the subsidiaries in question. Against the background of earlier case law, which had sometimes mentioned other elements of influence by the parent company as well⁽²⁰⁾, the Court has now clarified that it suffices for the Commission to demonstrate 100 % ownership to create the rebuttable presumption that the parent company exercised decisive influence over the commercial policy of the subsidiary and that the parent company can therefore be held jointly and severally liable together with the subsidiary that was directly involved in the anticompetitive behaviour. Nothing more than the 100 % shareholding needs to be shown.

A second and perhaps even more important issue on which the Court has thrown light is the question what the parent company or the subsidiary must show to rebut the presumption of liability of the parent company or alternatively, in cases where there is no such presumption because the parent company’s shareholding in the subsidiary is too low, what the Commission has to show to hold the parent company liable. It is in particular on this question that conflicting approaches have been advocated in the past, based on a long history of case law that has not always been clear and consistent. To simplify the debate, parent companies often saw the relevant question as being under what circum-

stances they could be held liable for the illegal actions of their subsidiaries. The Commission, on the other hand, has, especially in the decisions it has adopted in recent years, taken the view, based on the clear wording of Article 81 of the Treaty, that the infringement is committed by the undertaking, not just by the subsidiary which directly participated in the offensive behaviour. It is, therefore, in the view of the Commission, not a question of one legal person being responsible for the behaviour of another legal person, but of an economic unit being responsible for its own behaviour.

This difference in the starting point of the legal reasoning has important consequences for the question what exactly must be shown to hold parent companies (not) liable. Traditionally, parent companies, usually citing older case law, would argue that the parent company is only liable for the illegal actions of its subsidiary when the subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company⁽²¹⁾. Parent companies would only be liable when they had the power to direct the conduct of the subsidiary to the point of depriving it of any real independence in determining its own course of action on the market or, as sometimes said, its own commercial policy. This is, for instance, why Akzo Nobel NV argued in this case that its subsidiaries were free to determine their own prices and distribution policy in the market, which for Akzo Nobel meant that they were autonomous in their commercial policy.

The Commission’s starting point that it is the ‘undertaking’ that commits the infringement leads to a different kind of assessment. From this perspective, it is necessary first to determine what the undertaking consists of, i.e. to identify whether the subsidiary that is involved in anticompetitive behaviour is an autonomous economic actor or whether it is part of a larger economic actor. Then, in a second step, those legal persons should be identified within the undertakings that are to be held responsible for the infringement and should be the addressees of a Decision. These are normally at least the subsidiaries that were themselves directly involved in the anticompetitive behaviour and the legal entity that was directing the undertaking as a whole at the time of the infringement. In identifying the undertaking, it is obvious that attention must be paid to all legal, economic and organisational aspects of relations between the subsidiary and the parent company and not just to the much narrower question of whether the subsidiary received particular instructions from the parent company as to its behaviour on the market.

⁽¹⁹⁾ See paragraph 77 of the judgment. On this issue, the Advocate General had said: ‘This form of parent-company responsibility under antitrust law also has nothing to [do] with strict liability. On the contrary, as mentioned, the parent company is one of the principals of the undertaking which negligently or intentionally committed the competition offence. ... As the parent company exercising decisive influence over its subsidiaries, it pulls the strings within the group of companies. It cannot simply shift responsibility for cartel offences committed within that group just to individual subsidiaries.’ See paragraphs 98 and 99 of the Opinion.

⁽²⁰⁾ See in particular Case 286/98 *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925.

⁽²¹⁾ It is generally accepted that these instructions of the parent company do not have to concern the illegal behaviour, but rather the commercial policy of the subsidiary in general.

It now appears that the Court, as proposed by its Advocate General, has taken a stand in this debate and has accepted the logic followed by the Commission that any reasoning must necessarily start from the wording of Article 81 of the Treaty and therefore from the fact that infringements are committed by ‘undertakings’, in the sense of single economic units, not just by subsidiaries that are only constituent elements of the undertaking.

As a consequence, a parent company and its wholly owned subsidiaries, even if they have distinct legal personalities, are *a priori* considered to form a single economic entity. It is, after all, only normal that large undertakings operate in the market through legal subsidiaries, business units or branches and the mere fact that subsidiaries have legal personality, whereas business units and branches do not, in no way changes the economic reality. Nor is the mere fact that subsidiaries may have the power to take day-to-day pricing, production or distribution decisions sufficient to class those subsidiaries as autonomous economic actors. What matters is the overall distribution of responsibilities within the group and in particular the structure of economic, legal and organisational links between the subsidiary and the

(ultimate) parent company. In the words of Advocate General Kokott: ‘In the end, the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit’.

In view of the Court’s ruling, parent companies should now systematically expect to be held jointly and severally liable for the anticompetitive infringements committed by their wholly owned subsidiaries. It is then up to them to provide sufficient evidence of the subsidiary’s autonomy, taking into account the entire structure of legal, economic and organisational links between the parent company and the subsidiary.

This judgment of the European Court of Justice takes account of economic reality and sends a strong signal to the business community that parent companies should not seek to escape liability for competition law infringements of the undertaking they lead. It thus becomes all the more important that undertakings not only adopt good corporate governance principles but also ensure that they are effectively implemented throughout the undertaking.

Clearstream: General Court confirms Commission Decision

Rosalind Bufton and Eduardo Martínez Rivero ⁽¹⁾

On 9 September 2009 the Court of First Instance (now the General Court) dismissed the action for annulment ⁽²⁾ brought by Clearstream Banking AG (also known as Clearstream Banking Frankfurt or CBF) and Clearstream International SA against the 2 June 2004 Commission decision in the Clearstream case. The decision had found that Clearstream Banking AG and its parent company Clearstream International SA violated Article 82 EC (now Article 102 TFEU) by refusing to supply certain clearing and settlement services to one of its customers (Euroclear Bank SA), and by applying discriminatory prices to that same customer.

1. Background

1.1. Clearing and settlement

Clearing and settlement services are necessary steps for a securities trade to be completed. Although these services are provided by professionals such as central securities depositories to professionals such as banks, their cost is also passed on to consumers (for example when they buy or sell shares).

Clearing is the process by which the obligations of the buyer and seller are established. In some systems a central counterparty may fulfil a special function in this process but this was not the case in Germany at the time the infringements took place. *Settlement* is the transfer of the securities from the seller to the buyer, the transfer of funds from the buyer to the seller and the corresponding entries in the securities accounts. While clearing and settlement may generally be carried out by different types of financial institutions, each institution may only perform ‘primary’ clearing and settlement for the securities that it keeps in final custody. A central securities depository (CSD) is an entity which holds and administers securities and enables securities transactions to be processed through book entry for trades of those securities that have been deposited with it and which it holds in final custody. These services are defined in the Commission decision as ‘primary’ clearing

and settlement services. Clearstream Banking AG is Germany’s only CSD.

1.2. The 2004 Decision

The Commission decision found that Clearstream Banking AG enjoyed a dominant position in the market for the provision of ‘primary’ clearing and settlement services for securities issued under German law to CSDs in other Member States and to international central securities depositories (ICSDs) ⁽³⁾. For certain categories of companies seeking to provide efficient and less costly services to their customers, the decision found that the use of ‘secondary’ clearing and settlement through an intermediary could not be a substitute for access to ‘primary’ clearing and settlement services as it does not offer the same level of service. It also found that Clearstream Banking AG, together with its parent company Clearstream International, had:

- refused to supply clearing and settlement services for registered shares to Euroclear Bank for more than two years,
- discriminated against Euroclear by charging a higher per transaction price to Euroclear than to national central securities depositories outside Germany.

1.3. Market relevance

For many years and particularly since the introduction of the euro, the Commission has urged market players involved in European cross-border securities to promote cheaper and more efficient services because although some reductions in costs are reported in the ‘First report on monitoring prices, costs and volumes of trading and post-trading services’ ⁽⁴⁾, the costs of cross-border securities transactions within the single market continue to be higher than for national ones. Such a situation is suboptimal for promoting EU economic and financial growth.

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

⁽²⁾ Judgment of the Court of First Instance (‘CFI’) of 9 September 2009 in Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission*.

⁽³⁾ An ICSD’s core business is clearing and settling securities — traditionally Eurobonds — in an international environment. There are at present two ICSDs in the EU: Euroclear Bank, based in Belgium, and Clearstream Banking Luxembourg. ICSDs can provide other services such as intermediary services for equities.

⁽⁴⁾ http://ec.europa.eu/internal_market/financial-markets/docs/clearing/2009_07_ec_report_oxera_en.pdf, July 2009.

The Commission decided to refrain from legislating in this area until it had given the industry the opportunity to reduce costs and achieve efficiencies through self-regulation. On 7 November 2006, trading and post-trading infrastructures signed a Code of Conduct on clearing and settlement. The Code aims to enhance transparency and increase competition in the securities post-trading sector. To monitor the implementation of the Code, the Commission set up a Monitoring Group of the Code of Conduct on Clearing and Settlement (MOG). In its report to the Ecofin Council of November 2008⁽⁵⁾ 'Improving the efficiency, integration and safety and soundness of cross-border post-trading arrangements in Europe', the CESR group also noted positive changes in market structure due to new entrants.

The Clearstream decision provides legal clarity to Clearstream and to other companies active in securities post-trading services on the responsibilities of dominant companies. At its meeting in October 2009, the MOG drew the attention of service providers to the implications it has for their operations and the aim of improving the efficiency of EU post-trading operations.

2. The judgment

The judgment confirms both the Commission's delineation of the market and the existence of abusive behaviour vis-à-vis Euroclear Bank SA, a direct competitor to CBF's sister company Clearstream Banking Luxembourg SA.

2.1. Market definition and dominance

Market definition was one of the central issues in the case. The decision defined the relevant market as the market for primary clearing and settlement services for securities issued under German law.

The Commission argued that a distinction has to be made between 'primary' and 'secondary' clearing and settlement services, a distinction that was not a term used in the industry but corresponded to the way the market actually worked. According to the Commission's decision primary clearing and settlement is carried out by the same entity with which the securities are kept in final custody and whenever a change occurs on the securities account held by it. Secondary clearing and settlement, on the other hand, is performed by intermediaries on their own books as a result of internalisation or mirror operations. Clearing and settlement can only be internalised if both parties to the trade have a securities account with the same intermediary. In that case there is no primary settlement needed and there is

no movement in the books of the CSD where the securities are deposited.

Clearstream contested the definition of the market and hence the dominant position held by CBF. In particular, Clearstream argued that a distinction between primary and secondary services was artificial. Moreover, the product market should not be assessed from the perspective of providers of secondary clearing and settlement services. Instead, it should be assessed from the perspective of the end customers seeking a securities transaction. As such a transfer merely involved entries in the respective accounts of buyer and seller, but not a physical transfer of the securities, these end customers could turn to both CSDs such as CBF and to intermediaries for their service requirements. Competition between both groups indicated, in Clearstream's view, a broader market in which CBF's position was far from dominant. In fact, a significant number of transactions could be carried out through transfers between the various accounts of one intermediary, without any involvement of CBF. The fact that certain customers still preferred a direct link to CBF's data processing — e.g. for reasons of speed in the processing of transactions — did not, Clearstream argued, justify defining a separate market.

The CFI confirmed the Commission's market definition and rejected the applicants' argument that those requesting post-trading clearing and settlement services were the sellers and the buyers of the security transaction and therefore that there should be a general market for clearing and settlement services. This confirms that when defining markets the starting point is the need expressed by those requiring the product or service in question (Euroclear Bank in this case).

The decision also found that, as an unavoidable trading partner, CBF held a dominant position in the market for primary clearing and settlement of securities issued in accordance with German law. The judgment confirmed Clearstream's dominant position and pointed out that intermediaries, such as CSDs and ICSDs, can only provide clearing and settlement services for securities issued in Germany to their customers if they can make use of CBF's services. The CFI reached the conclusion that CBF's custody monopoly in respect of securities issued under German law results in a monopoly of primary clearing and settlement for those securities.

The CFI referred to its case-law that a dominant company has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market and that, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own com-

⁽⁵⁾ http://ec.europa.eu/internal_market/financial-markets/docs/clearing/ecofin/20081103_ecofin_en.pdf.

mercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it⁽⁶⁾.

2.2. The abuse

Regarding the abuse, the decision addressed two types of behaviour, in each case directed against Euroclear Bank, the direct competitor of Clearstream Banking Luxembourg SA⁽⁷⁾, CBF's sister company for cross-border clearing and settlement:

- First, CBF refused access by delaying the process of connecting Euroclear to CBF's data processing system; it thereby also discriminated Euroclear vis-à-vis other clients of CBF. This refusal concerned a particular type of securities (registered shares) in which end customers had shown an increased interest around the time of the infringement. Delaying (direct) access to CBF's primary clearing and settlement services inhibited innovation and hampered competition in the provision of secondary cross-border clearing and settlement services.
- Second, CBF charged Euroclear higher fees than it did other clients for equivalent primary clearing and settlement services.

2.2.1. Refusal to supply Euroclear Bank with primary clearing and settlement services for registered shares for a period of almost two years, and discriminating against it

Clearstream argued that even if a dominant position could be established, its conduct would not have been abusive with regard to the refusal to supply as the difficulties resulting in the delay in linking Euroclear to CBF's settlement processing system could be ascribed to Euroclear. Clearstream argued that it was actually the complexity of the connection, as well as technical problems on the side of Euroclear, that delayed the process of linking the latter to CBF's data processing system. In addition, the conduct of CBF should be assessed in the broader context of talks between Clearstream International and Euroclear by which the two groups sought to reorganise their overall business relationship. This included, in particular, access of Clearstream Banking Luxembourg SA to the clearing and settlement system of Euroclear France, the French CSD. Inso-

far as other clients of CBF were granted access to its data processing system more rapidly than Euroclear, this difference could be explained by objective factors such as the type of access requested or the speed with which the client could solve technical problems related to access.

In its judgment the CFI confirmed that Clearstream Banking AG and Clearstream International SA abused their dominant position by not providing Euroclear access to the services it had requested for more than two years, whereas they provided access to other customers, including Clearstream Banking Luxembourg SA, in a matter of months. The CFI underlined the special responsibility of undertakings in a dominant position not to allow their conduct to impair genuine competition on the common market and rejected Clearstream's arguments. In particular the CFI established that Clearstream could not rely on the rejection of CBF's request for access to Euroclear France in respect of all French securities or the renegotiation of contractual relations with Euroclear as an objective justification of its conduct.

2.2.2. Applying discriminatory prices for primary clearing and settlement services to Euroclear

The decision had also found that Clearstream had discriminated against Euroclear between January 1997 and January 2002, by charging a higher per transaction price to Euroclear Bank for equivalent clearing and settlement services than to other similar customers outside Germany. The Commission examined in detail the content of the services and the costs of providing them in order to establish whether the price difference could be justified and concluded that it was not. This behaviour raised Euroclear's costs and ultimately the prices paid by its customers.

Clearstream argued that its prices were not discriminatory, as foreign central securities depositories (CSDs) and international central securities depositories (ICSDs) such as Euroclear Bank received different service packages involving different costs (e.g. different transaction volumes, different degrees of standardisation, night services and special services only received by ICSDs, different insurance policies); as to the comparison of the fees charged to Euroclear, on the one hand, and to CBF's own sister company, Clearstream Banking Luxembourg SA (both ICSDs), on the other hand, Clearstream claimed the Commission overlooked that the service contract for Euroclear specified a number of special services not requested by Clearstream Banking Luxembourg SA.

Again as regards discrimination (charging a higher per transaction fee to Euroclear than to other simi-

⁽⁶⁾ Paragraph 132 of the judgment, with references to Case T-203/01 *Michelin v Commission*.

⁽⁷⁾ Clearstream Banking Luxembourg SA is one of two ICSDs active in the EU (alongside Euroclear Bank SA).

lar customers), the CFI dismissed the arguments of Clearstream. It held that the primary clearing and settlement services for cross-border transactions provided by Clearstream Banking AG to ICSDs and CSDs are equivalent services and consequently that Clearstream's behaviour amounted to discriminatory pricing.

Patent ambush in standard-setting: the Commission accepts commitments from Rambus to lower memory chip royalty rates

Ruben Schellingerhout and Piero Cavicchi ⁽¹⁾

1. Introduction

Standardisation involves competitors sitting around a table agreeing technical developments for their industry. Normally, antitrust rules do not allow competitors to jointly decide on market conditions. However, the European Commission recognises the general benefits that standardisation brings, and so standard-setting is acceptable under antitrust rules, provided this takes place under strict conditions of openness and transparency. This is essential in order to avoid standards being abused by commercial interests. The Commission had concerns that this may have happened in the Rambus patent ambush case.

On 9 December 2009, the Commission adopted a decision that rendered legally binding commitments offered by Rambus Inc which, in particular, put a cap on its royalty rates for certain patents for “Dynamic Random Access Memory” chips (DRAMs).⁽²⁾ The Commission initially had concerns that Rambus may have infringed EU rules on the abuse of a dominant market position (Article 102 of the Treaty on the Functioning of the European Union – TFEU) by claiming abusive royalties for the use of these patents. DRAMs are used to temporarily store data, for example in PCs.

The US-based standards organisation, JEDEC, developed an industry-wide standard for DRAMs. JEDEC-compliant DRAMs account for around 95% of the market and are used in virtually all PCs. In 2008, worldwide DRAM sales exceeded US\$ 34 billion (more than €23 billion).

On 30 July 2007, the Commission sent Rambus a Statement of Objections, setting out its preliminary view that Rambus may have infringed the then Article 82 of the EC Treaty (now Article 102 TFEU⁽³⁾) by abusing a dominant position in the market for DRAMs. In particular, the Commission was concerned that Rambus had engaged in a so-called “patent ambush”, intentionally concealing that it had

patents and patent applications which were relevant to technology eventually included in the JEDEC standard, and subsequently claiming royalties for those patents.

To address the Commission’s concerns, Rambus undertook to put a worldwide cap on its royalty rates for products compliant with the JEDEC standards for five years. As part of the overall package, Rambus agreed to charge zero royalties for the SDR and DDR chip standards that were adopted when Rambus had been a JEDEC member, in combination with a maximum royalty rate of 1.5% for the later generations of JEDEC DRAM standards (DDR2 and DDR3), which is substantially lower than the 3.5% Rambus was charging for DDR in its existing contracts. The Commission’s decision confirmed that it considers the commitments are adequate to address these competition concerns.

This article provides an overview of the facts of the case and the competition concerns that the Commission had, and explains how similar situations can be prevented in the future.

2. The facts of the case

2.1. Relevant markets

2.1.1. Product market

The relevant market is a technology market for DRAM (Dynamic Random Access Memory) interface technology. DRAM chips are a type of electronic memory primarily used in computer systems, but also used in a wide range of other products which need to temporarily store data, including servers, workstations, printers, PDAs and cameras. The interface technology allows interoperability between a DRAM chip and other computer components which need to access the data stored in the DRAM chips. The Commission left open the issues of whether there was a single market for the full package of DRAM interface technologies or whether there were separate worldwide markets for individual DRAM interface sub-technologies.

2.1.2. Geographic market

Synchronous DRAM licences are granted on a worldwide basis, and the resulting products are both manufactured and sold worldwide according to uniform specifications. Synchronous DRAM chips

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

⁽²⁾ A non-confidential version of the Decision and the commitments is available on the Commission’s website at: <http://ec.europa.eu/competition/antitrust/cases/>.

⁽³⁾ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the TFEU; the two sets of provisions are in substance identical.

are made in a few production sites throughout the world. They are distributed globally before being incorporated into PCs and other equipment manufactured in a range of countries across the world.⁽⁴⁾ Therefore, the market for the licensing of synchronous DRAM interface technology is global in its geographic scope.

2.2. Position of the parties on the relevant market

JEDEC, an industry-wide US-based standard setting organisation, developed a standard for DRAMs. JEDEC SDR DRAM standard-compliant chips were the main type of DRAM chip on the market as early as 1999, accounting for 84% of DRAM chips sold. By August 1999, the JEDEC DDR DRAM standard had been agreed, further entrenching the evolutionary path of the JEDEC DRAM standards in question.

JEDEC-compliant synchronous DRAM chips account for the vast majority of DRAM chips currently sold worldwide, representing more than 96% in terms of overall sales of DRAM chips between 2004 and 2008. Virtually all market participants confirmed that it is commercially essential to comply with JEDEC standards in order to be able to sell DRAM chips on the Community or worldwide market. Rambus' RDRAM technology and its successor, XDR DRAM, are the main non-JEDEC-compliant DRAM interface technologies.

As Rambus asserts patents on all JEDEC-compliant SDRAM chips and owns the proprietary RDRAM and XDR DRAM technology, the percentage of worldwide commercial DRAM production exposed to Rambus' patent claims is thus more than 90%. Rambus has been and remains the only company asserting patents on DRAM interface technology.

Every manufacturer wishing to produce synchronous DRAM chips or chipsets complying with JEDEC standards must therefore either acquire a patent licence from Rambus or litigate its asserted patent rights.

There are substantial barriers to entry on the market, primarily due to the fact that the industry is locked into JEDEC standards. Firstly, the initial costs and efforts relating to standards development are substantial. Furthermore, there are significant costs associated with switching from a standard once it has been adopted.

First and foremost, the specifications of a new standard would need to be agreed with the companies active in the sector (DRAM manufacturers, microprocessor manufacturers, component manufacturers, original equipment manufacturers (OEMs) and others). This in itself would take a significant amount of time. Moreover, the marketing burden for a new standard and related technology would also be significant.

As adoption of a new technology would also carry a high risk and substantial costs for customers, those customers would in fact need to be convinced that the new technology was viable and would be available in sufficient volume at an acceptable cost. Companies producing PCs and servers would need to develop and test new system architectures. Microprocessor and chipset manufacturers would also need to design chips to accommodate the new standard.

In parallel with the development of a new standard, DRAM manufacturers would need to consider the design of compliant parts and the new chips would need to be tested before mass production.

On the basis of the above, the Commission provisionally took the view in its Statement of Objections that Rambus held a dominant position on the market at the point when it started asserting its patents and that it has continued to hold that dominant position since.

2.3. Practices raising concerns

In the Statement of Objections, the Commission provisionally considered that Rambus may have engaged in intentional deceptive conduct in the context of the standard-setting process by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standard. Such behaviour is known as a "patent ambush."

The Commission took the preliminary view that Rambus may have been abusing its dominant position by claiming royalties for the use of its patents from JEDEC-compliant DRAM manufacturers at a level which, absent its allegedly intentional deceptive conduct, it would not have been able to charge. In the Statement of Objections, the Commission provisionally concluded that claiming such royalties was incompatible with Article 102 TFEU, in the light of the specific circumstances of this case, including Rambus' intentional breach of JEDEC policy and the underlying duty of good faith in the context of standard-setting, which resulted in a deliberate frustration of the legitimate expectations of the other participants in the standard-setting process.

Furthermore, the Commission provisionally considered that such behaviour by Rambus undermined

⁽⁴⁾ See also Commission Decision of 03 May 2000 declaring a concentration to be compatible with the common market (Case No IV/M.0044 - *HITACHI/NEC - DRAM/JV*) according to Council Regulation (EEC) No 4064/89, OJ C 153, 1.6.2000, p. 8, paragraph 21.

confidence in the standard-setting process, given that an effective standard-setting process is, in the sector relevant to the present case, a precondition for technical development and the development of the market in general to the benefit of consumers.

2.3.1. The standard-setting context and patent ambushes

In the Statement of Objections, the Commission provisionally considered that the specific context relating to standard-setting was important in order to properly assess Rambus' conduct. The process of standard-setting amounts to collective decision-making where there is a risk of an anti-competitive outcome. In essence, standard-setting provides a forum where companies come together and agree to exclude certain products or technologies from the market.

However, standards can have a positive economic effect insofar as they promote economic interpenetration on the internal market or encourage the development of new markets and improved supply conditions.⁽⁵⁾ Standards tend to increase competition and to lower output and sales costs, benefiting economies as a whole. Standards ensure interoperability, maintain and enhance quality, and provide information.⁽⁶⁾

For these benefits to be realised, and in view of the risk of anti-competitive outcomes, particular attention must be given to the procedures used to guarantee that the interests of the users of standards are protected. The Commission has therefore set forth the conditions that constitute appropriate behaviour in standard-setting organisations. In its 1992 Communication entitled "Intellectual Property Rights and standardisation",⁽⁷⁾ the Commission stated that an intellectual property right holder would act in bad faith if it was aware that its intellectual property related to a standard in development and did not disclose its intellectual property rights until after the adoption of the standard. This would force its competitors to accept higher licensing fees than those which could have been negotiated at an earlier stage before the adoption of the standard.⁽⁸⁾ The Communication also stated that, in order to ensure that a standard-setting process yields its benefits, intellectual property right holders should be required to

identify and report any intellectual property rights relating to a standard in development.⁽⁹⁾

The Commission's Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements⁽¹⁰⁾ ("Horizontal Guidelines") also provide a framework for the analysis of the effects of standardisation on competition. The Horizontal Guidelines state that standards must be set on a non-discriminatory basis, and that it must be justifiable why one standard is chosen over another.⁽¹¹⁾ By their nature, standards will not include all possible specifications or technologies and, in some cases, it may be necessary for the benefit of the consumers or the economy at large to have only one technological solution.⁽¹²⁾ The Horizontal Guidelines therefore stress the importance of "non-discriminatory, open and transparent procedures"⁽¹³⁾ to safeguard against anti-competitive outcomes.

Given these factors, standard-setting bodies generally adopt intellectual property rights policies which are designed to prevent or minimise the risk of anti-competitive outcomes. Such policies, including JEDEC's patent policy, generally stress the importance of good faith and early disclosure of potentially relevant intellectual property rights.

In order to ensure that any accepted open standard is accessible to the industry, JEDEC's policy was to exercise particular care when considering standards that might require the use of proprietary technology. Standards that require the use of a patent could not be considered by JEDEC unless all of the relevant technical information covered by the patent or pending patent was made known in advance of the standard being agreed.

To give effect to this policy, the Statement of Objections outlined that all members were required to disclose to JEDEC any and all issued or pending patents of which they were aware and which might be involved in the standard-setting work of JEDEC. The patent policy provided for a number of rules ensuring that the policy was effectively made known to all JEDEC members.

The Commission provisionally concluded that JEDEC and its members relied upon compliance with the patent policy in developing industry standards. Compliance with JEDEC patent policy, and in particular rules relating to disclosure of issue or pending patents, allowed JEDEC and its members to choose alternative technologies or to design around such potential or actual patents should JEDEC members be unable to obtain an assurance

⁽⁵⁾ Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2, paragraph 169.

⁽⁶⁾ Commission Communication "The role of European standardisation in the framework of European policies and legislation", COM(2004) 674 final.

⁽⁷⁾ Commission Communication "Intellectual Property Rights and standardisation", COM(1992) 445, paragraph 4.2.10.

⁽⁸⁾ COM (1992) 445, paragraph 4.4.1.

⁽⁹⁾ COM (1992) 445, paragraph 4.4.3 and 6.2.6.

⁽¹⁰⁾ OJ C 3, 6.1.2001, p. 2.

⁽¹¹⁾ Horizontal Guidelines, paragraph 171.

⁽¹²⁾ Horizontal Guidelines, paragraph 171.

⁽¹³⁾ Horizontal Guidelines, paragraph 163.

from the patent (application) holder that a licence would be available under satisfactory terms consistent with the JEDEC patent policy.

The Commission provisionally concluded that the JEDEC patent policy and the underlying duty of good faith was intended to provide members with an opportunity to develop open standards free from potential patent claims. In other words, the policy was aimed at preventing one member company from secretly capturing the standard by not disclosing to JEDEC that technologies being included were covered by the member's granted patent or pending patent application, and at ensuring that licences for technologies protected by patent rights included in the standard are offered to JEDEC members on reasonable and non-discriminatory terms.

It should be noted, however, that while the Commission considered that Rambus may have breached JEDEC's patent policy in its Statement of Objections, an actual breach of the precise rules of a standard-setting body would not be a necessary requirement for a finding of abuse in this context. The finding of abuse would instead be conditioned by the conduct that has necessarily influenced the standard process, in a context where suppression of the relevant information necessarily distorted the decision making process within a standard-setting body.

2.3.2. Rambus' capture of the JEDEC standards

The Commission provisionally considered that Rambus planned to capture the standard for DRAM interface technology from the outset and that, pursuant to its business strategy, Rambus may have deliberately used its participation in JEDEC to revise and tailor its pending patent applications in an effort to gain control over JEDEC standard-compliant synchronous DRAM chips.

In the Statement of Objections, the Commission considered that Rambus, as a member of JEDEC from 1991 to 1996, was duly informed and aware of the obligation incumbent upon every member of the organisation to disclose issued and pending patents relating to the standard-setting work of JEDEC. Rambus was perfectly aware of the expectations of other participants and of the fact that, as a consequence of its failure to disclose issued or pending patents, standards would not be adopted on the basis of all the relevant information.

The Commission took the preliminary view that, pursuant to its business strategy, and notwithstanding: (i) its knowledge of the requirements of the JEDEC patent policy and of the underlying duty of good faith that is binding on a participant in a standard-setting process; and (ii) its awareness of the relationship between its patents and patent applications and JEDEC's standard-setting work, Rambus was

indeed aware of the benefits of keeping its patent positions secret and intentionally did not disclose to JEDEC any patents or patent applications which related to the relevant JEDEC standards.

2.3.3. The effects of the capture of the JEDEC standards

In the Statement of Objections, the Commission provisionally considered that, absent Rambus' deceit, JEDEC Members were likely to have designed a "patent-free" standard around Rambus' patents. The Commission provisionally concluded that a number of factors pointed clearly in this direction.

The Commission took the preliminary view that there was wide-ranging evidence that the industry was concerned about costs associated with any DRAM interface technology. In this regard, the Commission provisionally concluded that payment of royalties on memory interfaces has been very much the exception, rather than the rule, in the DRAM industry, showing a disposition against including patents in the relevant standards.

Indeed, the Commission provisionally concluded that users were willing to forego increases in performance in order to keep costs down. In this regard, several higher performance alternative solutions were not selected, as they were not essential for the PC market.

Moreover, it was the preliminary view of the Commission that there was significant evidence that, during Rambus' membership of JEDEC, a broad range of alternative technologies to those that were eventually included in the JEDEC DRAM standard was available. The alternative technologies to the ones which were eventually included in the standard were technically and commercially feasible. There is no evidence indicating that there were patents reading on the alternatives that could have been incorporated into the standards.

The Commission provisionally considered that there were substantial barriers to entry on the market and that the industry was locked into the JEDEC DRAM standards. Moreover, the Commission took the view that, for these reasons, the effects of the alleged abusive behaviour also extended to subsequent JEDEC standards and not only to the SDR and DDR DRAM standards that were adopted during the time in which Rambus was a member of JEDEC.

In the Statement of Objections, the Commission therefore provisionally considered that Rambus was abusing its dominant position on the market for DRAM microchip technology by claiming unreasonable royalties for the use of its patents against JEDEC-compliant DRAM manufacturers at a level

which, absent its conduct, it would not have been able to charge.

3. The Commitments

To address the Commission's concerns, Rambus offered a bundled set of Commitments which extend worldwide. First and foremost, as part of the overall package, Rambus agreed not to charge any royalties for DRAM chips based on the SDR and DDR DRAMs standards which were adopted when Rambus was a member of JEDEC.⁽¹⁴⁾ Secondly, Rambus committed to a maximum royalty rate of 1.5% for the subsequent DRAM chips standards, i.e. below the 3.5% it had previously been charging for DDR in its existing contracts.

The package of Commitments offered by Rambus covered not only chips, but also memory controllers that are not standardised by JEDEC, but which need to interface with DRAM chips and therefore need to comply with the JEDEC DRAM standards. For Memory Controllers, Rambus offered a maximum royalty rate of 1.5% for SDR Memory Controllers until April 2010, then dropping to 1.0%, and a rate of 2.65% for DDR, DDR2, DDR3, GDDR3 and GDDR4 Memory Controllers until April 2010, then dropping to 2.0%.

The Commission took the view that the whole package of the Commitments was sufficient to address the concerns identified by the Commission in its Statement of Objections. As the competition concerns arose from the fact that Rambus may have been claiming abusive royalties for the use of its patents at a level which it would not have been able to charge absent its conduct, the Commission considers that the whole package of the Commitments is proportionate, as it addresses the royalty rates for the JEDEC standards.

The Commitments guarantee that industry will not have to pay more than the capped rates. This predictability and certainty has a clear value for business. Potential new entrants will also have a clear perspective of future royalty costs, facilitating a decision to enter the market. The Commitments will be binding worldwide on Rambus for a total period of five years. On 19 January 2010, Samsung Electronics and Rambus announced the conclusion of a licence agreement covering all Samsung semicon-

ductor products in line with the conditions of the Commitments.⁽¹⁵⁾

4. Conclusion

Given the increase in patenting and the number of standards which incorporate protected technologies, it has become increasingly clear that standard-setting which does not take place under strict conditions of openness and transparency may lead to serious distortions of competition on a given market. In fact, a patent essential to the implementation of a standard may have a much higher value once the standard has been adopted than it has ex ante. This can therefore create an incentive for the patent holder to attempt to extract the ex post rather than the ex ante value of his technology. There is therefore an important pro-competitive rationale behind requiring disclosure of patents and patent applications in the framework of standard-setting before a standard is adopted.

An effective standard-setting process should take place in a non-discriminatory, open and transparent way so as to ensure competition on the merits and to allow consumers to benefit from technical development and innovation. Abusive practices in standard-setting can harm innovation and lead to higher prices for companies and consumers. For its part, the Commission will vigorously enforce the competition rules in this area, for the benefit of technical progress and European consumers.

Standards bodies have a responsibility to design clear rules that ensure the standard-setting process takes place in a non-discriminatory, open and transparent way and hence reduce the risk of competition problems, such as patent ambushes. The role of the competition authorities in this context is not to impose a specific IPR policy on standards bodies, but to indicate which elements may or may not be problematic. It is then up to industry itself to choose which scheme best suits its needs within these parameters.

The Commission is currently revising the antitrust guidelines for horizontal agreements and intends to improve the existing chapter on standardisation to provide more guidance on standard-setting. The draft will be ready for public consultation in early 2010. Lessons learned from recent experiences such as the Rambus case will be reflected in this document.

⁽¹⁴⁾ As outlined above, the Commission provisionally considered that during this time Rambus may have engaged in intentional, deceptive conduct in the context of the standard-setting process by not disclosing the existence of the patents and patent applications which it later claimed were relevant to the adopted standards.

⁽¹⁵⁾ See http://www.rambus.com/us/news/press_releases/2010/100119.html and http://www.samsung.com/us/aboutsamsung/news/newsIrRead.do?news_ctgry=irpublicdisclosure&news_seq=17034.

The Commission's decision in the Microsoft Internet Explorer case and recent developments in the area of interoperability

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1. Commitment decision on the tying of Internet Explorer to Windows

1.1 Introduction

On 16 December 2009, the Commission adopted a commitment decision ('the Decision') pursuant to Article 9 of Regulation 1/2003 against Microsoft Corporation ('Microsoft') ⁽²⁾. With this decision the Commission made binding on Microsoft commitments that it had offered to address the Commission's preliminary concerns regarding potential abuse of its dominant position in the market for client PC operating systems as set out in a statement of objections issued on 14 January 2009. The concerns related to the tying of Microsoft's web browser, Internet Explorer, to its client PC operating system Windows. In order to meet these concerns, Microsoft committed to allow computer manufacturers and users to turn Internet Explorer off and to offer Windows users unbiased choice among different web browsers by means of a browser choice screen.

1.2 The competition concerns raised by the Commission under Article 102 of the TFEU

The case originated from a complaint lodged in December 2007 by Opera Software ASA, a Norwegian web browser manufacturer, which alleged that the tying by Microsoft of its web browser Internet Explorer to its dominant client PC operating system Windows foreclosed the market for web browsers.

1.2.1 Background

The reasoning in the statement of objections followed to a large extent the Commission's 2004 decision against Microsoft ⁽³⁾ as upheld by the General Court (then the Court of First Instance) in 2007 ⁽⁴⁾.

On 24 March 2004, the Commission had adopted a decision pursuant to Article 82 EC (now Article 102 TFEU) concluding inter alia that Microsoft had abused its dominant position on the market for client PC operating systems by tying its media player to its dominant PC operating system Windows ⁽⁵⁾.

1.2.2 Competition concerns raised

In the statement of objections the Commission preliminarily considered that the four criteria establishing a tying abuse contrary to Article 102 of the TFEU were fulfilled by the tying of Internet Explorer to Windows, namely

- (a) the tying and tied goods are two separate products;
- (b) the undertaking concerned is dominant in the tying product market;
- (c) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product;
- (d) the tying is liable to foreclose competition ⁽⁶⁾.

(a) Client PC operating systems are software products that control the basic functions of a computer and enable the user to make use of such a computer and run application software (such as a word processor) on it. Microsoft did not contest that it holds a dominant position on that market. Microsoft holds a worldwide market share of around 90 % in the market for client PC operating systems. Moreover, Microsoft has consistently held that very high market share for the past ten years ⁽⁷⁾.

(b) Web browsers are software applications that allow users to access and interact with web content. The Commission considered that, both for demand-side and supply-side reasons, web browsers and client PC operating systems are separate products.

(c) Before Windows 7 was released, the tying of Internet Explorer to Windows was both technical

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

⁽²⁾ The Decision, including Microsoft's commitments, is available at http://ec.europa.eu/competition/antitrust/cases/decisions/39530/final_decision_en.pdf.

⁽³⁾ Commission Decision 2007/53/EC of 24 March 2004, OJ L 32, 6.2.2007.

⁽⁴⁾ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601. See Kramler/Buhr/Wyns, CPN 3/2007, 39.

⁽⁵⁾ See Banasevic/Huby/Pena Castellot/Sitar/Piffaut, CPN 2/2004, 44 for details.

⁽⁶⁾ Case T-201/04 *Microsoft v Commission*, at paragraphs 842, 869 and 1058. See also Communication from the Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', OJ C 45, 24.2.2009, at paragraph 50.

⁽⁷⁾ See Commission Decision 2007/53/EC of 24 March 2004, OJ L 32, 6.2.2007, p. 23, at paragraph 432.

and contractual. PC manufacturers (also called original equipment manufacturers or ‘OEMs’) and end users could not technically de-install Internet Explorer from Windows. Moreover, licence agreements prevented OEMs from selling Windows without Internet Explorer pre-installed.

(d) The Commission preliminarily considered that the tying of Internet Explorer to Windows was liable to foreclose the market for web browsers and that the tying gave Internet Explorer an artificial distribution advantage that other web browsers were unable to match. By tying Internet Explorer to Windows, Microsoft ensured that Internet Explorer was as ubiquitous on PCs world-wide as was Windows. The statement of objections identified two major channels for distributing web browsers. Those two channels are distribution through OEMs and downloading via the internet.

Under Microsoft’s licensing model, OEMs must license Windows with Internet Explorer pre-installed. OEMs may also install an alternative web browser but only in addition to Internet Explorer. The evidence on the Commission’s file showed that OEMs which pre-install Windows hardly ever distribute competing web browsers. Until very recently, none of the top ten OEMs in the US and in the EEA shipped a client PC with Windows with a non-Microsoft web browser pre-installed, in spite of attempts by web browser vendors to obtain such distribution agreements. Such agreements could in any event not offset Internet Explorer’s ubiquity, since third-party web browsers could only be installed *in addition to* Internet Explorer. The reluctance of OEMs to ship two web browsers may also be explained by the additional resources which would be needed to support and test the second web browser. For many OEMs, customer support is a major business cost.

With respect to downloading via the internet, the analysis in the statement of objections indicated that that alternative channel — despite its importance for the distribution of web browsers — does not offset the artificial distribution advantage of Internet Explorer resulting from the tying to Windows. For that distribution mode to be successful, vendors of competing browsers must first overcome users’ inertia and persuade them not to limit themselves to the pre-installed Internet Explorer. Downloading a new web browser thus requires an active decision from the user who must be aware of the existence of that alternative product and then search for, choose and install such a competing web browser.

A consumer survey⁽⁸⁾ conducted on behalf of the Commission showed that more than half of Windows users and about two thirds of Windows users having Internet Explorer as their main web browser do not download web browsers from the internet or are reluctant to do so. All Windows users who had never or had only once downloaded a web browser were also asked during the survey why they did not download web browsers or, for those who had downloaded only once, why they did not do so more often. 55 % of those users said there was no need to download web browsers, 31 % did not know how to install or download software, 15 % replied that they considered downloading or installing software as difficult or complicated, 8 % feared security risks and 7 % were not aware that they could download a web browser. The survey confirmed that there is a significant information deficit on the part of consumers. 84 % of Windows users who use Internet Explorer as their primary web browser never use another web browser on their computer because they are unaware of the other options, or because they do not want to or do not know how to download. A business survey conducted on behalf of the Commission shows that the information deficit is not only limited to consumers.

The Commission preliminarily concluded that as a result of the tying, Internet Explorer’s market share remains much higher than that of its competitors although it could not be considered as a superior product compared to its main competitors. In fact, the Commission came to the preliminary conclusion that the tying allowed Microsoft to maintain its market share despite the fact that it did not improve Internet Explorer 6.0 for many years (while Internet Explorer 6.0 was released in 2001, Internet Explorer 7.0 was only released in 2006, and Internet Explorer 8.0 in 2009) and that neither Internet Explorer 7 nor previous versions seem to have been superior to their main competitors, in particular the Firefox web browser.

Internet Explorer’s ubiquity achieved through Windows was also preliminarily found to create network effects in favour of Internet Explorer. Under time and resource constraints, web designers and software developers tend to develop their product for the web browser that gives them the largest potential audience, namely that of Windows users.

In the statement of objections, the Commission also preliminarily concluded that the tying of Internet

⁽⁸⁾ The Commission carried out empirical surveys of the actual web browser usage characteristics of both consumers and enterprises with the help of a professional market research company. The surveys were conducted in parallel in eight Member States, namely Germany, France, the United Kingdom, Italy, Spain, Poland, Romania and Sweden. The sample size was fixed at 1 000 per Member State for consumers and 500 per Member State for enterprises.

Explorer to Windows could reinforce Microsoft's position on the market for client PC operating systems. More and more applications which used to be available only on desktop computers are now available also on the web (such as email, spreadsheets or word processing applications). Many web applications can be accessed through any web browser regardless of the operating system installed on the client PC. Such applications therefore have the potential to decrease computer users' dependency on specific operating systems. In the statement of objections, the Commission concluded that by tying its web browser to its operating systems, Microsoft attempted to counter this threat in view of the fact that Internet Explorer had its own way of interpreting web standards and used technologies such as ActiveX which are only available on Windows. As a result, no application written specifically for Internet Explorer could run on a web browser installed on a non-Microsoft operating system since Internet Explorer is only available for Windows.

1.2.3 The commitments offered by Microsoft

In the autumn of 2009, Microsoft offered commitments in order to address these competition concerns. Under the final version of the commitments made binding by the Decision, Microsoft undertook to make available within the EEA a mechanism in Windows 7 and its successors that enables OEMs and users to turn Internet Explorer off and on. If Internet Explorer is turned off, the browser frame window and menus would not be accessible in any way. OEMs will be free to pre-install any web browser(s) of their choice on PCs they ship and set it as the default web browser. Microsoft undertook not to circumvent the proposed commitments by any means and not to retaliate against OEMs for installing (only) competing web browsers.

Microsoft also committed to distribute, through Windows Update, a choice screen to all users of Windows XP, Windows Vista and Windows 7 in the EEA who have Internet Explorer set as their default web browser (that is to say the web browser which opens when the user e.g. clicks on a link received by email) and are subscribed to Windows Update. This choice screen update must allow an unbiased choice between web browsers. It will consist of an introductory screen explaining in particular what web browsers are. After that, the actual choice screen will appear and display the icons of the twelve most widely-used web browsers based on usage share in the EEA⁽⁹⁾. The five most popular web browsers will be prominently displayed and presented in a random order. Through scrolling sideways users

will find the remaining seven additional web browsers, also presented in a random order. The random order avoids any bias associated with any particular position on the screen. The approach of displaying five web browsers in a prominent manner, and seven more when the user scrolls sideways, was selected in order to strike an appropriate balance between the need to have a workable choice screen that users are likely to make use of and making the choice screen as accessible as possible to web browser vendors while reflecting the market situation. If the choice screen presented too many web browsers, users could be overwhelmed and as a consequence would be more likely not to exercise a choice at all, but rather to dismiss the entire choice screen. The leading five web browsers are by far more widely accepted than the others by the market⁽¹⁰⁾. At the same time, displaying seven additional web browsers gives web browsers with smaller usage share an opportunity to be included on the choice screen, and therefore to raise awareness about their products and gain new users.

On the choice screen users can choose to obtain more information about each web browser and/or to trigger a direct download of web browsers. The choice screen should thus create the conditions for users to make an informed choice between the web browsers presented. Users not wishing to make a choice may simply close the choice screen or postpone their choice. In order to reflect market developments, the list of the web browsers to be included on the choice screen will be updated every six months subject to a procedure set out in detail in the commitments text. The commitment text also specifies the design and implementation details of the choice screen. Entities running larger internal networks will have the possibility to determine whether the choice screen is displayed on each individual PC.

The term of the commitments is five years. Microsoft committed to regularly report to the Commission on the implementation of the commitments. It also committed to make adjustments to the choice screen within the scope of these commitments at the Commission's request and where proportionate and necessary in order to ensure the effective implementation of the commitments. Furthermore, in addition and without prejudice to the general provision of Article 9(2) of Regulation 1/2003, Microsoft or the Commission may request a review

⁽⁹⁾ The choice screen will also be accessible at www.browser-choice.eu.

⁽¹⁰⁾ According to NetApplications, in October 2009, the fifth web browser by usage share in Europe, namely Google Chrome, had a usage share of 3.8 %, while the sum of the usage shares of all other less widely used web browsers came to 0.45 % (when excluding Netscape, which is no longer supported and would therefore not be included on the choice screen).

of these commitments two years or later after the adoption of the Decision where either (i) the market circumstances have fundamentally changed or (ii) the choice screen has manifestly failed to provide consumers with an effective choice among browsers in a reasonable way. Microsoft will not unreasonably withhold its cooperation with such a review. This review mechanism is an important safeguard should the remedy need to be adjusted.

1.2.4 The commitments meet the competition concerns

The Commission took the view that these commitments meet its concerns with respect to the tying of Internet Explorer to Windows. The distribution of the choice screen through Windows Update requires minimum user activity for the choice screen to reach more than 100 million European users of Windows and does not necessitate the involvement of third parties in distributing competing web browsers, which could in and of itself jeopardise the effectiveness of the measure. Furthermore, OEMs will in future be able to freely choose between competing offerings as regards the web browsers to be installed on the PCs which they ship. The commitments are therefore suitable for providing rival web browsers with an effective opportunity to compete on the merits with Internet Explorer and for enhancing competition on the web browser market by removing Microsoft's artificial distribution advantage stemming from the tying of Internet Explorer to Windows and by informing users about available web browser choices.

Enhanced competition in the web browser market resulting from the implementation of the commitments would also substantially weaken the network effects currently favouring Internet Explorer. More competition should also lead to more widespread use of web browsers which run on multiple operating system platforms. This would in turn contribute to weakening the network effects in favour of Windows, the only operating system on which Internet Explorer runs.

2. Interoperability

Following discussions with the Commission, Microsoft published on 16 December 2009 an interoperability undertaking⁽¹¹⁾, in which it committed to disclose a large amount of interoperability information free of charge on its website. This information should improve interoperability between third party products and several Microsoft products, including Windows, Windows Server, Office, Exchange, and SharePoint. Pursuant to the undertaking Microsoft must ensure that the information is complete and accurate and must provide a warranty to that effect. Access to and use of the information will be subject to no more than a nominal upfront fee and licensing terms which are compatible with open source licences. The warranty agreements which Microsoft offers as part of the undertaking provide for private enforcement including a fast-track dispute resolution mechanism and a right to liquidated damages in case the warranties are breached. Microsoft's informal interoperability undertaking thus relies on some elements familiar from the post-judgment implementation of the disclosure remedy imposed by the Commission's 2004 Microsoft decision. As pointed out by Commissioner Kroes⁽¹²⁾ this is a very welcome initiative by Microsoft as enhanced interoperability is crucial for competition in the software industry. The Commission will now carefully monitor the impact of Microsoft's undertaking on the market and take its findings into account in its assessment of the pending antitrust investigation regarding interoperability⁽¹³⁾.

3. Conclusion

The commitments proposed by Microsoft, and made binding by the Decision, address the competition concerns preliminarily identified by the Commission effectively and in a timely manner. The swift solution achieved in this case is capable of having an immediate impact on competition in a very important technology market to the benefit of consumer choice and innovation.

⁽¹¹⁾ Available at <http://www.microsoft.com/Presspass/press/2009/dec09/12-16Statement.mspx>.

⁽¹²⁾ See Neelie Kroes, European Commissioner for Competition Policy, 'Your Internet, Your Choice': Microsoft web browsers decision, Opening remarks at press conference, Brussels, 16 December 2009, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/582>

⁽¹³⁾ In December 2007 proceedings were opened in relation to a complaint by the European Committee for Interoperable Systems (ECIS); see <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19>

Commitment decision in the ship classification case: Paving the way for more competition

Rüdiger Dohms and Piergiorgio Rieder ⁽¹⁾

1. Introduction

On 14 October 2009, the Commission adopted a decision under Article 9(1) of Regulation (EC) 1/2003 ⁽²⁾ that renders legally binding commitments offered by the International Association of Classification Societies (IACS) to address Commission concerns that IACS may have infringed Article 81 EC Treaty (now Article 101 TFEU) and Article 53 EEA Agreement, prohibiting anticompetitive business practices ⁽³⁾.

The Commission's concerns related to the ship classification market and in particular the issue that IACS might have prevented classification societies (CSs) that are not members of IACS from: (i) joining IACS; (ii) participating in IACS' technical working groups (which develop IACS technical resolutions laying down requirements and interpretations to be incorporated into the classification rules and procedures of individual CSs); and (iii) having access to technical background documents which relate to IACS technical resolutions and which are necessary to properly understand and apply these resolutions. Such behaviour would have hindered the entry and development of CSs that were not members of IACS in the ship classification market and may thus have restricted competition.

In order to accommodate the identified concerns, IACS offered a comprehensive set of commitments including (i) the establishment of objective and transparent qualitative criteria for membership of IACS, and guidance for their non-discriminatory application, (ii) the possibility for non-IACS CSs to participate in IACS' working groups and (iii) full access to IACS technical resolutions and related background documents.

The decision of 14 October 2009 is the first competition decision in the ship classification sector. The implementation of the commitments will bring

about significant change in this sector and will pave the way for more competition in this market, which should generate lower prices, more innovation and customer choice, as well as improved quality of service.

2. The ship classification market

The commitment decision concerns the market for classification services for merchant ships. In this respect, classification services of CSs consist of two closely related sub-segments ⁽⁴⁾:

- (a) Classification work. This is the traditional domain of CSs. It encompasses (i) the production of technical standards (commonly known as 'rules and procedures' ⁽⁵⁾) for ship construction, equipment, maintenance and inspection; (ii) the verification of plans and the supervision of ship construction against these rules and procedures; and (iii) the inspection and certification of ships against these rules once in service (thus issuing the so-called 'class certificates').
- (b) Statutory work. Flag states can delegate to CSs, separately, for each ship flying their flag, the task of (i) carrying out the surveys of ships provided for in the International Maritime Organisation (IMO) maritime safety conventions in order to verify compliance with the technical requirements contained in the IMO maritime safety conventions (statutory requirements); and (ii) issuing the international certificates on their behalf which attest the ships' compliance with these requirements.

The worldwide ship classification market is estimated to have an annual turnover of about 3.5 billion euros and it is obviously of great importance as an

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

⁽²⁾ Council Regulation (EC) No 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003.

⁽³⁾ See press release IP/09/1513, 14.10.2009. A full non-confidential version of the decision can be found at: http://ec.europa.eu/competition/antitrust/cases/index/by_nr_78.html#i39_416.

⁽⁴⁾ In practice, both classification work and statutory work are interrelated as (a) classification rules must respect and incorporate statutory requirements and (b) the inspection practice in both work areas is closely interlinked.

⁽⁵⁾ The term 'rules and regulations' comes from Council Directive No 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (OJ L 319, 12.12.1994, p. 20), which was repealed with effect from 17 June 2009. In the new legislation, namely Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations (OJ L 131, 28.5.2009, p. 11), the term has become 'rules and procedures'.

input service for the shipping sector. More than 90 % of the world's cargo-carrying tonnage is covered by the classification rules and procedures set by the current ten members and one associate of IACS, which are the largest classification societies in the world. In addition, IACS has had consultative status with the IMO since 1969, and has had a permanent representative within IMO since 1976.

3. The problem: foreclosure of CSs not members of IACS

The ship classification case was based on the results of a surprise inspection at five providers of ship classification services and at the association of these providers in January 2008 ⁽⁶⁾. The investigation was subsequently pursued between 2008 and 2009 with further requests for information being sent to relevant stakeholders in the ship classification market (competing non-IACS CSs, the shipping industry such as ship-builders and ship-owners as users of ship classification services, and regulators), as well as to the parties themselves.

In the course of its investigation, the Commission came to the preliminary view that the ten members of IACS had a strong position on the ship classification market. The Commission based its preliminary assessment amongst other things on the high combined market shares of the ten members of IACS ⁽⁷⁾, and on the view that CSs which are not members of IACS may face significant competitive disadvantages preventing them from competing effectively with IACS members, in particular:

- (a) Many flag states do not allow CSs that are not IACS members to perform statutory work on their behalf.
- (b) Many ports do not permit entry of ships that are not classified by an IACS member.
- (c) Some international associations of ship-owners and ship-builders require as a condition of membership that their members have their ships classified by IACS members.
- (d) Under the so-called Institute Classification Clause, ships classified by an IACS member (or associate member) benefit from the standard insurance and marine rates for the cargo they carry whereas ships classed by non-IACS CSs cannot benefit from this clause and would therefore have to negotiate the insurance and marine rates for their cargo.
- (e) Many Protection and Indemnity Clubs are hesitant to insure ships not classified by an IACS

member and they either do not normally accept such ships or require special conditions of entry.

- (f) IACS is the only actor from the ship classification industry having consultative status at the IMO and thus a permanent representative within IMO. Non-IACS CSs cannot take part in the formulation of proposals for IMO measures or in their defence; therefore their views and interests cannot as easily be taken into account.
- (g) Non-IACS CSs are barred from IACS' technical work, while IACS members alone decide within IACS upon adoption of IACS' rules and procedures, which are, in practice, de facto industry standards.
- (h) Non-IACS CSs are barred from the full knowledge and use of IACS technical standards (i.e. IACS resolutions). In particular, IACS prevents non-IACS CSs from having access to the technical background information relating to these standards ⁽⁸⁾.

In its preliminary assessment, the Commission took the preliminary view that there may have been a restriction of competition on the relevant market in ship classification services due to IACS' decisions (i) on the criteria and procedures governing membership of IACS and the suspension or withdrawal of membership, and on the way that these criteria and procedures were applied, and (ii) on the preparation and accessibility to non-IACS CSs of IACS resolutions and technical background information relating to these resolutions. Given the Commission's preliminary view that the ten members of IACS have a strong position on the market and that classification societies which are not members of IACS may face significant competitive disadvantages, the Commission's preliminary assessment was that these decisions therefore raised concerns as to their compatibility with Article 81(1) EC Treaty (now Article 101(1) TFEU) and Article 53(1) EEA Agreement. Moreover, the Commission's preliminary view was that these decisions did not appear to fulfil the cumulative requirements for exemption under Article 81(3) EC Treaty (now Article 101(3) TFEU) and Article 53(3) EEA Agreement.

In particular, the preliminary assessment expressed the concern that, contrary to Article 81 EC Treaty (now Article 101 TFEU) and Article 53 EEA Agreement as interpreted by the case law of the European

⁽⁶⁾ See MEMO/08/65, 30.1.2008.

⁽⁷⁾ Source: IACS website, <http://www.iacs.org.uk>.

⁽⁸⁾ During the Commission's investigation, IACS improved the accessibility of its technical information, which was then published on its website. The Commission however considered it appropriate to ensure that this issue was also addressed in formal commitments.

Court of Justice⁽⁹⁾ and the Commission's Horizontal Guidelines⁽¹⁰⁾, IACS may have failed to:

- (a) enact requirements that are objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner concerning admission to, as well as suspension and withdrawal of, membership of IACS;
- (b) apply these requirements in an appropriate, reasonable and non-discriminatory way (including the establishment of sufficient safeguards to ensure such kind of application through an independent appeal/review mechanism);
- (c) provide an adequate system for including non-IACS CSs in the process of developing IACS technical standards (i.e. IACS resolutions), including the establishment of independent complaint/grievance and appeal/review mechanisms ensuring access to IACS' technical working groups;
- (d) provide for proper dissemination to non-IACS CSs of technical background information (in particular technical background documents) with regard to the application of IACS resolutions (including the establishment of an independent appeal/review mechanism ensuring access to this technical background information).

4. The remedies offered by the commitments and their proportionality

In order to address the Commission's competition concerns, IACS offered a comprehensive set of commitments structured around the following core elements:

With regard to membership of IACS, IACS offered to set up objective and transparent membership criteria and to apply them in a uniform and non-discriminatory manner. In order to achieve this goal, the commitments provide for detailed rules, including clear deadlines, for the different steps of the membership application, suspension and withdrawal procedure.

With regard to IACS' technical working groups, which develop IACS technical resolutions, IACS

committed itself to ensuring that non-IACS CSs will nonetheless be able to participate in these groups.

With regard to IACS' technical documents, IACS committed itself to ensuring that all current and future IACS resolutions and their related technical background documents will be put into the public domain at the same time and in the same way as they are made available to IACS members.

In addition, IACS committed to setting up an Independent Appeal Board to settle possible disputes over access to or suspension or withdrawal of membership of IACS, participation in IACS' technical working groups and access to IACS resolutions and to their technical background documents.

In response to the market test notice published on 10 June 2009⁽¹¹⁾ pursuant to Article 27(4) Reg. 1/2003, the Commission received a significant number of responses from interested third parties representing different kinds of market participants. Most respondents welcomed the commitments as necessary for improving the competitive situation on the ship classification market and for further promoting the efficiency and quality of IACS' technical work and standards.

In its assessment of the proportionality of the commitments, the Commission pointed out in its decision that with regard to the proposed criteria for membership of IACS, the commitments strike an appropriate balance between on the one hand maintaining demanding criteria for membership of IACS, while on the other hand removing unnecessary barriers to membership of IACS. The new criteria would ensure that only technically competent CSs are eligible to become members of IACS, thus preventing the efficiency and quality of IACS' work being unduly impaired by too lenient requirements for participation in IACS. At the same time, the new criteria would not hinder CSs that are technically competent and willing to do so from joining IACS. Similarly, the new IACS system for participation of non-IACS CSs in the IACS technical standard-setting process would on the one hand ensure appropriate possibilities for non-IACS CSs to participate in the development of IACS technical resolutions, while guaranteeing the proper functioning of IACS' technical working groups. In addition, by granting access to technical background documents to non-IACS CSs, the commitments would also ensure full access to the results of IACS' technical standard-setting process.

Finally, the previous market test had also confirmed that the commitments were necessary and proportionate to remedy the above-mentioned competition concerns.

⁽⁹⁾ See in particular the judgment of the Court of First Instance of 11 July 1996 in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole télévision SA and others v Commission* ('EBU') [1996] ECR-II-649, at paragraphs 95 and 100-102.

⁽¹⁰⁾ Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2 ('Horizontal Guidelines'), section 6 (paragraphs 159-175) on agreements on standards.

⁽¹¹⁾ OJ C 3, 10.6.2009, p. 20; IP/09/898, 10.6.2009.

5. The future: paving the way for more competition

Competition law enforcement had been absent from the ship classification sector so far. While the Commission's commitment decision of 14 October 2009, like any other decision under Article 9(1) Reg. 1/2003, does not conclude whether there has been or still is an infringement, it nevertheless provides important clarifications about what EU competition law means for essential current features of the ship classification market. These clarifications can serve as precedents and at the same time enhance the possibilities for effective competition in the sector. Moreover, the Commission took particular care that the effectiveness of the commitments is ensured by the fact that they operate in full transparency, that there are clear deadlines for their implementation and that there is no practical scope for deviation from the understanding the Commission had of them when it made them binding upon IACS⁽¹²⁾.

5.1 The principles of the CFI's EBU judgment

First, the Commission's decision in the ship classification case is a confirmation of the principles laid down by the CFI in the so-called **EBU judgment** with regard to membership of commercial associations. While associations without market power may have wide discretion about the way they design and apply their membership rules, this is different in the special circumstances that can be derived from the *EBU* judgment. According to this judgment, where an association has strong market power and where non-membership of that association gives rise to appreciable competitive disadvantages, while mem-

bership is not open to all applicants, the restrictions in the membership rules can be held indispensable within the meaning of Article 81(3) EC Treaty (now Article 101(3) TFEU) and Article 53(3) EEA Agreement if: (i) the membership rules and practices of that association are objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-à-vis all applicants for membership⁽¹³⁾ and (ii) these membership rules are in fact applied in an appropriate, reasonable and non-discriminatory way⁽¹⁴⁾. This consideration applies not only for rules governing admission to membership of an association of undertakings and the way they are applied but also for the rules and practices concerning suspension and withdrawal of membership of that association.

The Commission's concerns in the ship classification case were that these principles may not have been respected. By making the commitments binding on IACS, the Commission's decision ensures that these principles are implemented in an effective way. In full detail and in concrete text formulations, the commitments lay down the necessary changes IACS has to make to its Charter and to its internal procedures. Moreover, the commitments establish guidance that IACS will follow when assessing membership questions. Finally they set up an Independent Appeal Board to ensure that the appropriate, reasonable and non-discriminatory way of applying the membership criteria is subject to an impartial appeal and review mechanism. All these changes have to be published on IACS' website.

5.2 The Commission's Horizontal Guidelines

Second, the Commission's decision of 14 October 2009 is also an example of how, with regard to a standard-setting process, the guidance laid down in the Commission's Horizontal Guidelines⁽¹⁵⁾ can be reasonably interpreted and implemented in the specific context of the ship classification sector.

In its technical working groups, IACS develops technical resolutions which lay down minimum requirements, and interpretations of public law requirements, to be incorporated into the classification rules and procedures of the individual CSs that are members of IACS. In practice, these minimum

⁽¹²⁾ The commitment decision was notified to IACS on 16 October 2009, i.e. the effective date for calculating the deadlines for implementation of the commitments: within 30 days of the effective date, IACS has to adopt the new membership criteria (by way of an amendment to the IACS Charter), several IACS procedural documents (on membership application and periodic verification of existing members, on guidance for the application of the membership criteria, and on participation in IACS' technical work and access to IACS resolutions and technical background documents). Within 90 days of the effective date, IACS has to establish the Independent Appeal Board and to adopt the Appeal Board Rules of Procedure. All these new texts are annexed to the commitments and form an integral part thereof. Finally, under the commitments, IACS is obliged to introduce, as soon as practicable and, in any event, no later than 1 January 2011, a system whereby audits and assessment of compliance with the Quality System Certification Scheme (QSCS) are carried out by an independent external Accredited Certification Body. The commitments are published on the Commission's website (see above footnote 3) and IACS is bound by the commitments to publish them (including their annexes) in a prominent manner on its website.

⁽¹³⁾ Judgment of the Court of First Instance of 11 July 1996 in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole télévision SA and others vs. Commission* ('EBU') [1996] ECR-II-649, at paragraph 95.

⁽¹⁴⁾ *Idem*, paragraphs 100–102.

⁽¹⁵⁾ Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3, 6.1.2001, p. 2 ('Horizontal Guidelines'), section 6 (paragraphs 159–175) on agreements on standards.

requirements and interpretations are de facto industry standards which all CSs need to know well, and be capable of applying properly, in order to operate and compete effectively on the market. Moreover, these de facto industry standards represent a platform on the basis of which innovation competition for the development of more demanding rules and procedures, quality competition and ultimately price competition can take place.

Pursuant to the Horizontal Guidelines, access to the results of a standard-setting process, that is the standards themselves, must be possible for third parties on fair, reasonable and non-discriminatory (“FRAND”) terms. This has been fully ensured by including in the commitments made binding on IACS the availability not only of IACS technical resolutions but also of the related background documents, which are necessary to properly understand and apply these resolutions.

The Horizontal Guidelines also state that participation in standard setting should be open to all, unless the parties demonstrate important inefficiencies in such participation. This is a question of proportionality and accordingly, in the ship classification case, the interest of non-IACS members in participation had to be balanced with the public interest that only highly competent CSs decide on the actual setting of a standard. Indeed, participation in IACS’ standard-setting process as such had to be seen from the standpoint that IACS standards, by establishing minimum requirements and interpretations to be incorporated in rules and procedures of CSs, play an important role in ensuring maritime safety and the prevention of marine pollution. Furthermore, it is clear from previous cases that ‘participation’ in standard setting within the meaning of the Horizontal Guidelines does not necessarily mean co-decision in the actual setting of the standard.

Therefore, the Commission accepted in the commitments a system which distinguishes between the right of any non-IACS CSs to actively participate in IACS’ technical working groups which prepare new standards and the right to finally decide about the adoption of a new standard. This latter right was reserved to CSs that are members of IACS and therefore have passed the demanding competence test of IACS’ objective technical membership conditions and are periodically checked as to their continuous compliance with these conditions. At the same time, the new design of IACS’ membership criteria as laid down by the commitments ensures that anticompetitive foreclosure under the disguise of technical competence requirements cannot occur.

In this system, all non-IACS CSs have the benefit of discussing, influencing and learning about the details, reasons and context of forthcoming new IACS standards through active participation in IACS’ working groups. This also enables them to anticipate new developments and, if necessary, to grow into higher technical competence and altogether to acquire a more solid basis for engaging in effective competition with the current members of IACS.

Moreover, those non-IACS CSs that wish to join IACS and pass the newly designed objective and non-discriminatory admission test will as new IACS members have the power to co-decide the adoption of new standards in the IACS Council.

5.3 Conclusion

In conclusion, the ship classification decision opens up the ship classification market to the benefit of both CSs that are not members of IACS and customers of ship classification services and enhances the possibilities for effective competition and in particular for lower prices, more innovation, more customer choice and improved quality of ship classification services.

The Online Commerce Roundtable — Advocating improved access to online music for EU consumers

Carlo Alberto Toffolon ⁽¹⁾

1. Introduction

In recent years, DG Competition has dealt with collective rights management issues and online music licensing practices under antitrust enforcement and advocacy initiatives. Among the former, the CISAC case ⁽²⁾ can be mentioned. DG Competition has also recently looked into pricing issues for online music services in the iTunes case ⁽³⁾. Among the advocacy initiatives, the Online Commerce Roundtable (hereafter: ‘the Roundtable’) is the most prominent example. The present article gives an overview of the discussions and outcome of the Roundtable.

The starting point for this advocacy initiative is to be found in the observation, which emerged from the iTunes case, that there is no internal market for digital music downloads and that consumers from the new EU Member States still have a limited choice of what digital music they can legally buy over the internet, even though the demand for such content is growing ⁽⁴⁾. European consumers seeking to legally buy content protected by Intellectual Property (IP) rights such as music, films, videos and pictures as electronic data files over the internet are often only allowed to access online stores directed to their country of residence. In spite of the open and borderless nature of the internet, territorial restrictions prevent the emergence of a genuine internal market for online services, limit business opportunities and harm consumers.

The current licensing practices applicable to IP-protected online content are not up to speed with technological progress brought about by the internet. It is very difficult for start-up companies to enter the European online music business because they need to negotiate with a large number of different entities to clear the music repertoire they plan to make available.

Against this background, in 2008 Commissioner Neelie Kroes started a dialogue with top industry and consumer representatives about how to eliminate existing barriers, how to increase the business opportunities open to creative industries on the internet and how to ensure that European consumers have access to the widest possible range of goods and services online. The outcome of the Roundtable is outlined below.

2. The legal context

2.1. Licensing of IP rights

IP rights are territorial in nature, which means that they can be granted territory by territory. Therefore, an online (or mobile) music provider who wants to make a commercially significant and attractive offer has to enter into as many different licence agreements as the number of countries in which it wishes to operate.

In most cases, the provider of an online/mobile music distribution service needs to acquire a licence for the relevant mechanical and performance rights pertaining to the author(s) of the music as well as a licence for the relevant recording rights, which mainly protect the individual interpretation of a song by a performing artist ⁽⁵⁾. While the publishing rights of a song are with the authors and their publishers, the recording rights are with the recording companies and the artists (e.g. singers, performers), who normally transfer them to their record companies. The lack of either of these rights prevents legal use of the song.

Generally, authors transfer copyright of their works to music publishers and receive from the latter payments of advances and a share of the royalties generated by the commercial exploitation of their works. Music publishers exploit the rights given by authors to grant licences to right-users. These right-

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

⁽²⁾ Case COMP/38.698 — *CISAC Agreement*.

⁽³⁾ Cases COMP/C-2/39.154 *PO/iTunes* and COMP/C-2/39174 *Which/iTunes*. See MEMO/07/126, 3.7.2007 and Press Release IP/08/22, 9.1.2008.

⁽⁴⁾ The IFPI Digital Music Report 2010 indicates that, among the EU-12 Member States, legitimate digital music services currently exist in Bulgaria (8), Cyprus (1), the Czech Republic (9), Estonia (1), Hungary (10), Latvia (1), Lithuania (1), Malta (1), Poland (11), Romania (3), Slovakia (1) and Slovenia (2). The number of legitimate digital music services is much higher in the EU-15 Member States.

⁽⁵⁾ The term ‘authors’ is used to cover both lyricists (text) and composers (music). A ‘mechanical right’ is the right to reproduce a musical work. A ‘performance right’ is the right of communication to the public. Both rights together are referred to as ‘online rights’ if they are needed for online/mobile applications. They relate to an author’s copyright over a musical work in the form of a melody or lyrics (here also: ‘publishing rights’). Neighbouring rights, which have to be distinguished from authors’ rights, are owned by the performing artists and their record companies and protect the recording (and individual performance thereof) of a specific song (here also: ‘recording rights’).

users encompass all sectors where music is required (CDs, films, advertising, radio, TV, internet and mobile applications). The users pay royalties for the use of these musical works.

The licensing of mechanical and performance rights is generally carried out by collecting societies⁽⁶⁾ on behalf of publishers and/or authors. The collecting societies generally sign agreements with all publishing companies, which allow the collecting society to grant a blanket licence (including repertoires from all publishing companies) so that all end users can enjoy full access to musical works.

2.2. Recent market developments

Since the 2005 Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services⁽⁷⁾, some major music publishers have started to 'withdraw' their Anglo-American mechanical rights from the global repertoire administered by collecting societies⁽⁸⁾ and to select agents to license their rights on a pan-European basis directly to online and internet music providers (e.g. iTunes, Amazon, Nokia, YouTube). For example, EMI Publishing partnered with CELAS (a joint venture between the German collecting society GEMA and the British PRS); Universal Music with the French collecting society SACEM; Sony/ATV with GEMA, and Warner/Chappell Music has appointed several collecting societies to license its rights.

The consequence is that a commercial user wishing to offer the global repertoire has to continue concluding licensing agreements with each national collecting society for the remaining repertoire, and must in addition secure agreements with the rights managers mandated to license the withdrawn Anglo-American rights of the major music publishers.

3. The meetings of the Online Commerce Roundtable

3.1. Overview

Commissioner Neelie Kroes hosted the first meeting of the Roundtable at the European Commission's

Brussels headquarters on 17 September 2008⁽⁹⁾. It was attended by Sir Mick Jagger, EMI Music Publishing, Fiat, eBay, Apple/iTunes, Alcatel-Lucent, LVMH, Which? (a UK consumers organisation) and SACEM (a French collecting society for authors and composers) and concerned both goods and music services online. Before and after the meeting, participants submitted to the Commission their views on the future of online retailing in Europe. Stakeholders who were not present at the meeting had the opportunity to send written contributions, which were published on the Roundtable's website⁽¹⁰⁾.

It was later decided that subsequent meetings would focus on the online distribution of music only and would be limited to participants concerned with this issue. As regards the online distribution of goods, a variety of views were outlined and the Commission announced that it would use these inputs in the context of its ongoing review of the rules on vertical restraints⁽¹¹⁾. A second full-day meeting of the Roundtable took place on 16 December 2008 at the premises of DG Competition in Brussels. The proceedings resulted in the Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing, which was published on 26 May 2009⁽¹²⁾ and submitted for public consultation⁽¹³⁾.

The third meeting (8 September 2009) was enlarged to other key players in the online and mobile music industry, i.e. Amazon, Nokia, PRS for Music (a UK collecting society), STIM (a Swedish collecting society), Universal Music Publishing and the representatives of European consumers (BEUC — the European Consumers' Organisation). The fourth meeting — being the last one under the mandate and aegis of European Commissioner for Competition Neelie Kroes — took place on 19 October 2009.

3.2. The discussions

The offering of EEA-wide multi-repertoire licences through a single point of contact emerged as one of the main themes for discussion; another main theme was the full availability to users of rights ownership information that should help to simplify the current complexities of the negotiation process and enhance cross-border licensing.

⁽⁹⁾ See Press Release IP/08/1338, 17.9.2008.

⁽¹⁰⁾ See http://ec.europa.eu/competition/sectors/media/online_commerce.html.

⁽¹¹⁾ See Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, OJ L 336, 29.12.1999, pp. 21–25, and the Commission notice — Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, pp. 1–44.

⁽¹²⁾ See http://ec.europa.eu/competition/consultations/2009_online_commerce/roundtable_report_en.pdf.

⁽¹³⁾ See http://ec.europa.eu/competition/consultations/2009_online_commerce/index.html.

⁽⁶⁾ Collecting societies are bodies authorised by right holders to commercially exploit their rights. Music authors usually sign over to collecting societies the rights to manage on their behalf, worldwide, the copyright in their musical works. This portfolio of rights constitutes the repertoire of the collecting society.

⁽⁷⁾ Commission Recommendation of 18 May 2005 (OJ L 276, 21.10.2005, p. 54).

⁽⁸⁾ Due to bilateral representation agreements, each collecting society grants to the other the right to represent its repertoire in the territory of the other.

Generally, it was agreed that the internet provides all actors involved in the music value chain with tremendous opportunities to foster their creativity and business activities, for the benefit of the end-consumers. Thanks to this new technology, the digital consumption of music can take a wide variety of forms and be delivered through many different channels, platforms and devices.

All participants recognised the need for EEA-wide licensing, in the online environment, of both performance and mechanical rights for a wider repertoire and in competition between several rights managers. Both EMI (though CELAS) and SACEM are offering EEA-wide licences and are willing to continue doing so. The success of a rights manager should not depend on its size, but on its efficiency and the quality of services it is able to offer.

Certain users, such as Apple, would prefer to obtain a 'blanket licence' from one-stop shops: the rights being fragmented, these users would need to request and obtain a separate licence for each repertoire. In this respect, a system of rights ownership information should help make life simpler for users and the relevant information would have to be shared among right holders/collecting societies, but several questions should be resolved first, e.g. how to avoid 'monopolisation' of the information by a single entity and ensure open access to the database.

One licensing model which seems to satisfy the needs of commercial users is to have several rights managers offering a licence that covers such a large repertoire that it comes close to the global repertoire and thereby *de facto* offers a one-stop shop. Nevertheless, a limited number of rights managers which offer a large, albeit not global repertoire, could still be a workable solution if a common database can provide transparency on who offers what at which price. If effectively implemented, in particular by publishers and collecting societies, this would benefit all stakeholders.

SACEM stated that it is willing, in principle, to entrust other collecting societies with pan-European licensing of its repertoire and to act as non-exclusive rights manager for publishers and other collecting societies. On the music publishers' side, EMI is ready to authorise more than one rights manager to offer its repertoire for the whole EEA, for example by appointing different entities (e.g. local agents) for efficient licensing purposes. Apple would consider making its content available to all European consumers if it was readily able to license rights on a multi-territorial basis from publishers and collecting societies.

3.3. Joint Statement on 'General principles for the online distribution of music'

Building upon the above premise, the members of the Roundtable signed up to a Joint Statement⁽¹⁴⁾ in which:

- They committed to pursue new EU licensing platforms comprising the repertoires of several collecting societies. These platforms should consolidate the widest possible repertoire in their catalogues and should be based on voluntary cooperation among right owners.
- They agreed that collective rights managers should adhere to certain objective, transparent and non-discriminatory criteria to allow other entities to deliver multi-territorial licences.
- They set up a working group to create a common framework for the identification and exchange of rights ownership information. This will make it easier for commercial users to identify the relevant right owners and secure the necessary rights.

(a) New online licensing platform(s)

The Roundtable participants realised that extensive fragmentation of rights and the lack of effective rights clearance mechanisms create challenges to efficient and transparent music licensing. They recognised that such mechanisms facilitate the emergence of new business models and the deployment of multi-territorial online (and mobile) music services. On this basis, they agreed, without prejudice to any other alternatives, to explore in the near term the following ways forward, which could coexist:

- The development of efficient licensing platforms including several collective rights managers offering multi-territorial licences for their repertoires. Such platforms would manage and, where possible, license the 'online rights' (performing and mechanical rights) of all right holders willing to entrust them.
- The potential for the creation of licensing platforms which would manage substantial bodies of repertoire and deliver pan-European/multi-repertoire licences to commercial users. Such platforms should be non-exclusive and non-mandatory.

Right holders should be free to license directly, or through the rights managers of their choice, which would compete for their rights, their own repertoire

⁽¹⁴⁾ See http://ec.europa.eu/competition/sectors/media/joint_statement_1.pdf.

to commercial users, subject to applicable European competition law rules. Commercial users and content providers should make all commercially reasonable efforts to ensure they have the right to offer pan-European music services to all European consumers.

Such commitment to develop efficient pan-EU licensing platforms comprising the repertoires of several collecting societies and publishers should meet the demand of commercial users who have expressed a preference for securing all the necessary online rights for a given repertoire from a single source.

(b) Objective, transparent and non-discriminatory criteria for the selection of entities entrusted to license online rights on a multi-territorial basis

It was agreed that such criteria should at least include the ability to secure an appropriate level of royalties for right holders; to manage and process efficiently all elements of a licence in accordance with the mandate granted; to accurately identify the rights; to meet certain technical standards; to ensure that royalty distribution is properly handled; and to carefully monitor and enforce uses in each territory of the licence. Objectively justified concerns about the reliability, trustworthiness and/or track record of the entity concerned and the market conditions may also be taken into account.

As a result, it can be expected that more collecting societies will be authorised to licence important repertoires on a pan-EU basis. For instance, following the Roundtable EMI has announced that it expected to mandate other collective rights managers than CELAS to license its repertoire.

(c) Common framework for rights ownership information

The members of the Roundtable also agreed that a common framework for consolidating and maintaining accurate rights ownership information is needed as soon as possible in order to facilitate the identification, management and administration of the relevant rights pertaining to a music track at global level, as well as to promote legal certainty and eliminate the risk of double payments. The participants are committed to working on common formats and standards and supporting the creation of modern systems of rights ownership information, for the benefit of all stakeholders. They will continue to discuss possible improvements regarding the interconnection and interoperability of the existing databases.

Some members of the Roundtable (EMI, PRS for Music, SACEM, STIM and Universal Music Publishing) formed a 'Working Group on a Common

Framework for Rights Ownership Information', which is open to other market participants, including commercial users, other collecting societies and independent publishers. This Working Group also delivered a Joint Statement⁽¹⁵⁾ indicating that it would consider, *inter alia*, appropriate measures to ensure open, transparent and non-discriminatory access to rights identification data; the continued accuracy of the data and avoidance of possible duplication of information; and the need to safeguard confidentiality of commercially sensitive information.

A commitment to work on a common database system that would make it possible to consolidate and maintain accurate rights ownership information on all music tracks would, in turn, greatly facilitate the identification of online rights and the management and administration of licences. It would also considerably reduce uncertainties as to the ownership of rights and the ensuing risk of double payments — a concern which is high on the agenda of digital service providers.

4. Follow-up

Following the Online Commerce Roundtable:

- Apple announced that it was encouraged by progress towards more efficient online music licensing and that it was optimistic in making the iTunes store available to consumers in more European countries in 2010.
- EMI announced that it expected to take an important step forward in digital licensing in Europe via forthcoming non-exclusive deals with the Spanish (SGAE) and French (SACEM) collecting societies.
- Amazon stated that it was committed to continue working to provide customers the broadest possible selection of online music offerings⁽¹⁶⁾.
- In line with the agreed principles of the Roundtable, SACEM will now actively cooperate with as many European authors' societies as possible with a view to building a common, non-exclusive portal able to offer the largest possible repertoire to online services on a pan-European basis.

5. Conclusion

The Online Commerce Roundtable agreed that the simplification of online licensing practices will benefit authors, right holders and commercial users alike and will allow more European consumers to

⁽¹⁵⁾ See http://ec.europa.eu/competition/sectors/media/joint_statement_2.pdf.

⁽¹⁶⁾ On 3 December 2009, Amazon announced the launch of their new MP3 stores in Austria and Switzerland.

have legitimate access to more music online. This initiative delivered concrete results within a short timeframe; it allowed industry stakeholders to engage in open discussions leading to jointly agreed actions; it also helped to foster the internal market for online services, increase business opportunities and benefit consumers.

This initiative took place in parallel with DG Competition's monitoring of the implementation of the CISAC prohibition decision, and was followed by policy initiatives by other Commission departments⁽¹⁷⁾. It should be seen in the wider context of Commission President José Manuel Barroso's Political guidelines for the 2010-2015 Commission⁽¹⁸⁾, which *inter alia* propose to tackle the main obstacles to a genuine digital single market. In this wider context, DG Competition will continue to play a key role, particularly by examining from an EU competition law perspective not only the current online licensing practices, but also other collective rights management and copyright-related matters (including issues related to copyright levies and private copying).

⁽¹⁷⁾ See the Reflection Paper 'Creative Content in a European Digital Single Market: Challenges for the Future', available at http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm

⁽¹⁸⁾ See http://ec.europa.eu/commission_barroso/president/pdf/press_20090903_EN.pdf.

The heat stabilisers cartels

Patricie Eliasova, Josefine Hederström, Willibrord Janssen and Eline Post ⁽¹⁾

1. Introduction

On 11 November 2009, the Commission adopted a prohibition decision against suppliers of tin stabilisers and ESBO/esters (two types of heat stabilisers) and one consultancy firm. The Decision found that they had operated two single and continuous cartels on tin stabilisers and on ESBO/esters respectively. The Commission imposed fines of more than EUR 173 million on them for infringing Article 81 of the Treaty ⁽²⁾ and Article 53 of the EEA Agreement.

The Decision was addressed to the following undertakings:

- For the tin stabilisers cartel: Akzo Nobel, Elementis, Elf Aquitaine (including Arkema France and CECA), Baerlocher, Chemtura, BASF, Reagens and AC-Treuhand.
- For the ESBO/esters cartel: Akzo Nobel, Elementis, Elf Aquitaine (including Arkema France and CECA), GEA Group, Chemson, Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH, Chemtura, BASF, Faci and AC-Treuhand.

The operation of the two cartels was particularly well organised. The suppliers were careful to cover their tracks by meeting and keeping documents at locations outside the jurisdiction of the European Commission. A consultancy firm based in Switzerland, AC Treuhand, organised the meetings, kept the documents at its premises and monitored the arrangements. Also, AC Treuhand was fined for having participated in the cartels.

2. Products concerned

Heat stabilisers are added to PVC products in order to improve their thermal resistance. The cartels covered two product categories: tin stabilisers and ESBO/esters. Tin stabilisers are used to avoid decomposition caused by heat during the processing of PVC into final products. Their two main applications are in rigid PVC products, such as packaging, credit cards, pipes, fittings, profiles and bottles and plasticised PVC products, such as coatings, flooring and car interiors. ESBO/esters are used for plasti-

cised PVC products (as plasticisers and heat stabilisers). They are commonly used in products such as food packaging materials, medical products, different kinds of film gaskets, sheet materials, tubing, refrigerator sealing strips, artificial leather, plastic wallpaper, electrical wires and cables and floor coverings. At the time of the infringements, the combined markets for tin stabilisers and ESBO/esters in the EEA were worth some EUR 121 million.

3. Procedure

In November 2002, Chemtura applied for immunity under the Commission's 2002 Leniency Notice. ⁽³⁾ The Commission launched surprise inspections in February 2003 in **Germany, France, Italy and the United Kingdom**. This was the first time that surprise inspections had been carried out by the European Commission and the American, Japanese and Canadian antitrust authorities simultaneously. ⁽⁴⁾ Subsequently, Arkema France, Baerlocher, Akzo Nobel and BASF applied for leniency under the 2002 Leniency Notice.

During the inspections at Akros Chemicals (UK), which belonged to the Akzo Nobel group at the time, its representatives claimed that certain documents were covered by legal professional privilege. Following an application by Akzo Nobel and Akros Chemicals in April 2003 for the annulment of several Commission decisions, the issue of the disputed documents was settled by the Court of First Instance (now General Court) in its judgment of 17 September 2007. ⁽⁵⁾ The Court dismissed the actions brought by Akzo Nobel and Akros Chemicals and found that the documents were not covered by legal professional privilege.

The Commission issued a series of requests for information. On 17 March 2009, a Statement of Objections was issued. The Decision was adopted on 11 November 2009.

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

⁽²⁾ Now Article 101 TFEU.

⁽³⁾ Commission notice on immunity from fines and reduction of fines in cartel cases (*OJ C 45, 19.2.2002, p. 3–5*).

⁽⁴⁾ Commission press release of 13 February 2003, Memo/03/33.

⁽⁵⁾ Joined Cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission, [2007] ECR II-3523.

4. The cartels

The Decision concerns two cartels: one covering tin stabilisers and the other covering ESBO/esters. The tin stabilisers cartel lasted from February 1987 until March 2000. The ESBO/esters cartel lasted from September 1991 until September 2000. The duration of the involvement of each individual undertaking varied. Both cartels covered the territory of the EEA.

The objective of both cartels was to increase and maintain prices in the EEA above normal competitive levels and to sustain this objective through customer and sales volume allocation. The participants engaged in anticompetitive arrangements which consisted of:

- (a) fixing prices;
- (b) market sharing by fixing quotas;
- (c) sharing and allocating customers; and
- (d) exchanging commercially sensitive information.

The principal decisions for both cartels were taken at meetings organised by AC Treuhand, which made its premises in Switzerland and its services available to the suppliers involved. For a considerable proportion of the infringement periods, AC Treuhand monitored the implementation of the agreements on sales quotas and on fixed prices. During the meetings, AC Treuhand distributed “red” and “pink” papers containing details of fixed prices and allocation of sales volumes. Those papers were not allowed to be taken outside the meeting room.

The AC Treuhand meetings were held monthly for tin stabilisers and quarterly for ESBO/esters. Specific country meetings were held to implement the agreements reached at the AC Treuhand meetings.

5. Fines

In calculating the fines, the Commission applied the 2006 Guidelines on Fines.⁽⁶⁾ The Commission calculated the fines to be imposed on each supplier concerned on the basis of the value of their respective sales.

The basic amount was multiplied by the number of years of participation in the infringement, taking fully into account the duration of the participation of each individual undertaking in the infringement.

There were no mitigating circumstances. Aggravating circumstances were applied for Arkema France for recidivism. A multiplier to the fine was imposed on Elf Aquitaine S.A. as a specific increase for deterrence, pursuant to point 30 of the 2006 Guidelines on fines.

6. Application of the 2002 Leniency Notice

Chemtura was the first undertaking to submit information and evidence, which opened the door for the Commission to carry out targeted inspections. Therefore, Chemtura was granted a reduction of 100% for both tin stabilisers and ESBO/esters. CECA/Arkema France/Elf Aquitaine was granted a reduction of 30% for tin stabilisers and 50% for ESBO/esters. Baerlocher was granted a reduction of 20% for tin stabilisers and BASF was granted a reduction of 15% for tin stabilisers and 25% for ESBO/esters. Akzo’s contribution was not considered as being of “significant added value”. Therefore, the Commission did not grant Akzo any reduction of its fines.

⁽⁶⁾ Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p. 2.

Merger: main developments between 1 September and 31 December 2009

John Gatti ⁽¹⁾

1. Introduction

The number of notifications rose significantly during the previous four-month period, from 75 to 109 — an increase of more than 45%. That figure itself was 10% up on the comparable period in 2008, when 98 notifications were received. The Commission adopted a total of 96 first phase decisions, of which 91 were unconditional clearances (55 of these decisions — i.e. some 60% — were adopted under the simplified procedure). Five first phase decisions were cleared conditionally. No decisions were adopted after second phase investigations, although one case was abandoned during the second phase investigation. One decision was adopted under Article 4(4) of Council Regulation 139/2004 which refers a case with a Community dimension to the Member States. The Member States accepted eleven requests for referrals to the Commission under Article 4(5) of the same Regulation. Member States made two requests for cases to be referred to the national competition authorities; one request was accepted, the other was refused.

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

2.1 Sanyo/Panasonic

On 29 September 2009 the European Commission cleared the acquisition of Sanyo Electric Co., Ltd. by Panasonic Corporation, both of Japan. The approval was conditional upon the divestment of certain battery production facilities in markets where the Commission had identified competition concerns.

Both Sanyo and Panasonic are diversified industrial groups. Panasonic is primarily active worldwide in the development, manufacture and sale of a wide range of audiovisual and communication products, home appliances, electronic components and devices, including batteries and industrial products. Sanyo is primarily active worldwide in the development, manufacture and sale of consumer products, commercial equipment, electronic components, including batteries, and industrial logistics and maintenance equipment.

The Commission's investigation identified competition concerns in a number of battery markets where the merged entity would have a significant market share. These are the markets for primary cylindrical lithium batteries, portable rechargeable nickel-metal hydride batteries and rechargeable coin-shaped batteries based on lithium.

Primary cylindrical lithium batteries are particularly well-suited to applications that require strong bursts of power and where the battery is used for long periods without being replaced (e.g. alarms, utility meters). Portable nickel-metal hydride rechargeable batteries are used in a wide range of products, such as power tools, personal care products (e.g. shavers, toothbrushes and epilators), toys, portable scanners and two-way radios. Rechargeable coin-shaped batteries based on lithium are used principally as a back-up power supply for real-time clocks in mobile phones and digital still cameras, as well as in certain other applications such as watches, laptops and keyless entry systems for cars.

To allay the concerns raised by the Commission relating to cylindrical lithium and rechargeable coin-shaped batteries, the parties undertook to divest a production plant that currently produces both these types of batteries. The proposed transaction, as modified by this commitment, would not result in any increase in market share for cylindrical lithium and rechargeable coin-shaped batteries. The parties also agreed to divest the portable rechargeable nickel-metal hydride businesses of one of the parties, thereby eliminating any increase in this product's market share.

After market testing of the proposed commitments, the Commission concluded that these would alleviate its serious doubts and therefore ensure that the proposed transaction would not impede effective competition as a result.

The Commission worked on this case in close cooperation with the US Federal Trade Commission and the Japanese Fair Trade Commission in the context of the bilateral cooperation agreements between the respective authorities.

2.2 EDF/Segebel

On 12 November 2009, the European Commission cleared the proposed acquisition by EDF (France) of exclusive control of Segebel (Belgium), a holding company whose only asset is a 51% stake in SPE

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

S.A., which is the second largest electricity operator in Belgium. Both companies are active in the energy sector. To allay competition concerns on the part of the Commission in relation to the reduced incentives for EDF to continue with its plans to build additional electricity generation capacity in Belgium after the proposed acquisition, EDF has committed to immediately divest the assets of a subsidiary in charge of one of EDF's planned power station projects. In addition, if EDF were not to invest in a second planned power station by a given date, or if no decision to invest had been taken by then, EDF has undertaken to divest the assets of the subsidiary developing that project. In the light of the remedies proposed, the Commission concluded that the operation would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. As a result, the Commission has decided that there is no need for the matter to be examined by the Belgian competition authority (Conseil de la Concurrence), which had asked for a partial referral of the case under Article 9.

EDF and its subsidiaries are active, both in France and elsewhere, in the generation and wholesale trading of electricity and the transmission, distribution and retail supply of electricity, as well as the provision of other electricity-related services. EDF is also active, although to a lesser extent, in the natural gas retail and wholesale markets. Its presence in Belgium has been relatively limited, despite the fact that it was the third largest electricity operator.

Segebel's only asset is a 51% equity interest in SPE S.A., which is a Belgian company active in the production of electricity and in the trading and supply of electricity and gas in Belgium. SPE produces electricity through a portfolio of power plants in Flanders and Wallonia. It is the second largest electricity operator in Belgium after the incumbent operator, GDF SUEZ (Electrabel). It is present in the market under the Luminus brand.

The Commission's investigation revealed that the proposed transaction would not significantly affect competition on most relevant markets, as there were few, if any, horizontal overlaps between the parties' various activities.

Nevertheless, the Commission identified competition concerns in various Belgian electricity markets, in particular with regard to the Belgian wholesale electricity market. These concerns arose from the fact that the proposed transaction eliminated EDF as a potential significant entrant in these markets, because the incentives for the merged entity to develop new generation capacity in Belgium were likely to have been significantly reduced in comparison to the incentives that EDF had enjoyed before the takeover. EDF has been developing two sites which would add 10% to

Belgium's capacity. This additional capacity would allow EDF to further develop its business in the downstream markets for supplies to end consumers.

The Commission took the view that, in the absence of development on the part of EDF, the remedy package would provide another operator with sufficient incentives to develop the sites, equivalent to EDF's incentives to do so prior to the takeover.

2.3 Towers Perrin/Watson Wyatt

On 4 December 2009, the European Commission approved a merger between US-based consultancy companies Towers Perrin and Watson Wyatt. The approval was conditional upon the parties' divestment of Watson Wyatt's life actuarial software business, *VIPitech*. The Commission had concerns that the transaction, as originally notified, would have given rise to competition issues in the field of actuarial software for life insurance in the European Economic Area (EEA).

Towers, Perrin, Forster & Crosby, Inc. (Towers Perrin) and Watson Wyatt Worldwide, Inc. (Watson Wyatt) are global consulting firms providing consulting services in human capital and financial management. Both Towers Perrin and Watson Wyatt provide services in the fields of retirement benefits consulting, pension administration, investment consulting, human capital services, insurance and financial services consulting. They also offer a number of software solutions related to their consulting services.

The Commission investigated a number of national and EEA-wide markets, where the activities of the parties overlap to an appreciable extent, namely in the areas of retirement benefits consulting, pension administration, financial valuation and capital adequacy consulting, general insurance consulting and actuarial software for life insurance. The Commission found that competition concerns could be excluded in all markets except one, because – even in those markets where the shares of the combined firm would be significant post-transaction – a sufficient number of credible competitors would remain and would be able to expand their capacity after the proposed transaction.

However, the Commission found that the transaction gave rise to competition concerns in the market for the supply of actuarial software for life insurance in the EEA, where the number of actual established competitors post-transaction would be reduced from three to two. To address the Commission's competition concerns, the parties proposed to divest Watson Wyatt's *VIPitech* business.

In view of the proposed commitments, the Commission concluded that the proposed transaction would no longer raise any competition concerns.

2.4 Bilfinger Berger/MCE

On 18 December 2009, the European Commission cleared the acquisition of the Austrian company MCE AG by German-based Bilfinger Berger AG. Both companies are active in industrial services. In its investigation, the Commission identified competition concerns in the market for the installation of high pressure pipes. Therefore, its clearance decision is conditional upon the divestiture of a major part of MCE's business in the installation of high pressure pipes.

The Commission's investigation of the proposed transaction identified competition concerns in the German/Austrian market for the installation of high pressure pipes. High pressure pipes are mainly installed in power plants and represent up to 10% of the entire cost of a new plant. As a result of the proposed concentration, Bilfinger Berger - the market leader in this area - would have acquired the third largest player, MCE, which had grown rapidly into a significant competitive force.

In order to address the competition concerns identified by the Commission, Bilfinger Berger offered to divest its subsidiary, MCE Energietechnik GmbH, which is specialised in the installation of high pressure pipes but also offers complementary services. In addition, a large MCE high pressure pipe project will be transferred from another MCE subsidiary to the Divestment Business.

Following a satisfactory market test, the Commission concluded that the commitments offered by Bilfinger Berger would remove its competition concerns.

3. Summaries of decisions taken under Article 9

3.1 SNCF-P/CDPQ/Keolis/Effia

In response to a request by France's Competition Authority, the European Commission decided, on

30 October 2009, to refer to that authority the matter of examining the acquisition of joint control of the French companies Keolis et EFFIA by France's Société Nationale des Chemins de fer français (SNCF) and the Caisse de Dépôt et de Placement du Québec (CDPQ) of Quebec, Canada. The Commission took the decision to refer the matter to the Competition Authority, because a merger would risk having a significant effect on competition in the public passenger transport markets only in France.

The operation in question was the acquisition of joint control by SNCF and CDPQ of Keolis, which specialises in public passenger transport by bus and coach, and EFFIA, which is currently an SNCF subsidiary specialising in services connected with public passenger transport.

SNCF operates passenger rail transport services on France's rail network and other rail transport services, including international services. It also manages the infrastructure of the French rail network ('Réseau ferré').

CDPQ is an institutional fund manager, which basically administers the pension and insurance scheme funds of public and private bodies, mainly in Quebec.

In its request for referral of 8 October 2009, the French Competition Authority stated that the proposed operation would be likely to significantly affect competition in the French public passenger transport markets through potential conglomerate effects, that is to say anti-competitive effects connected with the presence of the new group throughout the whole transport chain. Moreover, the markets in France in which competition would be affected by the operation are national or regional in scope.

Following an inquiry conducted among customers and competitors of the companies concerned, the Commission agreed to France's request.

EDF/Segebel (SPE)

More power to boost competition in Belgian energy markets.

Pablo Asbo, Raphaël De Coninck, Cyril Hariton,
Krisztian Kecsmar, Polyvios Panayides and Augustijn Van Haasteren ⁽¹⁾

1. Introduction

In September 2009, the Commission received a notification of a proposed concentration whereby Electricité de France (“EDF”) would acquire from Centrica, a UK energy company, a 100% stake in Segebel (hereinafter the “transaction”). Segebel is a Belgian holding company, whose only asset is a 51% stake in SPE S.A. (“SPE”).

EDF and its subsidiaries are active in various electricity markets, including the generation, wholesale and trading of electricity and the retail supply of electricity in France and other countries. EDF is also active, to a lesser extent, in the retail and wholesale markets for natural gas, including Belgium. Although EDF is currently the third largest operator, its presence in Belgium’s electricity markets has so far been relatively limited. However, EDF is currently developing two investment projects for CCGT generation capacity that would significantly expand its market presence in Belgium.

SPE is a Belgian company active in the production, wholesale and trading of electricity and the supply of electricity and gas in Belgium. SPE has a portfolio of power plants and is the second largest electricity generator in Belgium, after the incumbent operator GDF SUEZ (Electrabel). It operates in the end-consumers markets under the Luminus brand.

Once the transaction is completed, the two largest Belgian electricity companies would be controlled by French companies in which the French State holds interests. The French State holds a controlling interest in EDF ⁽²⁾ and, since 2006, has held a 35.91% stake in GDF SUEZ. Electrabel is Belgium’s biggest electricity company and is part of the GDF Suez group ⁽³⁾.

The Commission’s investigation revealed that the transaction would not significantly affect competition on the most affected markets. Nevertheless, despite the low market share of the merging parties, the transaction raised competition concerns with regard to the Belgian electricity generation, wholesale and trading market (hereafter “electricity wholesale

market”). In this market, the operation threatened to remove EDF, which was the most ambitious potential entrant. However, the merging parties offered remedies that addressed these concerns. Consequently, the Commission was able to clear the transaction, with conditions, following its Phase I investigation.

After the case had been notified to the Commission, the Belgian National Competition Authority (the “Belgian NCA”) requested the Commission to refer the EDF/Segebel transaction to the Belgian NCA as far as the Belgian electricity markets were concerned, pursuant to Article 9(3)(b) of the EC Merger Regulation, although the criteria set out in Article 9(2)(a) of the EC Merger Regulation for referral were fulfilled. The Commission exercised its discretion under Article 9(3) and decided not to refer the case to the Belgian authorities.

2. Market definitions

The transaction primarily concerned the Belgian wholesale markets for electricity as well as the market for supply of H-Gas to small industrial and commercial customers in Belgium. Any overlaps between the Parties in other markets, and in France and the Netherlands, were very limited.

Only the market definition relating to the Belgian wholesale electricity market is described here because the transaction raised serious doubts solely as to its compatibility with the common market with regard to this market.

Contrary to its past decisions concerning Belgium ⁽⁴⁾, the Commission took the view that the Belgian electricity wholesale market comprised, apart from locally generated electricity and imports, also electricity products traded on organised and OTC trading platforms (whether or not they were physically or financially settled). This market definition took into account the results of the market investigation from which it became apparent that the conditions of competition in Belgium are homogeneous enough to consider that traded electricity cannot be distinguished from locally generated and imported electricity. This view is consistent with the Commission’s more recent decisions concerning electricity markets ⁽⁵⁾.

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

⁽²⁾ The French State holds 84.6% of the issued ordinary shares of EDF.

⁽³⁾ M.4180 – *Gaz de France / Suez*

⁽⁴⁾ In particular M.4180 – *Gaz de France / Suez*

⁽⁵⁾ In particular Case M.5224 EDF – *British Energy*

On the other hand, the Commission followed its past decisions that defined the geographic scope of the electricity wholesale market as being national in scope. The recent introduction of market coupling mechanisms, linking the day-ahead-electricity markets of France, Belgium, and the Netherlands, was considered insufficient to offset the differences between the Belgian market and the markets of these neighbouring Member States. The fact that the liquidity and composition of traded electricity products in Belgium continues to differ in important respects from those in adjoining Member States was an important consideration in this regard, as it demonstrates that electricity trading is not sufficiently homogeneous and does not allow the substitution of traded products between adjoining electricity markets.

3. Possible coordination risks due to shareholdings by the French State in both GDF Suez (Electrabel) and EDF

As for the analysis of the competitive assessment of the transaction, the Belgian NCA submitted in its referral request that there was a risk of coordination between EDF and GDF SUEZ when taking their strategic business decisions resulting from their common shareholder, the French State, and the common management through the French Government's shareholding agency ("Agence des Participations de l'Etat" or "APE").

The Commission took the view that when an undertaking establishes its own business plan, budget and strategy, in its own commercial interests and in an independent manner, it can be considered as having an independent power of decision in relation to other undertakings where the same State is the main or a major shareholder.

To assess whether the undertaking has such independent power of decision, two aspects were analysed: (i) the existence of interlocking directorships between the undertakings owned by the same acquiring entity; and (ii) the existence of adequate safeguards ensuring that commercially sensitive information is not shared between such undertakings. As regards the first aspect, none of the representatives of the French State appointed to the Board of Directors of EDF is also a member of the Board of Directors of GDF Suez (Electrabel), and *vice versa*. As regards the second aspect, it was confirmed that the members of the Board are bound by governance rules relating to confidentiality and independ-

ence, in accordance with the corporate governance principles applicable to listed companies⁽⁶⁾.

The information provided by EDF indicated that EDF is able to establish its business plans independently of GDF Suez (Electrabel) and in accordance with its own commercial interests. During the market investigation the Commission did not receive any evidence to the contrary. The fact that a governmental agency (APE) is responsible for managing the French State's shareholdings in EDF and GDF Suez (Electrabel) did not call this conclusion into question. Its role is clearly limited and it does not affect the commercial and business autonomy of these companies.

The commercial independence of EDF is demonstrated by its plans to expand its business in Belgium, in particular by preparing the construction of significant new CCGT generation capacity. These expansion plans, through their impact on Belgian's electricity wholesale prices, would be more likely to have a negative effect on the revenues of GDF Suez (Electrabel) than on any other market participant in the Belgian electricity wholesale market. EDF's expansion plans thus refute the assertion that the French State is exerting its influence on EDF and GDF SUEZ with a view to increasing the profits of both groups.

Consequently, since EDF can be regarded as a company with its own powers of decision independent of GDF Suez (Electrabel), and is actually a competitor of GDF Suez (Electrabel), the alleged risk of coordination with GDF Suez (Electrabel) in the Belgian electricity markets due to the companies having the same major shareholder was considered unfounded.

4. Competition concerns identified by the Commission

Even though the parties' combined *current* market shares in the Belgian electricity wholesale market were relatively modest, competition concerns were identified as the operation would give rise to horizontal unilateral effects. The Commission found that the operation would significantly affect the incentives for the merged entity to continue to develop EDF's planned projects in additional CCGT generation capacity. These projects are sizeable and likely make EDF the most ambitious entrant into the Belgian electricity wholesale market. Consequently,

⁽⁶⁾ They follow the governance principles applicable to listed companies, as described in the guidelines published on 17 December 2003, entitled "Enforcement of the Financial Security Act with regard to the chairman's report on internal control procedures established by the company" by the *Association Française des Entreprises Privée* (AFEP) and the *Mouvement des Entreprises de France* (MEDEF).

the operation would significantly affect competitive conditions on this market *in the future*.

With regard to the two EDF CCGT projects, the Commission identified a number of plausible scenarios under which the incentives for EDF to develop one or both of its CCGT projects would be significantly reduced after the merger, taking into account the negative impact of the additional capacity on EDF and SPE's combined electricity sales on prices. A company considering investing in new generation capacity takes into account not only the stream of revenue generated on the project itself (as any entrant with no existing installed capacity would do), but also the impact of the added capacity on overall price levels and hence on the profits earned by all the power plants in its portfolio. Post-merger, the combined entity would have a larger portfolio than EDF alone, which means that the decrease in profits on SPE's installed base would be factored into EDF's investment decisions. In this respect, the analysis carried out by the Commission indicated that the additional capacities planned by EDF would have a significant impact on prices, and hence on the margins earned by SPE's installed power plants, which would significantly reduce the profitability of these projects for the combined entity⁽⁷⁾.

EDF is not the only entrant in the Belgian electricity wholesale market. E.ON recently also entered this market through the acquisition, from GDF SUEZ, of 1,441 MW of existing generation capacity located in Belgium. However, in contrast to EDF, E.ON's entry does not bring any new generation capacity to Belgium. New generation capacity leads to more effective competitive pressure, as this directly affects the balance between supply and demand in Belgium. Consequently, the fact of E.ON's entry cannot offset the negative effects that the proposed transaction would have in reducing the incentives for EDF to pursue its ambitious expansion strategy.

Therefore, the view was taken that there were serious doubts with regard to the incentives of the merged entity to further develop EDF's two planned CCGT projects after the merger. The operation would remove EDF as the most ambitious potential entrant into the Belgian electricity wholesale market and, thus, remove the improvement in competitive conditions on the Belgian electricity wholesale market that would have been expected in the absence of the transaction.

The Commission did not identify any serious competition issues with regard to coordinated or non-horizontal unilateral effects resulting from the

⁽⁷⁾ SPE also had a pre-merger investment project in CCGT generation capacity. However, it was considered that the merged entity would have no incentive to delay or decline investing in this project.

transaction on the remaining Belgian electricity markets⁽⁸⁾.

5. Remedies

In order to address the identified competition concerns related to the incentives for the merged entity to continue to develop EDF's investment projects, the Parties submitted commitments to the Commission. The accepted commitments were:

- (i) The immediate divestiture of the assets of one of the two companies set up to implement EDF's planned CCGT projects; and,
- (ii) The divestiture of the assets of the other company in the event that, by a certain date⁽⁹⁾, the new entity has not taken a positive investment decision to construct the CCGT project in question or has decided not to proceed with the investment. EDF must invest or divest.

By divesting the assets, EDF is placing them in the hands of another market participant whose incentives to develop the divested assets are equivalent to those of EDF prior to the proposed transaction.

The Commission therefore concluded that the remedy package removed, in an appropriate and proportional manner, the concerns that it had identified. This was confirmed by the market test of the proposed remedies. Thus, Belgian consumers and businesses will not be disadvantaged, as the incentives to commission new capacity are restored to the pre-transaction levels.

6. Decision on the Belgian referral request

The Belgian NCA requested, pursuant to Article 9(3)(b) of the EC Merger Regulation, that the Commission should, as far as the Belgian electricity markets were concerned, refer the transaction to it with a view to assessing the operation under Belgian competition law.

According to Article 9(3) of the EC Merger Regulation the Commission can refer all or part of a case to the competent authorities of the Member State

⁽⁸⁾ In particular, the Commission assessed whether the increase in multi-market contacts (defined as interactions on different markets) between EDF and GDF Suez (Electrabel) as a result of the proposed transaction was likely to lead to coordinated effects. In this case, the market investigation did not provide any credible indication that factors which currently constrain the incentives of EDF or GDF Suez (Electrabel) to coordinate would be relaxed by the increase in multi-market contacts resulting from the transaction in a way that would make coordination easier, more stable, or more effective.

⁽⁹⁾ The exact date of the final investment decision constitutes a business secret.

concerned where a concentration threatens to significantly affect competition in a market within the relevant Member State which represents all the characteristics of a distinct market⁽¹⁰⁾.

The Commission concluded that the conditions laid down in Article 9(2)(a) of the EC Merger Regulation were fulfilled, because the geographic scope of the relevant markets were at most national. Further, it had serious concerns that the reduction in the incentives of the post-merger entity to develop EDF's CCGT projects might significantly affect conditions of competition on the Belgian electricity wholesale market. Thus, the requirements for a referral as set out in Article 91(2)(a) were fulfilled.

Nevertheless, the Commission had to analyse whether it was appropriate to refer the case to the Belgian NCA under the provisions of Article 9(3)(a) of the EC Merger Regulation. The Commission decided that the Commission was the authority best placed to review the transaction since (i) it has developed,

in recent years, significant expertise in the Belgian electricity markets and there were no compelling reasons to refer the case⁽¹¹⁾, and (ii) the competition concerns highlighted by the Belgian NCA extended beyond Belgium, thus requiring a cross-border analysis for which the Commission was better equipped. Furthermore, adequate remedies had already been proposed by the parties and the fact that it was uncertain whether these remedies could be obtained by the Belgian NCA⁽¹²⁾ was also taken into account.

For these reasons, the Commission decided to deal with the transaction itself.

7. Conclusion

In view of the above, the Commission issued, on 12 November 2009, an Article 6 decision on the competition aspects of the transaction, clearing the transaction with commitments in Phase I, and a decision under Article 9, rejecting the referral request by the Belgian Authorities.

⁽¹⁰⁾ The Belgian NCA argued that various threats to competition would result from the transaction, *inter alia* due to the French State's shareholding in EDF and GDF Suez (Electrabel) and the alleged risk of coordination between these groups.

⁽¹¹⁾ Point 13 of the Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), OJ C 56

⁽¹²⁾ Under Belgian law, mergers are automatically cleared if the combined market share of the merging parties remains below 25%. The market definition for the wholesale and generation market adopted for this Decision (see above) that included electricity trading activities, made it unlikely that these market shares would be attained.

Merger Case M.5421 Panasonic/Sanyo – Batteries included or ‘lost in translation’?

Rita Devai, Tobias P. Maass, Dimitrios Magos and Robert Thomas ⁽¹⁾

1. Introduction

It would be fair to say that consumer electronic products, rather than batteries, are perhaps the first things that come to mind when the names ‘Panasonic’ and ‘Sanyo’ are mentioned. Although the Commission’s 2009 investigation of the tie-up between these two Japanese groups looked closely at a number of consumer products ⁽²⁾, it was in fact batteries in various shapes, sizes and chemistries that were at the heart of the competition analysis ⁽³⁾.

The case raised a number of interesting issues from a merger control perspective related to the Commission’s remedy policy and how the Commission interacts with other competition authorities around the world. Besides notification to the European Commission, the transaction was subject to review by at least ten other competition authorities.

Considering the importance of the transaction and to gain the maximum benefit from international cooperation, the case team made contact with their Japanese and US colleagues at a very early stage of the procedure (during pre-notification). These early contacts allowed the authorities to exchange information on their procedural timetables and the focus of their market investigations. During the procedure, a great deal of information was exchanged between the three authorities. These exchanges were made possible thanks to bilateral agreements on competi-

tion between the Commission and the governments of Japan ⁽⁴⁾ and of the United States ⁽⁵⁾. The parties granted waivers to the European Commission to enable it to share and discuss confidential information with its Japanese and US counterparts. Cooperation with the Chinese authorities was not possible given the absence of a similar bilateral agreement between the European Commission and the Chinese Ministry of Foreign Commerce (MOFCOM).

In addition to the European Commission, three other authorities, namely the US Federal Trade Commission (FTC), the Japanese Fair Trade Commission (JFTC) and MOFCOM, cleared the case conditionally after the parties submitted remedies. As the market structure differs across regions, the competition concerns were not always identical. In order to avoid conflicting remedies in different regions and to ensure that, in the interest of the merging parties, the remedies were consistent and coherent, the Commission worked in close cooperation with its US and Japanese counterparts.

2. Rechargeable batteries for automotive use

The Commission looked in some detail at batteries ⁽⁶⁾, or more precisely, rechargeable batteries and their actual and potential use in passenger cars.

These batteries have attracted much attention recently as various battery producers, car manufacturers and even governments have announced plans to support the development of battery technology and encourage the move towards the mass production of electrically powered vehicles, perceived to be more environmentally friendly.

⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors. The authors would like to thank the case manager, Maria Reh binder, for her invaluable comments.

⁽²⁾ The Commission examined the horizontal overlaps between the merging parties in digital still cameras, voice recorders, DVD player-recorders, home audio systems, flat-panel televisions, digital projectors, microwave ovens, air conditioners and camcorders. A detailed description of these markets can be found in the public version of the decision, which can be accessed on the website of the Directorate-General for Competition at the following address: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_5421.

⁽³⁾ This case highlighted the difficulties of conducting an extensive investigation of companies that do not ordinarily use a Community language in their day-to-day affairs. That said, the Commission was able to benefit from the parties’ need to translate documents for the US authorities, which base an in-depth investigation (second request) on extensive document requests. It might be worth mentioning that the second request of the FTC was quite substantial, so that the notifying parties had to hire more than 1 000 Japanese-English translators to handle the document requests in a timely manner.

⁽⁴⁾ Agreement between the European Commission and the Government of Japan concerning cooperation on anti-competitive activities, OJ L 183, 22.7.2003, p. 12.

⁽⁵⁾ Agreement between the Government of the United States of America and the European Communities regarding the application of their competition laws, OJ L 95, 27.4.1995, pp. 47-52, approved by Decision 95/145/EC, ECSC of the Council and the Commission of 10 April 1995.

⁽⁶⁾ Batteries are devices that produce electrical energy by means of a chemical interaction between a negative electrode (anode) and a positive electrode (cathode) through a conductive material (electrolyte). The resulting electricity may be tapped from the cell and used to power a wide range of devices.

Electrically powered vehicles, which include hybrid electric vehicles (HEVs), plug-in HEVs (PHEVs) and pure electric vehicles (EVs), are currently sold in limited volumes in comparison to conventional vehicles⁽⁷⁾. Their sales, however, are expected to increase dramatically in the future as consumers become more familiar with the new technology and car manufacturers strive to meet more stringent emission and fuel consumption targets by either partnering or replacing the vehicle's internal combustion engine with an electric motor.

The batteries used in these new vehicles are for the most part developed from the nickel metal hydride (NiMH) and lithium-ion (Li-ion) technologies that are used in the type of portable batteries that power hand-held devices such as power tools, mobile phones, personal care products and laptops.

2.1 Combination of the leading players — but no competition concerns

Sanyo is active in the manufacture and supply of NiMH batteries for automotive use and is in the process of beginning the production and commercialisation of batteries using Li-ion technology. Panasonic is, however, currently active only in the manufacture and supply of NiMH batteries both independently and via a joint venture with Toyota (Panasonic EV Energy Co., Ltd. or PEVE), which also has the possibility to offer NiMH batteries to third parties.

The Commission therefore first examined whether the combination of the merging parties' activities in NiMH batteries for automotive use would result in anti-competitive effects as the parties are the leading players in this market.

Although the volume of NiMH batteries manufactured and sold is expected to increase significantly in the near future as a number of vehicle models already under development come to the market using this technology, the Commission's market investigation confirmed that competition to supply NiMH for automotive applications has essentially ended. This is because NiMH, although a proven technology in HEVs, has certain limitations in terms of weight and energy density when compared to Li-ion that appear to make it unsuitable for use in PHEVs

and EVs, where the degree of vehicle electrification and the demands placed on the battery are greater.

As a result, new investment in rechargeable batteries for automotive applications is directed towards Li-ion. The Commission's extensive market investigation confirmed that the development efforts of numerous car manufacturers and battery suppliers are focused on Li-ion for future model programmes (whether HEV, PHEV or EV), leading to the expectation that Li-ion will replace NiMH in the mid-term.

The market investigation indicated that issues may arise relating to the use of Li-ion in automotive applications, such as safety concerns because of the sensitivity of Li-ion technology to high temperatures. However, the Commission found that this would be likely merely to delay the adoption of Li-ion technology and would not lead OEMs to return to NiMH, where the merged entity would have a strong market position. Therefore, the Commission was able to conclude that competition in the market for NiMH automotive batteries was already essentially over.

Given the above circumstances, the Commission concluded that the proposed transaction would not raise competition concerns in the area of rechargeable batteries for automotive use⁽⁸⁾.

The FTC and JFTC reached a similar conclusion to that of the Commission. MOFCOM however found that the concentration as originally notified raised competition concerns in the area of NiMH batteries for automotive use given the merged entity's high market share. To address these concerns, Panasonic committed to divest its automotive nickel metal-hydride battery business to a third party and implement measures to eliminate its influence on the PEVE joint venture with Toyota⁽⁹⁾.

3. Portable batteries

The Commission also investigated primary (non-rechargeable) and rechargeable 'portable' batteries. The term 'portable' refers to batteries that can be carried and as previously noted are used in relatively small devices such as power tools, mobile phones, personal care products and laptop computers. The merged entity will become the biggest rechargeable battery producer in the world.

There are also different technologies for rechargeable batteries which lead to different physical and

⁽⁷⁾ The term hybrid electric vehicle is used to describe a vehicle that combines a conventional internal combustion engine (ICE) with one or more electric motors. An electric vehicle, on the other hand, does not have an ICE and therefore relies entirely on battery power. Plug-in hybrid electric vehicles or PHEVs, which can be seen as an intermediate category in terms of vehicle electrification, have an ICE but differ from HEVs in that their battery can be recharged through external sources whereas the other systems recover electric energy from kinetic energy during the braking process (i.e. regenerative braking).

⁽⁸⁾ This is independent of the exact product market definitions, i.e. possible markets for NiMH and/or Li-ion modules and/or battery systems.

⁽⁹⁾ <http://panasonic.co.jp/corp/news/official.data/data.dir/en091104-5/en091104-5-1.pdf>.

performance characteristics⁽¹⁰⁾. In general terms, the market investigation showed that NiMH batteries are being replaced by Li-ion technology, in particular for some ‘weight-sensitive’ applications (such as mobile phones and laptops). As a result, today, Li-ion is by far the dominant technology.

However, and in contrast to batteries for passenger cars, the Commission found that for some applications NiMH offers very desirable properties such as increased safety, reliability and lower cost and therefore the demand for NiMH portable batteries for these applications will persist. These applications include power tools, cordless telephones, shavers as well as consumer rechargeable batteries⁽¹¹⁾.

3.1 Different market dynamics in the NiMH and Li-ion markets

Different competitive conditions resulted in different conclusions being reached with respect to the Li-ion and NiMH battery markets despite the leading position of the merged entity post-transaction in both of these markets.

The market investigation showed that for NiMH batteries the parties are considered to be very close competitors. For some high-quality industrial applications they are even viewed by market participants as the only two reliable suppliers. This was also supported by the parties’ tender data. Furthermore, the NiMH market is very concentrated and new entry in the market was seen as unlikely by the respondents to the market investigation. As a result the Commission raised competition concerns in the NiMH market.

The situation in the Li-ion market(s)⁽¹²⁾ is somewhat different. Industrial manufacturers considered that competing battery manufacturers offer credible alternative solutions for virtually all applications. These findings were confirmed by the parties’ tender data. Also, the Li-ion market(s) are fast-growing and characterised by a high rate of innovation. Therefore, the Commission was able to clear the market(s) for Li-ion batteries.

The other antitrust authorities reached the same conclusion for the Li-ion markets. As to NiMH battery markets both the FTC and MOFCOM also identified competition concerns that needed to be remedied.

⁽¹⁰⁾ A further rechargeable battery technology not used in passenger cars is based on Nickel Cadmium (NiCd). However, Panasonic is no longer active in this market.

⁽¹¹⁾ They are sold to end-consumers as a replacement for primary (e.g.) alkaline batteries.

⁽¹²⁾ Li-ion batteries might be further segmented according to their different shape and type, i.e. cylindrical, prismatic or polymer.

3.2 Competition concerns for CLBs and rechargeable coin-shape batteries

The Commission raised serious doubts in two further, albeit smaller, portable battery markets, namely cylindrical lithium batteries (CLBs) and rechargeable coin-shape batteries. CLBs are primary (i.e. non rechargeable) batteries that are mainly used in fire alarms and utility meters due to their long shelf life and their ability to generate strong bursts of power. Rechargeable coin-shaped batteries are very small batteries whose diameter is greater than their height. Due to their limited capacity they are mainly used as back up power for certain applications (in mobile phones), in watches as well as for keyless entry systems (in cars). In both of these markets, the Commission identified competition concerns as Panasonic and Sanyo are strong players, close competitors and face limited competition from other battery manufacturers.

The JFTC also identified competition concerns in CLBs⁽¹³⁾ whereas MOFCOM raised doubts in the rechargeable coin-shape battery market.

4. The remedies

In response to the Commission’s findings in phase I, Panasonic and Sanyo agreed to divest the entire overlap for rechargeable NiMH batteries, CLBs and rechargeable coin-shape batteries. The remedy discussions with the parties, the market test and the final commitments submitted touched on a number of interesting issues, namely: (i) the problems with carve-outs, (ii) the submission and market testing of alternative remedies with no *a priori* ranking, (iii) divestments in China, and (iv) the importance of good coordination with other competition authorities in formulating suitable remedies (which will be addressed in the last section of this article).

4.1 Carve-out vs. full plant divestiture

In line with the commitments submitted originally to the JFTC, the parties initially proposed a carve-out solution to the Commission to remedy the competition concerns for CLBs and rechargeable coin-shape batteries. The Commission’s investigation, however, showed that a carve-out solution could not be accepted as a *prima-facie* clear-cut remedy to be market tested. The Commission Notice on Remedies⁽¹⁴⁾ expresses a clear preference for divestiture of an exist-

⁽¹³⁾ The competition concern identified by the JFTC related mainly to the use of CLBs in residential fire alarm systems, which became mandatory in Japan recently.

⁽¹⁴⁾ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, pp. 1-24.

ing stand-alone business over a carve-out solution as it offers a higher likelihood that the business will be able to compete effectively with the merged entity on a lasting basis.

In the present case, the respective battery manufacturing equipment consisted of heavy machinery which could only be removed, transported and reassembled at high cost. Furthermore, it would have led to considerable disruption of the business as it is a time-consuming process. In addition, it was doubtful whether the necessary qualified personnel with the requisite know-how would be willing to be transferred to another location.

Therefore, a carve-out solution was not accepted for market testing. Accordingly, the parties committed to divest a plant which would remove the entire overlap in CLBs and in rechargeable coin-shape batteries. The market test confirmed the suitability of this remedy. The JFTC subsequently approved the same commitment in terms of removing the competition concern identified in the (Japanese) CLB market.

4.2 Alternative remedies

To eliminate the competition concerns in the NiMH battery market, the parties proposed to divest either the Panasonic NiMH business or the Sanyo NiMH business. Either alternative would include the respective production facilities with all the respective tangible and intangible assets and would remove the entire overlap between the parties' activities in this area. The two alternative divestments each had their respective strengths and weaknesses and hence differed from a 'crown jewel solution' where one of the proposed divestments *prima facie* is clearly superior. This was confirmed by the market test and therefore both alternatives were retained in the final commitments.

In general, the submission of alternative remedies is not appropriate. They complicate the remedy procedure as the competition authority has to gather information on both alternatives, seek the views of market participants and negotiate the concrete terms of two different scenarios. As the Notice on Remedies stresses it is necessary that the commitments establish a clear procedure on how the divestment takes place⁽¹⁵⁾. It is indispensable that interim preservation and hold-separate measures apply to each alternative remedy business until one alternative

has been completely implemented. In practice this means that both businesses have to be ring-fenced and not integrated into the new merged entity until the divestiture has been implemented. Nevertheless, in the very specific circumstances of this case the Commission accepted alternative remedies.

4.3 Divestment in China

In this case the divestment of plants located in China was part of the remedy package. As more and more products are manufactured in China and global businesses shift their production there, the assessment and effective implementation of divestitures in China becomes increasingly relevant. One particular concern in this case was the feasibility of speedy divestments in China, due to alleged burdensome legislation and approval processes. This could jeopardise the time-frame required by the Commission's standard commitments, which serves to preserve the viability and competitiveness of the divested business. If remedies are also offered in jurisdictions that normally require a fix-it-first solution, the coordination of remedies between jurisdictions adds further complications.

In the present transaction, the divestiture of a plant in China was accepted as a suitable clear-cut remedy by the Commission. Nevertheless, in the end, the alternative divestiture involving a plant in Japan was successfully implemented as it could also be approved by the US authorities in a timely fashion.

5. International cooperation

Given the procedural and substantial differences between different merger control systems, dealing with multi-jurisdictional transactions can be very challenging for merging parties and for the competent competition authorities. This is particularly true when the clearance of the transaction is subject to remedies agreed with several competition authorities as was the case in Panasonic/Sanyo.

In the present case, the difficulties resulting from procedural differences were further emphasised by the fact that the notification was made much earlier in the US than in the EU. At the time of the formal notification in the EU the FTC had already opened a second-phase proceeding (second request) and the parties were also in an advanced stage of negotiations with the JFTC⁽¹⁶⁾.

⁽¹⁵⁾ In a scenario of real alternative remedies as in the present case, the notifying party has the option throughout the First Divestiture Period to switch between both alternatives until the Commission has approved one of the alternatives. Similarly, the Divestiture Trustee has the option during the Trustee Divestiture Period to switch between both alternatives.

⁽¹⁶⁾ It should be also noted that under the Japanese system, the parties to the transaction (anticipating possible anti-competitive concerns) have the possibility to engage in formal consultation on potential commitments with the JFTC well before the formal filing becomes due. Unlike the Japanese system, the Commission does not adopt such practice and formal remedy discussions only start once competition concerns have been identified.

Thanks to the contacts established with the FTC and the JFTC, the Commission was informed, at an early stage in its procedure, of the major legal, economic and factual focus of its US and Japanese counterparts. The sharing of information received in the framework of the market investigations was beneficial in understanding the different market structures for batteries across the various regions of the world. Moreover, cooperation with the JFTC and the FTC was useful given the world-wide scope of some of the battery markets and the fact that all the production facilities of the parties, competitors and the main customers were headquartered outside the EEA, mainly in Asia.

The biggest challenge of the cooperation was the coordination of remedies. This is not surprising given the overlapping competition concerns on potentially world-wide markets. Furthermore, a locally tailored divestiture was not possible as all relevant production facilities were located outside the EU, mainly in Asia. As a result the Commission had to coordinate its remedy negotiation closely with the

US and Japanese authorities in order to avoid conflicting remedies which would have created problems for the merging parties and caused political unease. The difficulty in finding remedies satisfactory to all authorities was also complicated in the present case by the gap between the different timetables and different procedures⁽¹⁷⁾.

6. Conclusion

The Panasonic/Sanyo case has demonstrated the importance of effective cooperation between competition authorities in particular when remedies are involved. Notifying parties need to be aware of this issue when managing the review process and should be ready to engage constructively in remedy discussions if a successful outcome in phase one is to be achieved. Overall, and after the successful implementation of the remedies, it can be affirmed that international cooperation between the Commission, the FTC and the JFTC contributed significantly to the successful and timely conclusion of the merger review process.

⁽¹⁷⁾ For instance, the US competition authorities generally prefer a fix-it-first solution, whereby the identity of the buyer is decided before closing of the transaction, in contrast to the Commission's post-transaction trustee-based divestment procedure.

State aid: main developments between 1 September and 31 December 2009

By Koen Van de Castele (¹)

1. Policy developments

1.1 Guidelines for broadband networks

The European Commission has adopted Guidelines on application of state aid rules to the public funding of broadband networks. Over the last five years, the Commission has adopted more than 40 individual decisions developing coherent and consistent practice with regard to state support for the roll-out of broadband networks. The new Guidelines build on this experience.

In particular, they explain how public funds can be channelled into deployment of basic broadband networks and next generation access ('NGA') networks in areas where private operators will not invest. The Guidelines outline the distinction between competitive areas ('black' areas), where no state aid is necessary, and unprofitable or underserved areas ('white' and 'grey' areas), in which state aid may be justified if certain conditions are met. This distinction is then adapted to the situation of NGA networks (deployment of which is still at an early stage) by requiring Member States to take into account not only existing NGA infrastructure but also firm investment plans by telecom operators to deploy such networks in the near future. A number of crucial safeguards (such as detailed mapping, open tenders, an open access obligation or technological neutrality and claw-back mechanisms) are laid down in the Guidelines in order to promote competition and avoid 'crowding out' private investment.

The primary objective of the Broadband Guidelines is to foster wide and rapid roll-out of broadband networks, while at the same time preserving the market dynamics and competition in a sector that is fully liberalised. The Guidelines also specify that whenever state aid is granted to private operators it must foster competition by requiring the beneficiary to provide open access to the publicly funded network for third-party operators.

1.2 Technical amendment to the Temporary Framework

On 8 December 2009 a technical amendment to the Temporary Framework was adopted (²) to open up easier access to finance and encourage long-term investment, especially in Member States with low labour costs. Member States will now be able to base the maximum amount of the investment loan covered by a guarantee either on the total annual wage bill of the beneficiary or on the EU-27 average labour costs established by Eurostat (the latest available data). (An earlier amendment made on 28 October 2009 allows separate compatible aid limited to € 15 000 for farmers (³).)

2. Cases approved (⁴)

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

France Télévision

On 1 September 2009, the European Commission authorised a payment of state aid to France Télévision in 2009 (⁵), as it complied with the Commission Communication on state aid for the funding of public service broadcasters. The Commission approved immediate payment of a € 450 million subsidy for 2009 of France Télévision's public service broadcasting costs, for which provision had already been made in France's Budget Act adopted in December 2008. However, at the same time, the Commission opened a formal investigation into several aspects of funding notified for subsequent years (⁶). The Commission is concerned about the use made of the taxes introduced by the reform and about possible overcompensation for public service costs up to 2011 and 2012. France will have an opportunity to comment on the concerns expressed by the Commission, which will also take stakeholders' comments into account before taking a final decision.

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

(²) Official Journal C 303, 15.12.2009, p. 6.

(³) Official Journal C 261, 31.10.2009.

(⁴) This is only a small selection of the cases approved in the period under review.

(⁵) N 34a/2009.

(⁶) N 34b/2009.

Dutch social housing

On 15 December 2009, the European Commission endorsed commitments made by the Dutch authorities to bring the social housing system into line with EU state aid rules⁽⁷⁾. In particular, the Dutch authorities will ensure that state funding is not used for commercial activities and that housing is allocated in a transparent manner based on objective criteria. The Commission also approved new aid of € 750 million for social housing projects in declining urban areas for the next ten years. The Commission found the aid compatible with the rules on services of general economic interest. In 2005, the Commission had expressed doubts about the social housing system in the Netherlands. It had received complaints from Dutch house-building companies that, with the help of state aid, social housing corporations were steadily expanding their commercial activities instead of using state funding to provide social housing. The state support for social housing corporations mainly takes the form of loan guarantees and grants. Following the Commission's investigation, the Dutch authorities have undertaken to change the social housing system to make it more transparent and focus on a clearly defined target group of socially less advantaged persons. Commercial activities, by contrast, can no longer benefit from aid. On commercial housing markets, social housing corporations will have to compete on the same conditions as other operators.

In the interest of social mix and social cohesion, 90 % of the dwellings in each housing corporation ('woningcorporatie') will be rented to a pre-defined target group of socially less advantaged persons. The remaining 10 % may be allocated to other groups, but on the basis of objective criteria with an element of social prioritisation. The Commission concluded that social mix and social cohesion are valid public policy objectives, for which state aid may be justified. The Commission's decision confirms its long-standing policy line that national authorities have a wide margin for defining the criteria and conditions for social housing and other services of general economic interest.

Polish post

On the same day as the Dutch decision, the European Commission also endorsed a scheme to compensate the Polish post for net losses incurred in discharging its public service obligations between 2006 and 2011⁽⁸⁾.

The Commission found the compensation mechanism compatible with Article 106(2) of the TFEU, provided certain conditions are fulfilled. In partic-

ular, the Commission required Poland to improve the parameters for calculating, monitoring and reviewing the compensation, in order to avoid overcompensation, and the arrangements for repaying overcompensation. Poland must also ensure that any significant changes made to the Polish accounting system during the aid scheme are compatible with Article 14 of the EU Postal Directive (Directive 97/67/EC) and that the Commission is informed of such changes within three months of their introduction. The Commission authorised the measure until 31 December 2011.

Finally, the Polish post has been transformed from a state enterprise into a joint-stock company in which the Treasury holds 100 % of the shares. As a result, it has lost the legal status which prevented it from going bankrupt, which was equivalent to an unlimited state guarantee. The company is now subject to ordinary bankruptcy proceedings.

Broadband Hauts-de-Seine

On 30 September 2009, the European Commission approved public co-financing of the roll-out of a passive, neutral and open broadband network covering the entire French department of Hauts-de-Seine, including the non-profitable areas⁽⁹⁾.

The broadband infrastructure will be constructed and operated under a 'public service delegation', a form of concession under French law, lasting for 25 years.

The Commission concluded that the public funding totalling € 59 million would be used to offset the cost of complying with the obligations of a service of general economic interest imposed following an open and transparent tendering procedure and therefore was not state aid. In particular, the compensation does not exceed the cost of rolling out the network in the non-profitable areas of Hauts-de-Seine. The Commission found that the plan is in line with the precedent established by the Court of Justice in the 'Altmark' case and with the new Guidelines on the application of state aid rules to the financing of high-speed and very high-speed broadband networks.

In particular, the public service concession-holder chosen as a result of a prior competition procedure will have the status of 'operator of operators' and will not be able to deal directly with final consumers or sell services to them. The availability of 'dark fibre' (optical fibre that is sold and installed but not connected to active equipment) will make real competition possible at every level. The compensation granted (€ 59 million) is intended solely to offset the

⁽⁷⁾ E 2/2005.

⁽⁸⁾ C 21/2005.

⁽⁹⁾ N 331/2008.

costs arising from the roll-out of such a network in non-profitable areas of Hauts-de-Seine.

2.2 Decisions taken under Article 107(3)(b) of the TFEU

2.2.1 Banking

Schemes

On 11 September, the Commission endorsed a Finnish recapitalisation scheme for banks⁽¹⁰⁾. Under this scheme the Finnish state will subscribe non-cumulative and unsecured subordinated loan instruments issued by eligible banks equal to up to one quarter of the amount of their own funds required. The subordinated loans would be reimbursed after three years upon approval by the Financial Supervisory Authority.

On 25 September, the Commission approved a Polish scheme to stabilise the financial system⁽¹¹⁾. Two kinds of support measures are envisaged: state Treasury guarantees for issues of new senior debt by banks and liquidity support measures in the form of Treasury bonds, either as a loan or to be sold with deferred payment. The Commission found the measure in line with its Guidance Communication on state aid to overcome the current financial crisis. In particular, the scheme provides for non-discriminatory access for eligible financial institutions, is limited in time and scope and contains safeguards to minimise distortion of competition.

The Commission authorised a Cypriot scheme⁽¹²⁾ on 22 October 2009. Cyprus will issue special government bonds that it will lend to credit institutions to use as collateral to obtain liquidity from the European Central Bank (ECB) and on interbank markets. The credit institutions will use the liquidity raised for housing loans and loans to small and medium-sized enterprises on competitive terms.

The Commission approved amendments to an Irish measure⁽¹³⁾ on 20 November. The material scope of the scheme has changed. The new guarantee excludes subordinated debt and extends to instruments with a maturity of up to five years. Previously, liabilities were covered until 29 September 2010 at the latest. Secondly, the duration of the scheme has also been altered. The instruments guaranteed under the scheme may be issued from 1 December 2009 until 1 June 2010. Finally, the new scheme aligns the guarantee fee to the remuneration structure set out in the Commission Guidance Communication on state aid to overcome the financial crisis.

On 8 December, the European Commission approved a Slovak scheme aimed at maintaining stability in the banking sector by providing capital injections and guarantees to eligible financial institutions⁽¹⁴⁾.

Ad hoc aid

On 18 November 2009, the Commission adopted decisions on the restructuring of three major banks: ING, Lloyds and KBC.

ING

ING received a € 10 billion capital injection from the Dutch state on 22 October 2008. This was authorised by the Commission as rescue aid on 13 November 2008⁽¹⁵⁾. After early redemption of € 5 billion before the end of 2009, ING obtained better repayment terms worth approximately € 2 billion. Moreover, ING received € 12 billion under the Dutch liquidity guarantee scheme, approved by the Commission in October 2008⁽¹⁶⁾. Finally, on 26 January 2009, the Dutch government provided ING with an illiquid asset back-up facility covering 80 % of a portfolio of \$ 39 billion. The Commission approved the measure on 31 March for six months, while at the same time opening an in-depth investigation into the valuation of the portfolio and the degree of burden-sharing.

At the end of its investigation, the Commission was able to approve the restructuring plan for ING, including the illiquid asset back-up facility provided by the Dutch state⁽¹⁷⁾. Approval of the facility became possible after an additional agreement between the Dutch state and ING. Under the restructuring plan notified, ING will pay a significant proportion of the restructuring costs, ING's long-term commercial viability will be restored and the aid will not lead to undue distortion of competition. The restructuring plan envisages that ING will reduce the risk profile and complexity of its operations and will sell its insurance activities over time. Following a detailed timetable supervised by trustees, ING will also carve out a business unit (Westland Utrecht Hypotheekbank (WUH)/Interadvies) to step up competition on the Dutch retail banking market. The Netherlands also committed itself to ban ING temporarily from acquiring other firms and from exercising price leadership. Furthermore, ING will need formal Commission approval for calling (i.e. repaying) hybrid and subordinated debt capital instruments.

⁽¹⁴⁾ N 392/2009.

⁽¹⁵⁾ N 528/2008, see IP/08/1699.

⁽¹⁶⁾ N 524/2008.

⁽¹⁷⁾ C 10/2009; the Netherlands and ING have announced an appeal before the General Court against the Commission decision. See [http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vic8ao6fx9wi?ctx=vg9wikc5q2yt,T-29/10 and T-33/10](http://www.europa-nu.nl/9353000/1/j9vvh6nf08temv0/vic8ao6fx9wi?ctx=vg9wikc5q2yt,T-29/10 and T-33/10 respectively) respectively.

⁽¹⁰⁾ N 329/2009.

⁽¹¹⁾ N 208/2009.

⁽¹²⁾ N 511/2009.

⁽¹³⁾ N 349/2009.

These commitments will stay in place for three years or until the full amount of the capital injection is repaid to the Dutch state, whichever is sooner.

Lloyds Banking Group

Lloyds Banking Group is the entity resulting from the acquisition of HBOS by Lloyds TSB in January 2009. In 2008, HBOS was on the brink of bankruptcy as a result of risky lending and heavy dependence on wholesale funding. In view of the importance of HBOS to the UK financial system, the UK government facilitated the takeover of HBOS by Lloyds TSB, notably by making a £ 17 billion (€ 19 billion) capital injection into the bank, which gave the state 43.5 % ownership of Lloyds Banking Group. Approval of this recapitalisation was conditional on submission of a restructuring plan.

On 3 November 2009, a capital-raising share offer of £ 20.5 billion was announced. The Commission found that the state's participation in this share offer worth £ 5.9 billion (€ 6.6 billion) constitutes state aid, since it made it easier to place the shares. This was therefore also assessed in the framework of the restructuring plan.

On the basis of this restructuring plan, the Commission concluded that this scheme is in line with its Communication on restructuring⁽¹⁸⁾. In particular, the plan is that Lloyds will pay a significant proportion of the restructuring costs and ensure a sustainable future for the Group without continued state support and that there will be no undue distortion of competition.

In addition, the plan contains a divestment package for Lloyds Banking Group's core business of UK retail banking to limit the impact of the aid on competition. The divested entity will have a 4.6 % share of the personal current account market gained via a network of at least 600 branches. This proposed divestment package will make it easier for a new competitor to enter the UK retail banking market or strengthen the position of a smaller existing competitor on that market and will therefore remove the distortion of competition created by the aid.

Finally, the Commission found that the exit fee which will be paid by Lloyds Banking Group for not participating in the asset protection scheme is high enough to compensate for the advantage which the bank gained from its participation announced on 7 March 2009.

KBC

KBC has benefited from three aid measures:

- a recapitalisation of € 3.5 billion;

⁽¹⁸⁾ N 428/2009.

- a second recapitalisation of another € 3.5 billion; and
- an asset relief measure on a portfolio containing collateralised debt obligations (CDOs).

The Commission temporarily approved the first recapitalisation on 18 December 2008⁽¹⁹⁾ and the other two measures on 30 June 2009⁽²⁰⁾, while simultaneously opening an in-depth investigation into several aspects of the asset relief measure. Final approval of the measures was conditional on presentation of a restructuring plan capable of restoring the long-term viability of the bank without continued state support.

The Belgian authorities submitted a plan for in-depth restructuring of KBC on 30 September 2009. KBC will retain its integrated banking and insurance model. However, it will divest or run down a significant number of businesses, including in Central and Eastern Europe, particularly those that are not fully in line with its core business model. Furthermore, it will divest a banking business (Centea) and an insurance business (Fidea) in Belgium which will stimulate competition on this core market. The restructuring plan also sets out how KBC will repay the two capital injections to the Belgian authorities.

The Commission's in-depth investigation⁽²¹⁾ into the asset relief measure dispelled its concerns, as it confirmed that the valuation of the CDO portfolio is in line with the Commission's Communication on impaired assets. In addition, the remuneration paid by KBC to the Belgian authorities is above that required by the same Communication. Furthermore, the Commission found that the restructuring plan will secure the long-term viability of KBC, as the main cause of its difficulties, the CDO exposure, has been addressed by the asset relief measure and the run-down of the business that gave rise to the CDOs. The Commission also found that KBC has contributed adequately to the restructuring from its own resources by means of asset sales and various financial restructuring measures. The Belgian divestments, the other reductions of KBC's business activities and the commitments provided by the Belgian authorities will sufficiently limit any distortion of competition brought about by the aid.

Northern Rock

On 28 October 2010, the Commission approved a package of measures to support the restructuring of UK mortgage bank Northern Rock⁽²²⁾. The bank will be split into a 'good' bank that will continue the economic activities of Northern Rock and a 'bad'

⁽¹⁹⁾ N 602/2008.

⁽²⁰⁾ N 360/2009.

⁽²¹⁾ C 18/2009.

⁽²²⁾ C 14/2008.

bank, an asset management company which will run down the remaining assets. The financial support from the UK government includes recapitalisation of up to £ 3 billion, liquidity measures worth up to £ 27 billion and guarantees covering liabilities totalling several billion pounds. Following an in-depth investigation launched in April 2008, which was extended following substantial amendments to the original plan in May 2009, the Commission concluded that the aid is compatible with the EU rules on state aid and with the Commission's Communications on application of the state aid rules to banks in times of crisis. The Commission also concluded that the restructuring is capable of restoring the 'good' bank's long-term viability, as it will have only limited exposure to Northern Rock's risky past lending. Therefore, it will be able to operate without state support in the long term and will eventually be sold to a third party. Moreover, the aid package will enable the 'good' bank to continue to provide lending to the real economy. The restructuring measures will correct the excessive pre-crisis expansion of Northern Rock and cut its market share to less than half the pre-crisis level. Please see the separate article on Northern Rock in this issue of the CPN.

Royal Bank of Scotland

Under a package of financial support measures approved by the Commission on 13 October 2008, RBS received state recapitalisation of £ 20 billion (€ 22 billion), giving the state a 70 % stake in the bank. Approval of this recapitalisation was conditional on submission of a restructuring plan. This was submitted to the Commission on 2 June 2009 and contained additional state measures.

On 26 February 2009, the UK authorities and RBS announced that the bank would take part in the UK's asset protection scheme (APS). The detailed terms of the APS and of the accompanying aid package for RBS were announced in November 2009: the state would cover 90 % of the losses arising from a £ 281 billion (€ 309.1 billion) portfolio of assets. RBS would retain the first £ 60 billion (€ 66 billion) of losses and the residual 10 % of all further losses. The state would provide a second recapitalisation of £ 25.5 billion (€ 28.05 billion) and give a commitment to provide up to £ 8 billion (€ 8.8 billion) of additional capital if the bank's core tier-one ratio were to fall below 5 % in the next five years.

The Commission considers that the proposed measures will ensure RBS's return to long-term viability⁽²³⁾. The commitment to withdraw from all non-core and riskier business lines will reinforce its capital and liquidity position. The bank's participation in the APS will cap the impact of any further impairment

of the riskier assets on the bank's capital position and help to restore market confidence in the bank.

The Commission also found that the level of first losses borne by RBS under the APS and the remuneration charged by the state for its different measures, together with the restructuring plan, would ensure fair sharing of the burden of past losses and an adequate contribution by the bank and its capital providers to financing the restructuring costs.

The restructuring plan provides for divestment of a number of businesses, including RBS's insurance, transaction management and commodity-trading operations. These sales are important to generate resources which will limit the need for further aid to finance the return to viability, but also to limit the moral hazard (i.e. the danger that a company might take excessive risks if it considers that it will not have to pay for the consequences itself) and any distortion of competition brought about by the aid.

In addition, the plan contains a package for divestment from the UK SME and mid-corporate banking sector, a concentrated market in which RBS is the leading bank. The divested entity will have a 5 % market share in the SME and mid-corporate banking market gained via more than 300 branches and 40 business and commercial centres. This will make it easier for a new competitor to enter the market or for a smaller existing competitor to strengthen its position on the market and will therefore stimulate competition.

LBBW

Landesbank Baden-Württemberg ('LBBW') benefited from two support measures: an injection of € 5 billion of tier-one capital and an impaired assets relief measure in the form of guarantees of € 12.7 billion for two portfolios of structured securities totalling € 35 billion.

The restructuring plan provides for LBBW substantially to change its business model by focusing on its regional core banking businesses and reducing its capital market activities and proprietary trading. Overall, balance sheet reductions will total about 40 % compared with the 2008 year-end figures.

In addition, LBBW will make a series of changes to its corporate governance with the aim of increasing corporate oversight and reducing the potential for undue influence over its day-to-day management. Amongst other things, LBBW will change its current legal status to that of a joint-stock corporation. New requirements regarding the qualifications of board members set out in the EU Banking Directive (Directive 2006/48/EC) will be complied with immediately. In addition, key parts of the voluntary German corporate governance code will be implemented by LBBW before the end of 2010.

⁽²³⁾ N422/2009 and N621/2009.

LBBW has given a commitment to increase the remuneration of the impaired assets measure to be paid to the Land of Baden-Württemberg, thereby bringing the measure into line with the Commission Guidelines on impaired assets.

Moreover, the Commission concluded that the restructuring measures will enable LBBW to restore its long-term viability. In particular, there will be a clear focus on lending activities and the remaining capital market activities should no longer have the potential to jeopardise the bank's soundness. LBBW will also make a sufficient contribution to the costs of the restructuring. In particular, LBBW has agreed to meet the Commission's criteria on burden-sharing by allowing loss-participation by the holders of hybrid capital in the form of non-release of reserves. Finally, from the point of view of appropriate remuneration of the aid and burden-sharing, the Commission was satisfied that the measures set out in the restructuring plan will sufficiently offset the distortion of competition brought about by the aid. In addition, the Commission considers that the changes in corporate governance should ensure that LBBW's soundness will no longer be put at risk and, thus, support its return to viability. On that basis, on 15 December 2010 the Commission approved the impaired asset relief measures and the restructuring plan for LBBW⁽²⁴⁾.

2.2.2 Real economy cases approved under the Temporary Framework

Compatible limited amount of aid (N 408/2009, N 547/2009 and N 523/2009)

The European Commission authorised Polish and Romanian schemes to provide relief to companies encountering financing difficulties as a result of the credit squeeze in the current economic crisis. The schemes meet the conditions set by the Commission's Temporary Framework and do not apply to firms that were already in difficulty on 1 July 2008 (i.e. before the credit crunch).

The Commission also approved an amendment to a Lithuanian scheme allowing aid of up to € 500 000 per company, initially approved on 8 June 2009. The amendment will extend the scheme, in particular to support small non-agricultural businesses in rural areas until the end of 2010.

Aid for the production of green products (N 542/2009)

The Commission authorised an Italian scheme offering interest-rate subsidies for the production of environmentally friendly (green) products. The measure will focus on the car component industry

and, more precisely, on financing investments related to early adaptation to or exceeding the 'Euro 6' standard which regulates emissions from light passenger and commercial vehicles. The Commission concluded that the scheme will facilitate investments in products featuring early adaptation to EU standards to improve environmental protection. It therefore meets the conditions set in the Commission's Temporary Framework for state aid.

Short-term export credit insurance (N 409/2009, N 384/2009, N 532/2009, N 605/2009, N 434/2009, N 554/2009 and N 456/2009)

The Commission authorised Dutch, French, Belgian and Austrian measures to provide insurance cover to exporters who are unable to obtain cover from the private market as a result of the current financial crisis. The Commission found the measure in line with its Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis. In particular, the measures require market-oriented remuneration and focus specifically on the current unavailability of short-term export credit insurance cover on the private market. The Commission authorised the measure until 31 December 2010.

The Commission also approved an amendment to an earlier Danish scheme, which consisted of extension of the list of markets that are temporarily non-marketable, changes to the terms of the quota-share system, namely a reduction of both premiums and insurers' and exporters' minimum retention rate, and introduction of an additional top-up window to supplement the existing quota-share system.

Finally, the European Commission authorised a German scheme to limit the adverse impact of the current financial and economic crisis on the supply of export credit. Under the scheme, the German public credit institution Kreditanstalt für Wiederaufbau (KfW) will be allowed to purchase existing export loans from banks. These banks will have to use the cash received for granting new export loans to purchasers outside the European Union. The Commission found the draft measure in line with its October 2008 Communication on state support for financial institutions in the current financial crisis and authorised it for six months.

Other measures (N 159/2009)

The Commission endorsed a Finnish proposal for tax incentives for productive investment projects. Under the proposed scheme, for the 2009 and 2010 fiscal years Finland will temporarily double the depreciation rates for new factory and workshop buildings and for new machinery and equipment used in them.

⁽²⁴⁾ C 17/2009.

The aim of the scheme is to stimulate investment in response to the current economic downturn. The Commission found that the tax incentive is a general measure, as it will be available to all enterprises with factory or workshop buildings, regardless of their location, size and sector. The measure therefore does not count as state aid. The temporary Finnish tax incentives for productive investment projects are a good example of how to stimulate investment, especially in times of economic downturn, without favouring certain companies, regions or sectors.

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

Regional aid and regeneration

The Commission authorised establishment of urban tax-free zones in certain parts of Italy⁽²⁵⁾. The aim is to encourage regeneration of particularly deprived areas. In the 22 areas classified as urban tax-free zones, small and micro-enterprises starting up new business activities will be eligible for a range of tax exemptions.

The Commission considers that this upgrading of deprived urban areas will contribute to the Community objective of economic and social cohesion. The measure is in line with the Communication of 17 July 2006 on cohesion policy and cities.

Given the level of concentration of socio-economic difficulties and the strict geographical targeting of the planned measures, the Commission considered them necessary and proportionate to achieve the aim of urban regeneration without causing any distortion of competition contrary to the common interest. The Commission also concluded that the effects on trade would be very limited, for the following reasons:

- the main aim of the measures is to combat social exclusion in particularly difficult areas;
- the scheme concerns small and micro-enterprises only;
- the geographical scope of the measures is limited (they cover only 0.58 % of the population);
- the areas were selected on the basis of objective criteria such as the unemployment rate, employment rate, proportion of people under 24 in the total population and level of training.

Fiscal measures

Spanish goodwill

In 2007, the Commission initiated a formal investigation of a corporate tax provision that allows

Spanish companies to amortise goodwill (i.e. write off, over a period of time, the price paid for acquisition of a business in excess of the market value of its assets) stemming from acquiring a stake in non-Spanish companies. This was in response to questions from Members of the European Parliament and complaints that the Spanish scheme was unlawful and had damaging effects in a number of takeover bids by Spanish companies.

Article 12(5) of the Spanish Income Tax Code stipulates that Spanish companies may amortise the financial goodwill resulting from acquisition of a significant shareholding in a foreign company during the 20 years following the acquisition. This results in an economic advantage equal to the difference between the acquisition cost of the shares and the market value of the underlying assets of the target. This is a clear exception to the general Spanish tax system that applies to Spanish-Spanish transactions, as it allows amortisation of goodwill even in cases where the acquiring and the acquired companies are not combined into a single business entity. The Commission found that the favourable treatment of Spanish acquisitions in other Member States was discriminatory and therefore unjustifiable⁽²⁶⁾. These advantages cannot be justified by the general logic of the Spanish tax system, as they mark a clear, unjustified exception to the common rules applicable to acquisitions. Consequently, the Commission requested Spain to abolish the corporate tax provision permitting this amortisation. The Commission also ordered Spain to recover any unlawful aid granted under this provision in connection with European acquisitions since 21 December 2007 (the date of publication of the notice of initiation of the formal investigation procedure, as the Commission recognised the existence of legitimate expectations). As regards application of this provision to acquisitions outside the EU, the Commission will continue its investigation.

Hungarian interest group taxation

In January 2003, the Hungarian authorities introduced new provisions allowing favourable taxation of net interest income received from affiliated companies belonging to the same corporate group. The measure allowed a tax deduction of 50 % of the net interest received from affiliated companies, with the result that only half of the interest would be taxed. Conversely, the affiliated company paying the interest would add 50 % of the amount of net interest paid to its tax base, therefore adding to its tax bill.

The Commission had concerns that the measure was likely to distort competition on the single market, as it was not open to all companies in Hungary and could therefore count as state aid.

⁽²⁵⁾ N 346/2009.

⁽²⁶⁾ C 45/2007.

Following comments submitted by third parties, the Commission concluded that the interest deduction measure was state aid, as it excluded several sectors (e.g. the financial sector) and certain types of companies (small companies).

However, due to the fact that the measure was introduced before Hungary joined the EU, combined with the uncertainties regarding classification of the scheme as aid at the time it was introduced, the Commission concluded that the scheme constituted existing aid which is generally assessed under a specific set of rules known as the ‘cooperation procedure’ (and does not entail recovery of the aid granted) ⁽²⁷⁾. However, as Hungary has already adopted a law repealing the scheme with effect from 1 January 2010, there is no need to open the cooperation procedure.

R&D in the defence sector

The European Commission has concluded that Italian measures in favour of two R&D projects conducted by Agusta concerning helicopters (A139 and BA609) are of a military nature and therefore fall within the scope of Article 346 of the TFEU (which allows Member States to take measures necessary to protect their essential security interests). The Commission therefore closed its in-depth state aid investigation ⁽²⁸⁾, opened in 2003 following a complaint. However, the Commission considers that these measures also have an impact on the civilian market. It will therefore continue to examine, with Italy, how these measures can be adjusted to the rules laid down in the Treaty, including the competition rules, in line with Article 348(1) of the TFEU.

Energy and environment

Alcoa

After an in-depth investigation opened in July 2006, the European Commission found that operating aid granted to aluminium producer Alcoa by Italy since 2006 was incompatible ⁽²⁹⁾. The preferential electricity tariffs that Italy offered Alcoa for its aluminium smelters in Sardinia and Veneto from 2006 to 2010 only contribute to reducing Alcoa’s operating costs and have no other justification. They therefore give the company an unfair advantage over its competitors, which have to operate without such subsidies. The Commission therefore ordered Italy to end the illegal subsidies and to recover part of the aid already paid from Alcoa.

Under the original scheme, the Italian state-owned utility ENEL supplied electricity to Alcoa at a tariff set for ten years, i.e. until December 2005. The

Commission approved this mechanism because, at that time, it was an ordinary business transaction concluded under market conditions and therefore free of state aid.

However, Italy adjusted the original financing mechanism and extended the tariff without adapting it to developments on the market. The current tariff no longer corresponds to market conditions but is a subsidised price, financed by a levy imposed on electricity consumers. Alcoa purchases its electricity from ENEL and the Italian state reimburses Alcoa the difference between the contractual purchase price and the historical tariff, which has been adjusted only marginally over time.

The Commission’s in-depth investigation found that the price subsidy mechanism following the adjustment and extension of the 1996 tariff was illegal state aid in favour of Alcoa since 2006. Electricity supplied below the market price reduces the beneficiary’s ordinary operating costs and enables it to sell its products at a lower price or a higher margin.

The decision therefore requires Italy to put an end to the preferential tariff and to recover the aid already granted. The aid in favour of the Veneto smelter must be paid back in full. However, in the case of the smelter in Sardinia, the Commission accepted that, under the specific circumstances and on the basis of the principle of sound administration, only the part of the aid granted until January 2007 should be recovered.

Production of ceramic products

After an in-depth investigation opened in February 2009, the European Commission found that a tax exemption which the Dutch state intends to grant for natural gas used in installations producing ceramic products would be in breach of EU state aid rules and therefore cannot be implemented ⁽³⁰⁾. In particular, the Commission found that the tax exemption would provide a selective advantage to the Dutch ceramic sector and, hence, count as operating aid. The proposed tax exemption did not stem from the basic guiding principles of the Dutch system on the taxation of energy products. Such operating aid can be authorised only if it furthers, at least indirectly, environmental objectives, as required by the EU Guidelines on state aid for environmental protection. Reductions of or exemptions from environmental taxes concerning certain sectors or categories of undertakings may make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement in internalisation of environmental costs, and to create further incentives to improve environmental protection. The Guide-

⁽²⁷⁾ C 10/2007.

⁽²⁸⁾ C 61/2003.

⁽²⁹⁾ C 36/b/2006 and C 38/a/2004.

⁽³⁰⁾ C 5/2009.

lines allow tax exemptions, under certain conditions, in cases where a tax without reduction would lead to a substantial increase in production costs which cannot be passed on to customers without causing substantial reductions in sales (the ‘necessity test’). As the Netherlands has not demonstrated how the measure would comply with the relevant Guidelines, the Commission concluded that it would be incompatible with the EU state aid rules.

3. Decisions under Article 108 of the TFEU

The Commission brought another case before the Court of Justice for failure to recover, this time from Arbel Fauvet Rail (France).

The European Commission also formally requested Spain to implement a European Court of Justice judgment (case C-177/06) declaring that Spain had failed to recover illegal and incompatible state aid granted by certain Basque provinces, as ordered by Commission decisions dating back to December 2001. If Spain continues to fail to comply with the ECJ decision, the Commission could take it to the Court for a second time and request the ECJ to impose fines until the aid has been fully recovered.

Restructuring in the banking sector during the financial crisis: the Northern Rock case

Živilė Didžiokaitė and Minke Gort ⁽¹⁾

1. Introduction

In normal circumstances the exit of inefficient firms is part of a self-correcting mechanism in the market. In this way market-based competition penalises those who make less efficient choices about how they organise themselves, what risks they take and what they produce. Unconditional State support granted to companies in difficulties would hinder the necessary adjustment process and generate harmful moral hazard. As a result, the provision of rescue or restructuring aid to companies in difficulty is generally considered as highly distortive to the markets and may only be regarded as legitimate subject to strict conditions.

In the context of the financial crisis the Member States generally intervened to rescue failing financial institutions in order to prevent harmful spillover effects such as a bank run and to ensure overall financial stability. Justified as these interventions may be from the financial stability perspective, the rescue of the banks raises questions regarding moral hazard and distortions of competition.

In order to deal with these issues, the Commission adopted a Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ⁽²⁾ (the 'Restructuring Communication'). It contains the following conditions for restructuring aid to banks to be approved:

- (i) A restructuring plan, which has to rely on prudent economic assumptions, must provide for restoration of the bank's long-term viability (with no further aid) and has to be fully implemented.
- (ii) The amount of aid must be limited to the minimum to cover the restructuring costs necessary to enable proper restructuring and, where appropriate, to prevent credit supply restrictions and limit the pass-on of the financial markets' difficulties to other businesses. To this end, the bank and its capital holders should contribute to the restructuring as much as possible with their own resources. The latter is necessary not only to minimise the aid, but even more impor-

tantly in order to ensure that rescued banks bear adequate responsibility for the consequences of their past behaviour and to create appropriate incentives for their future behaviour.

- (iii) Measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors.

In this context, on 28 October 2009 the Commission authorised, under the EC Treaty rules on State aid (Article 88(2)), a package of measures to support the restructuring of Northern Rock ⁽³⁾.

2. Beneficiary

Before the difficulties started in the second half of 2007, Northern Rock ('NR') was the fifth biggest UK mortgage bank with a balance-sheet total of GBP 113.5 billion on 30 June 2007 and GBP 109.3 billion at the end of 2007. The bank had 77 branches throughout the United Kingdom and was present in Ireland, Denmark and Guernsey. Residential mortgage lending was and remains NR's core activity. This represents more than 90 % of all outstanding loans in its loan portfolio. In the first half of 2007, the bank had a market share of UK gross mortgage lending of 9.7 % and of net mortgage lending of 18.9 % ⁽⁴⁾.

Banks raise funds to lend to mortgage customers by two principal means. One is by the use of funds deposited in accounts by retail and commercial depositors. The other is by borrowing money on the wholesale funding markets. NR financed the majority of its long-term mortgage loans by raising short- to mid-term funding on wholesale financial markets. This included short-term borrowing in the financial markets, issuing bonds (in a variety of forms) and undertaking securitisations, notably by issuing residential mortgage-backed securities through a 'master trust' established in 2001. As a result, NR became increasingly present in securitisation markets. Meanwhile, a continuously declining share of its funding came from retail deposits. On 30 June 2007, retail

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

⁽²⁾ OJ C 195, 19.8.2009, p. 9.

⁽³⁾ Commission Decision of 28 October 2009 in State aid case No C 14/2008 (ex NN 1/2008) — *United Kingdom — Restructuring aid to Northern Rock*, OJ L 112, 05.05.2010, p.38, available at http://ec.europa.eu/competition/state_aid/register/ii/doc/C-14-2008-WLAL-en-28.10.2009.pdf.

⁽⁴⁾ Gross lending is total advances, and net lending is advances less redemptions and repayments.

deposits amounted to only GBP 24 billion out of a balance-sheet total of GBP 113 billion.

NR was one of the first banks to be hit by the financial crisis. NR's dependence on wholesale funding caused difficulties in the second half of 2007 when the mortgage securitisation market collapsed. It suffered a bank run in September 2007. NR's funding problems as exacerbated by the bank run led the UK authorities to intervene.

3. State measures

NR benefited from several aid measures of different types to enable it to cope with the effects of the financial crisis. At the very beginning of the crisis, in September 2007, the UK authorities provided a guarantee on all existing retail deposits (savings), as far as they were not covered by the UK deposit guarantee scheme⁽⁵⁾, in order to stop the run on the bank. This guarantee was accompanied by a liquidity facility. Both measures were approved by the Commission on 5 December 2007⁽⁶⁾. The guarantee on existing retail deposits was later extended to new retail deposits and several types of unsubordinated wholesale deposits. This was necessary in order to avoid a ratings downgrade by the ratings agencies which would have had serious consequences for NR's ability to raise funds on the capital markets. The changes made to the guarantee were approved by the Commission on 2 April 2008⁽⁷⁾.

After nationalising NR on 17 February 2008, the UK authorities submitted an initial restructuring plan for NR. This plan focused on the return of NR to the market as a whole entity after restructuring. However, with the financial crisis reaching its peak at the end of 2008, it soon became apparent that the plan had to be amended to take into account the dramatic changes in the financial markets. The second restructuring plan the Commission received included a split-up of NR into a much smaller bank (BankCo), which would be sold by the UK in the future, and an asset management company (AssetCo), which would hold the remaining assets. As a result of the split-up, the good quality assets would, in principle, go to the bank and the impaired assets to the asset management company. Both BankCo and AssetCo would benefit from further aid measures under the plan. For BankCo the aid measures in-

cluded continuation of the guarantees on retail and wholesale deposits (together approximately GBP 21.6 billion), a recapitalisation of GBP 1.4 billion and a contingent liquidity facility of GBP 1.5 billion. AssetCo was to receive a guarantee on the wholesale deposits that remained with it (approximately GBP 8.3 billion), the liquidity facility granted to NR but for a higher amount and with changed conditions (up to GBP 23 billion), a recapitalisation in a stress case of GBP 1.6 billion and a working capital facility of GBP 2.5 billion.

In its assessment of the measures taken by the UK, the Commission also found that the split-up of NR into two parts resulted in aid being granted to BankCo. The Commission concluded that the split-up had the effect of an asset relief measure, as BankCo would be relieved of the impaired assets and resulting losses which would stay with AssetCo. The Commission furthermore found that the aid was substantial as the assets were transferred from NR to AssetCo at book value, which is reasonably expected to be above their real economic value, thus necessitating a far-reaching restructuring.

4. Procedural steps

The entire procedure in the NR case encompasses four decisions taken over a period of just over two years. The first decision was the rescue decision of 5 December 2007⁽⁸⁾, followed by a decision opening the formal investigation procedure on the initial restructuring plan and approving the extension of the guarantees on retail and wholesale deposits, taken on 2 April 2008⁽⁹⁾. A little over a year later, on 7 May 2009, the Commission extended the formal investigation procedure to cover the new restructuring plan⁽¹⁰⁾. The final decision on the second restructuring plan was taken on 28 October 2009.

As regards the legal basis of the Commission's decisions, the rescue decision and the decision of 2 April 2008 to open the formal investigation procedure were taken on the basis of Article 87(3) (c) of the Treaty and the Rescue and Restructuring Guidelines⁽¹¹⁾. The reason for this was that the Commission considered that the difficulties NR was facing were linked to problems specific to NR and therefore did not justify the application of Article 87(3)(b). As the severity of the financial crisis af-

⁽⁵⁾ The Financial Services Compensation Scheme (FSCS), a UK national scheme funded by the banks which compensates retail deposit holders in case of the failure of a financial institution for a maximum amount of GBP 50 000.

⁽⁶⁾ Commission Decision of 5 December 2007 in State aid case No NN 70/2007 — *United Kingdom — Northern Rock*, OJ C 43, 16.2.2008, p. 1.

⁽⁷⁾ Commission Decision of 2 April 2008 in State aid case No NN 1/2008 — *United Kingdom — Restructuring aid to Northern Rock*, OJ C 135, 3.6.2008, p. 21.

⁽⁸⁾ See footnote 6.

⁽⁹⁾ See footnote 7.

⁽¹⁰⁾ Commission Decision of 7 May 2009 in State aid case No C 14/2008 (ex NN 1/2008) — *United Kingdom — Restructuring aid to Northern Rock*, OJ C 149, 1.7.2009, p. 16.

⁽¹¹⁾ Communication from the Commission — Community guidelines on State aid for rescuing and restructuring of firms in difficulty, OJ C 244, 1.10.2004, p. 2.

affected more and more banks, in September 2008⁽¹²⁾ the Commission accepted the application of Article 87(3)(b) to banks that received State aid from then onwards. Therefore, the decision extending the formal investigation procedure and the final decision were taken on the basis of Article 87(3)(b) of the Treaty.

5. Assessment of restructuring aid to Northern Rock

The restructuring plan submitted by the UK authorities on 7 May 2009 was subsequently amended by the UK. The final version of the restructuring plan was submitted on 10 June 2009 and was the basis of the Commission's final decision in the NR case. In it the UK authorities outlined their proposal for the split-up of NR and how the plan fulfilled the requirements of the Restructuring Communication as regards return to viability, burden-sharing and own contribution and measures limiting the distortion of competition.

5.1. Return to viability

The main aim of this part of the assessment of a bank's restructuring plan is to verify whether the bank post-restructuring will be a viable entity that will be able to stand on its own feet in the medium to long term without further State support.

In its assessment of the restructuring plan for NR, the Commission focused its viability assessment on BankCo, the new bank that would be the institution competing on the market after the split-up of NR, as AssetCo would be used as a mere vehicle holding the impaired assets transferred to it at the split-up and would no longer be competing on the market.

The Commission therefore first verified whether the macroeconomic assumptions underlying the plan were reasonable, in both the base case and the stress case. To this end, the assumptions were compared to forecasts by, among others, the Commission, the IMF and the OECD. The Commission found that the assumptions were reasonable.

The next step consisted in the assessment of the business model and business plan for BankCo. The Commission had to investigate whether the split-up of NR into BankCo and AssetCo addressed the main difficulties experienced by NR, namely the significant impairments on its loan book due to the financial crisis and economic recession and its reliance on wholesale funding to finance its lending activities. It found that directly after the split-up, BankCo would be a much smaller bank, approxi-

mately one fifth of the size of NR before the crisis. At the end of the restructuring period, BankCo would be around one third of the size of NR pre-crisis. It furthermore would have assets of high quality and a considerable amount of cash, while its liabilities would mainly be retail deposits and only a limited amount of wholesale funding. Thus, it would have both good quality assets and a proper funding base. The latter is essential as the situation in the financial markets has not stabilised yet. As a result, it should be a robust and healthy bank. The Commission furthermore found that BankCo's commercial strategy would be more conservative compared to that of NR prior to the crisis, aiming at less risky lending. The same applied to BankCo's funding of its activities, which would be predominantly based on retail deposits. Due to its limited size after the split-up, BankCo's market share would be relatively small. The business plan furthermore showed that BankCo would be able to fulfil all relevant regulatory requirements in both a base case and a stress case and that it would return to profitability in the medium term in both scenarios.

The Commission therefore concluded that BankCo would be a viable bank and that its doubts regarding the viability were allayed.

5.2. Burden-sharing and own contribution

To address distortions of competition and moral hazard, the aid should be minimised and the bank and its capital holders should contribute to the restructuring as much as possible with their own resources.

In its assessment the Commission took into account the objective of ensuring continued lending to the real economy and concluded that the aid was limited to the minimum necessary. The Commission considered that this was justified in the exceptional circumstances of the financial crisis and, in particular, due to its effects on the UK mortgage market. In this context, the Commission observed that in 2008 and 2009 NR had already reduced its lending to very low levels compared to the situation before the State's intervention, as the bank had been encouraging its customers to transfer their loans to competitors through its active mortgage redemption programme. This was deemed necessary to address competition concerns caused by the continued rescue aid. Notwithstanding the above objective, the market presence which the bank was allowed to have was significantly reduced compared to the situation before the State intervention (see section 5.3 below).

The Commission also found that NR and its capital owners had contributed to the restructuring to the maximum extent. The bank was nationalised and its

⁽¹²⁾ The first case to be decided under Article 87(3)(b) was in fact *Bradford & Bingley*, see Commission decision in Case NN 41/2008, OJ C 290, 13.11.2008, p. 2.

former shareholders would only be compensated on the basis of the value of the company without any State support. As this compensation would represent fair value of the company without the aid (and was likely to be limited in this case), the former shareholders were considered as having sufficiently supported the consequences of the failure of NR. Since NR's subordinated debt holders would remain with AssetCo, they would be compensated through the amounts that were recovered from AssetCo's assets. Also, the management of NR had been replaced during the crisis.

5.3. Measures to limit distortions of competition

In order to keep NR in business since September 2007 and to facilitate the split-up, a large amount of aid was and will continue to be necessary. As a result, the distortions of competition caused by NR are significant. NR's successor BankCo will be well-funded and relieved of the burden of the risky lending made by NR in the past. The Commission and the third parties intervening in the procedure were concerned by the distorting effects of such aid.

As a result of intensive negotiations with the UK, a comprehensive set of measures limiting the distortion of competition and addressing the concerns voiced by the Commission and notably the bank's competitors has been put in place by the United Kingdom. Firstly, NR has been subject to profound in-depth restructuring. As a result, a much smaller bank, BankCo, will compete on the UK retail market. Secondly, the bank's market presence in its core markets of UK mortgage lending and UK retail funding was reduced by at least around 20-25 % and its international presence limited through its withdrawal from Denmark. Caps introduced on BankCo's retail deposits and mortgage lending will limit BankCo's ability to expand aggressively on the market. Thirdly, to address the concerns raised by third parties as to BankCo's ability to crowd-out competitors through aggressive pricing strategies, the United Kingdom has given a commitment that BankCo will stay out of the Moneyfacts top 3 tables as regards mainstream mortgages. In this context, the Commission considered that for smaller banks, such as BankCo, it is important to be visible in the Moneyfacts table (the top 5 prices are visible) as it is an effective way to come into contact with customers. The United Kingdom's commitment ensures that BankCo, although still visible, cannot offer the best price on the market. Thus, potential crowding-

out of competitors is limited during the years when BankCo is most reliant on State aid.

Furthermore, the United Kingdom has given a commitment to sell BankCo. Timely exit from temporary public ownership (TPO) ensures that third parties have the possibility to acquire BankCo. In that respect, NR's competitors complained, above all, that while in TPO it is easier for NR to attract retail deposits as consumers are aware that the bank is State-supported. Putting an end to TPO will remove this distortion of competition. The United Kingdom has also given a commitment that the guarantees on retail and wholesale deposits for BankCo will be withdrawn by a specified date. Since this form of aid was considered as particularly distortive by the third parties having commented in the context of the in-depth investigation procedure, this commitment adequately addresses competitors' concerns. As regards the guarantee on retail deposits, the UK authorities gave notice on 24 February 2010 that the guarantee would be lifted three months following the notice, on 24 May 2010.

Finally, BankCo will be limited in its activities by an acquisition ban and a ban on promoting the State guarantees and TPO.

6. Conclusion

This case is important for the following reasons.

Firstly, it illustrates how a Member State, in this case the UK, may adequately address competition distortions in a timely manner by introducing behavioural constraints immediately after the rescue phase and before the Commission takes a final decision on restructuring aid. Such an approach is incentivised by the Commission, as these measures can be taken into account from the moment they are imposed upon the beneficiary.

Secondly, it provides an example of a comprehensive package of measures to limit distortions of competitions, where an amount of aid is particularly high and no or only limited effective divestitures can be envisaged. In such cases it is in particular necessary to set up mitigating measures targeting the core markets of the beneficiary bank, as was the case with NR, where both its lending and funding operations were significantly reduced and capped. It is also one of the first State aid cases where pricing constraints were imposed on the bank.

Thirdly, it provides an example to the Member States of a restructuring method that ensures maximum burden sharing by the former capital holders of a highly distressed bank.

EU-Korea FTA: a stepping stone towards better subsidies' control at the international level

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On 15 October 2009 a free trade agreement (FTA) between Korea and the EU, the EU's first with a trading partner in Asia, was initialled ⁽²⁾. It is the most ambitious FTA ever negotiated by the EU, containing the most comprehensive deal on subsidies of any bilateral trade agreement so far. For the first time a bilateral trade agreement will contain substantive WTO+ rules on subsidies on goods that are enforceable through bilateral dispute settlement with commercial sanctions.

1. The Global Europe strategy bears first fruits

In its Global Europe communication ⁽³⁾ of 2006, the Commission set out how the renewed Lisbon strategy for growth and jobs ⁽⁴⁾ should be supplemented with an external agenda for creating opportunities in a globalised economy, encompassing our trade and other external policies. The core argument of the Global Europe communication is that the rejection of protectionism at home must be accompanied by activism in creating open markets and fair conditions for trade abroad.

Part of that approach was to conclude 'next generation' FTAs with important trading partners that combine high levels of protection with large market potential. Korea, ASEAN, Mercosur, India and Ukraine emerged as priorities. In terms of content it was felt that these new FTAs would need to be comprehensive and ambitious in coverage, comprising the highest possible degree of trade liberalisation, including far-reaching liberalisation of services

and investment. At the same time FTAs should also tackle non-tariff barriers through regulatory convergence wherever possible and include stronger provisions for IPR, competition and state aid.

1.1. The case for state aid provisions in FTAs

Provisions on state aid and subsidies have traditionally only played a minor role in bilateral trade agreements. Existing provisions are generally rather vague and practically non-enforceable ⁽⁵⁾. However, the rationale for including such rules in FTAs is not difficult to grasp.

The aforementioned cornerstone of the Commission's external strategy to create jobs and growth in Europe, namely opening markets abroad, can no longer be achieved by simply lowering tariffs. Global Europe recognises that non-tariff barriers behind the borders of the EU's trading partners will have to be dismantled in order to fulfil its market access objectives. The granting of state aid can, of course, amount to a non-tariff trade barrier which limits effective market access.

Foreign companies can gain an undue advantage from unchecked state aid disbursed by their governments which is not available to European firms. The potential advantages of trade liberalisation by tariff reductions can therefore be mitigated or even undone by trade-distorting subsidisation in the market for which greater access is sought.

More generally, subsidies can also lead to or maintain inefficient location of economic activity, resulting in a decrease of overall welfare. Likewise, international coordination failures can lead to subsidy races with negative effects on overall welfare.

The above reasons — amongst others — led to the inclusion of state aid control in the Treaty of Rome where it became the cornerstone of an integrated internal market. Time and time again, most recently during the financial crisis, EU State aid control has

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

⁽²⁾ The initialling of the FTA signifies the closing of negotiations with a stable legal text, which the European Commission will formally present to EU Member States in early 2010. Following the signature of the agreement by the EU Presidency and the Commission, the FTA will be presented for approval by the European Parliament. Entry into force of the agreement would then be expected in the second half of 2010. See Press Release IP/09/1523, 15.10.2009.

⁽³⁾ Global Europe: Competing in the world — A contribution to the EU's Growth and Jobs Strategy, Communication from the Commission, COM(2006) 567 final, 4.10.2006.

⁽⁴⁾ Working together for growth and jobs — A new start for the Lisbon strategy, Communication from the Commission, COM(2005) 24 final, 2.2.2005.

⁽⁵⁾ See for example the Euro-Mediterranean Agreements, the 1972 agreement with Switzerland, or the cooperation and association agreements with South Africa, Turkey, Russia, and Moldova. The difficulties regarding enforceability are generally ascribed to the fact that the provisions on state aid in these agreements are not subject to a binding dispute settlement mechanism.

proven to be an essential coordination tool for Member States, preventing harmful subsidy races and preserving the free flow of goods and services across borders. A similar logic applies on an international level, and provides the justification and rationale for including provisions on subsidies in FTAs.

It goes without saying that multilateral or even global subsidy control would be preferable to bilateral control. However, as will be shown in turn, there is a large discrepancy between the EU's rules on state aid and those that apply to its trading partners.

1.1.1. The shortcomings of existing multilateral rules on subsidies compared to EU state aid control

Contrary to the EU (or the EEA), which has adopted its rather unique system of state aid control, most other countries accept state aid/subsidy control only at the multilateral level, under WTO rules. According to the WTO's Agreement on Subsidies and Countervailing Measures (the SCM agreement), two types of subsidies are forbidden, and others are challengeable if they distort trade and cause injury to the industry of the country concerned. In practice, the EU has rarely challenged foreign subsidies as proving that a subsidy is responsible for harming the domestic industry is very difficult. Another explanation is found in the fact that — in spite of state aid control in the EU ensuring that state aid is well-targeted at market failures and objectives of common interest, is proportionate and therefore distorts competition only to a limited extent — the EU remains one of the largest subsidy-providers in the world⁽⁶⁾.

Apart from the difficulties related to enforcement, there are some other important limitations of the WTO's rules on subsidies⁽⁷⁾. First, the SCM does not cover subsidies to services. Secondly, in terms of procedure, the WTO's subsidy rules only provide for prospective remedies⁽⁸⁾ against measures that are already in force and have caused a (demonstrated) adverse effect on a WTO Member. State aid control, on the other hand, requires ex-ante authori-

sation of future aid and also provides for retroactive remedies where the notification obligation has not been respected.

Finally, as regards transparency, the SCM requires the notification of all subsidies every two years from each WTO member state, yet it does not provide for any effective sanction if reports are not submitted or are incomplete, which is frequently the case in practice. In the EU, on the other hand, all aid is completely transparent due to instruments such as publication in the OJ, the state aid scoreboard and the State aid register.

In sum, compared to State aid control, other WTO members still have considerable leeway to grant subsidies, which in turn risks diminishing the benefits of trade liberalisation. As enhancing subsidy control at multilateral level appears unrealistic for the near future, bilateral solutions are the next best option for the EU.

The initialling of the Korea FTA marks an important milestone for the Global Europe strategy, and provides a good opportunity to take stock and assess the outcome. In doing so for the subsidies section, there is one essential question that needs to be asked: Has a WTO+ been achieved? In other words, has the other party committed to more stringent rules on subsidies than those that exist under the WTO?

2. The WTO+ provisions in the EU-Korea FTA

The final result in the FTA's subsidies section immediately shows that the objective of a WTO+ has been met, and the regulatory gap between our own regime and that applicable to Korea has been narrowed. In a nutshell, the WTO+ rules are as follows:

- prohibition of two additional categories of subsidies — unlimited guarantees and subsidies for ailing companies without a credible restructuring plan;
- comprehensive enhanced transparency provisions on the granting of subsidies;
- an enforceable, and therefore credible, dispute settlement system with commercial sanctions;
- a rendezvous clause to discuss extending the scope of the agreement to the services sector.

As regards the prohibited categories, the agreement builds on the notion of a subsidy according to the relevant WTO rules, combined with a lower burden of proof as regards the affectation of trade, and bans those that we have identified as being the most distortive (and which are always incompatible with the EU's state aid rules).

⁽⁶⁾ According to the WTO's report on subsidies of 2006, the percentage of subsidies compared to GDP over the period from 1998 to 2002 amounts to 1.5 % in the EU, whereas it is 1.2 % in Australia, 1.1 % in Canada and China, 0.8 % in Japan, 0.8 % in the USA and 0.3 % in Brazil. See http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf.

⁽⁷⁾ The following comparison is of course by no means exhaustive.

⁽⁸⁾ The WTO provides both for a multilateral dispute settlement procedure ('dispute settlement track'), which may lead to the removal of the foreign subsidies, and the possibility to impose countervailing duties ('countervailing track') to offset the effects of foreign subsidies to imports at the EU borders.

First, the parties cannot therefore guarantee the debts or liabilities of certain enterprises without any limitation. The added value lies in the fact that an unlimited guarantee of this type, which would amount to a highly distortive permanent operating aid, would breach the agreement.

Second, the parties can only grant support to ailing companies if they present a reasonable restructuring plan that ensures long-term viability and contribute themselves to the costs of restructuring. This provision transposes the centrepiece of our compatibility analysis under the rescue and restructuring guidelines into this bilateral agreement, and ensures that ailing companies are not artificially kept alive through public subsidies alone. This will increase the chances of efficient European companies expanding their market shares at the cost of Korean firms with unviable business models.

The transparency provision of the subsidy section obliges the parties to report annually the total amount, types and sectoral distribution of subsidies. Moreover, parties have to provide further information on any subsidy upon request.

This is an important WTO+ provision as it tackles a particular weakness of the WTO system, briefly touched upon above, namely the incompleteness of subsidies notifications, which can hardly be remedied due to the characteristics of the system and the absence of effective sanctions. The information gained through this obligatory information exchange mechanism will facilitate enforcement both under the FTA as well as under the WTO, where lack of information has sometimes hampered enforcement attempts in the past.

In the context of current negotiations it was not possible to extend the scope of these new rules to services (they apply to goods only). The agreement provides, however, that the parties should use their best endeavours to develop rules applicable to subsidies to services and that they will hold a first exchange of views on subsidies to services within 3 years from the entry into force of the FTA. This ensures that the EU engages an important trading partner in a constant dialogue on subsidies, and will enable it to address potential future problems in this field in an already existing forum.

Perhaps most importantly and for the first time ever the FTA contains provisions on subsidies which are

enforceable via a dispute settlement mechanism. A party that considers that the other party has infringed the agreement can launch a consultation on the contentious matter, which would be referred to an arbitration panel if the consultation does not lead to a satisfactory outcome. The decision of the panel would be binding and enforceable with commercial sanctions. This equips these provisions with an effective enforcement mechanism that will significantly enhance their practical value.

Beyond the legal aspects, one of the expected results of the overall agreement including the dispute settlement mechanism lies with the incentives it provides for the parties to engage in a bilateral dialogue with a view to remedying problematic subsidy practices. This is further enhanced by a regular bilateral platform for discussing subsidies, be it through exchange of information on request, or through dialogue in the Trade Committee. The bilateral character of such exchanges may prove a useful channel of informal consultations compared to the more public character of all WTO platforms.

3. A first step towards a global control of for subsidies?

The FTA with Korea embodies the first tangible results of the EU's efforts to introduce more comprehensive disciplines on subsidies in trade agreements with third countries. The initialling of this agreement could not be timelier — in the midst of a worldwide economic crisis, the EU and Korea are sending a strong anti-protectionist signal to the rest of world. Not only is the EU determined to keep trade open and free; this agreement, once ratified, will also contribute to avoiding an international subsidy race, and will help European firms abroad to compete on the merits with their Korean peers.

It remains to be seen to what extent the EU will succeed in obtaining similar results in ongoing and future FTA negotiations, some of which have proven to be extremely challenging. In any event the initialling of this FTA constitutes an important stepping stone for similar agreements and can hopefully serve as a point of reference which the EU can use when attempting to persuade trading partners to commit to rules on subsidies that mirror those contained in the Korea FTA, on either a bilateral or even a multilateral level.

The German Law to Modernise the General Conditions for Capital Investments (MoRaKG)

Zajzon Bodó, Torsten Peters and Albert Rädler ⁽¹⁾

1. Introduction

The German parliament adopted the MoRaKG ⁽²⁾ with the aim of giving tax incentives for risk capital investments. The law was subject to a standstill clause pending Commission approval. After the law had been notified in summer 2008, the Commission opened a formal investigation procedure in January 2009 ⁽³⁾. Third party comments confirmed the Commission's doubts, so on 30 September 2009 the Commission took a negative decision ⁽⁴⁾, under State aid rules, on the *business tax break* (*Gewerbesteuerbefreiung*) for Venture Capital Companies ⁽⁵⁾ (VCC – *Wagniskapitalbeteiligungsgesellschaft*) and on the right of Target Enterprises ⁽⁶⁾ (TE) acquired by VCCs to *carry forward losses*. At the same time, the Commission authorised *income tax benefits for private investors* subject to certain conditions.

2. State aid measures in the MoRaKG

2.1. Business tax break

In German tax law, profits are in principle subject to business tax (*Gewerbesteuer*) if the activity qualifies as a business activity. However, if the activity is characterised as asset administration (*Vermögensverwaltung*) rather than a business activity, the sale of the underlying investment may not be subject to business tax. The German Minister of Finance issued a circular letter ⁽⁷⁾ to clarify the distinction. This letter gives

guidance on whether the activities of venture capital funds and of private equity funds qualify as asset administration. According to Germany, the MoRaKG aimed at statutory clarification of the letter with respect to VCCs, but would not have introduced any novelty or changed current practice.

When it opened the formal investigation procedure, the Commission questioned whether the MoRaKG was a mere clarification of the letter, as it found some substantial differences. Moreover, the Commission could not find a justification for the following:

- only VCCs falling under the MoRaKG definition, but not other companies with similar activities, would benefit from the statutory clarification;
- the German authorities' estimate that the measure, which allegedly merely clarified the existing situation, would lead to € 90 million loss in State tax revenue.

In the final decision, the Commission concluded that its doubts had not been dispelled and the clarification deviated from the provisions of the circular letter. Consequently, some VCCs could benefit from the tax exemption under the MoRaKG while they would be liable for business tax under the circular letter. This also means that the measure is selective and involves State aid to such VCCs.

2.2. Right to loss carry-forward

The right to carry forward losses allows a company's losses in a given year to be taken into account in its tax declarations in future years. However, this also permits abuse when so-called shell companies which have ceased their activities but accumulated losses are sold, as their loss carry-forwards still represent a value for tax purposes. A purchaser of such a company will benefit from a reduction of its future taxes by deducting the losses of the shell company.

In 2008, Germany introduced restrictive anti-abuse rules on loss carry-forward in corporate taxation. These rules prohibit the carry-over of losses if the ownership structure of a company changes substantially. The MoRaKG intended to relax the anti-abuse rules for VCCs that buy shares in TEs. In principle, Germany agreed that the measure is selective and favours both TEs and VCCs. Germany, however, claimed that it was justified by the nature and logic of the German tax system, as the right to loss carry-forward already existed. In addition, Germany also

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

⁽²⁾ Gesetz zur Modernisierung der Rahmenbedingungen für Kapitalbeteiligungen (MoRaKG) vom 12. August 2008, BGBl. I 2008, 1672.

⁽³⁾ OJ C 60, 14.3.2009, p. 9.

⁽⁴⁾ OJ L 6, 9.1.2010, p. 32. Case C-2/2009, also see on: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?id=3_229452.

⁽⁵⁾ The MoRaKG definition of a VCC states that it must be recognised by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*). Furthermore the VCC must have its domicile and its corporate management in Germany.

⁽⁶⁾ A TE must be an incorporated enterprise and must, at the time it is acquired by a VCC, have less than € 20 million owner's equity and have been founded less than 10 years ago.

⁽⁷⁾ Income tax treatment of venture capital und private equity funds; delimitation of private fortune administration; BMF letter of 20 November 2003, Federal Fiscal Gazette (*Bundessteuerblatt* — BStBl), 2004, Part I, No 1, p. 40.

pointed out that the introduction of the restrictive rules in 2008 put the German venture capital market in an underprivileged situation.

The Commission noted that the venture capital market includes other investment companies which may also invest in TE and should, therefore, be able to benefit from the loss carry-forward. The Commission found that the re-establishment of the right solely for a specific group of companies (VCCs and TEs) could not be claimed to stem from the nature and logic of the tax system. In its comments, the German Private Equity and Venture Capital Association (*Bundesverband Deutscher Kapitalbeteiligungsgesellschaften e.V.*) also advocated uniform legal and fiscal conditions applicable to the whole venture capital market.

Germany also claimed that the measure would not affect trade between the Member States, since its objective was national compliance with the Notice on Business Taxation⁽⁹⁾ and it gave no advantage to German companies compared with companies resident in other Member States. However the Commission pointed out that the beneficiaries may be involved in trading with other Member States. The point of reference for assessing whether an undertaking receives an advantage likely to distort competition and affect trade, as defined in the State aid rules, is always the system generally applicable in the Member State concerned. Therefore the Commission concluded in its final decision that the measure was selective and involved State aid to TEs and VCCs.

2.3. Income tax benefit for private investors

The income tax benefit would be granted to private investors, such as business angels, if they realise a capital gain on selling their interest in a TE. No tax advantage would be granted if the sale leads to a loss. Germany claimed that the measure benefits individuals; therefore it does not constitute State aid.

The Commission, however, found that TEs would indirectly benefit from State aid.

Germany stressed that the tax benefit per investor is limited to € 22 500 and is contingent upon uncertain future profits. Therefore its impact on present investment decisions is rather limited. Consequently, the measure's indirect advantage to TEs is unquantifiable and negligible.

The Commission, however, found that a single TE may benefit from several, potentially successive, investments by different private investors. Yet, as the

aid is unquantifiable and there is no register for successive investments, the aid would be non-transparent. Therefore the Commission found that TE could theoretically benefit from indirect State aid exceeding the *de minimis* threshold of € 200 000. Germany, however, could not align the measure with the *De Minimis* Regulation⁽⁹⁾. Being non-transparent aid, the *De Minimis* Regulation would require all private investments into TEs to be declared as *de minimis* aid. This would include investments where no aid is granted to the investor at all. This is because the provision of the aid is contingent upon future capital gains while the *de minimis* declarations have to be submitted at the time of investment.

3. Internal market aspects

The MoRaKG definition states that VCCs should have their domicile and corporate management in Germany, so the Commission also considered that the *business tax exemption* for VCCs and the right of TEs acquired by VCCs to *carry forward losses* were incompatible with the principle of freedom of establishment.

Such a requirement infringes the right of companies to establish themselves anywhere they chose within the Internal Market. The Commission therefore concluded that business tax breaks and the right to carry forward losses were incompatible with the Internal Market and could not be implemented.

4. Compatibility of the measures with State aid rules

The measures were assessed under the Risk Capital Guidelines. State aid in the form of risk capital cannot be granted to large enterprises, firms in difficulty or firms in the shipbuilding, coal and steel industries. However the *business tax break* measure and the *right to carry forward losses* did not exclude such undertakings, meaning that the scope of these measures is not compatible with the Risk Capital Guidelines.

Some other requirements under the Guidelines are also not met, e.g. maximum level of investment tranches, restriction to expansion stage of target enterprises, cumulation and reporting obligations, etc.

The Commission did however approve the *income tax benefit for private investors* measure under the Risk Capital Guidelines, subject to certain conditions. The Commission agreed that the measure has a general positive effect in the sense of stimulating the provision of risk capital and does not infringe the freedom of establishment principle. Consequently, the Commission invited Germany to bring

⁽⁹⁾ Commission Notice on the application of the State aid rules to measures relating to direct business taxation; OJ C 384, 10.12.1998, p. 3.

⁽⁹⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

this measure into line with the Guidelines⁽¹⁰⁾ and inform the Commission of the amendments within two months.

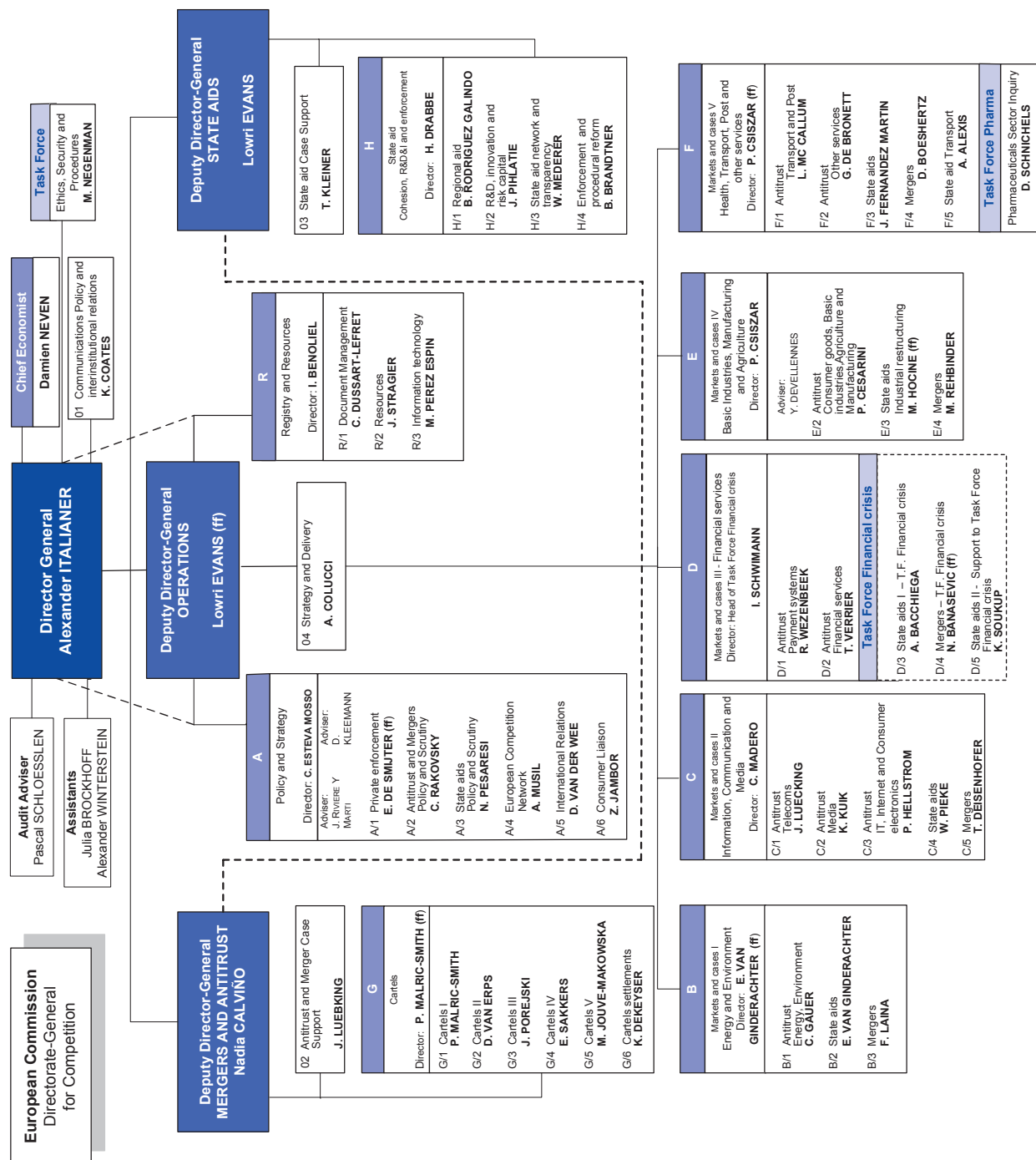
5. Follow-up

By letter of 2 December 2009, the German authorities informed the Commission that they would not implement the *business tax break* and the *right to carry forward losses* contested by the Commission and they would inform the Commission if they aligned the *income tax benefit for private investors* with the Risk Capital Guidelines.

Germany informed the Commission that it would not implement any of the measures.

⁽¹⁰⁾ OJ C 194, 16.08.2006, p. 2.

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



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Documents

Speeches

From 1 September 2009 to 31 December 2009

This section lists recent speeches by the Commissioner for Competition and Commission officials. Full texts can be found on <http://ec.europa.eu/competition/speeches>. Documents marked with the reference "SPEECH/08/..." can also be found on <http://europa.eu/rapid>

By Neelie Kroes, European Commissioner for Competition

SPEECH/09/582, 16 December 2009

Your Internet, Your Choice: Microsoft web browsers decision Opening remarks at press conference. Brussels

SPEECH/09/575, 9 December

Commission accepts commitments from Rambus lowering memory chip royalty rates - Opening remarks at press conference. Brussels

SPEECH/09/568, 3 December

Five years of sector and antitrust inquiries Keynote address at "Competition 09 Summit". Brussels

SPEECH/09/569, 3 December

GDF Suez commits to open French gas market Opening remarks at Press conference. Brussels

SPEECH/09/560 - 28 November

Keynote address at conference organised by EStALI (European State Aid Law Institute). London, UK

SPEECH/09/552 - 25 November

Hungary and the EU: better together Address at conference organised by the Hungarian Competition Authority – GVH. Budapest, Hungary

SPEECH/09/541, 18 November

Commission outlines conditions for state aid to KBC, ING and Lloyds Opening remarks at press conference. Brussels

SPEECH/09/534, 16 November

Why we need competitive markets Conference on "Competition, Public Policy and Common Man", Delhi, India

SPEECH/09/525, 12 November

Market behaviour: the rules of the game Address at seminar of Algemene Pensioen Groep. Amsterdam, The Netherlands

SPEECH/09/521, 11 November

Plastic additives cartels Opening remarks at Press conference. Brussels

SPEECH/09/486, 21 October

Opening address at conference: "Competition and Consumers in the 21st century". Brussels

SPEECH/09/481, 19 October

Private Enforcement of State Aid rules - State aid conference. Brussels

SPEECH/09/475, 15 October

Setting the standards high Address at Harvard Club of Belgium, "De Warande". Brussels

SPEECH/09/454, 8 October

Tackling cartels – a never-ending task Anti-Cartel Enforcement: Criminal and Administrative Policy – Panel session. Brasilia, Brazil

SPEECH/09/447, 7 October

Power transformers cartel busted; Microsoft web browsers case Opening remarks at press conference. Brussels

SPEECH/09/439, 5 October

Vooruitgang voor Europa – Hoe het mededingingsbeleid een beter Europa tot stand brengt Toespraak voor de Nederlandse Open Gespreksgroep. Brussels

SPEECH/09/420, 29 September

Lessons learned from the economic crisis Address to Committee on Economic and Monetary Affairs, European Parliament. Brussels

SPEECH/09/408, 24 September

Antitrust and State Aid Control – The Lessons Learned 36th Annual Conference on International Antitrust Law and Policy, Fordham University. New York, USA

SPEECH/09/394, 17 September

Commission Guidelines for broadband networks Introductory remarks at press conference. Brussels

SPEECH/09/385, 11 September

Competition law in an economic crisis 13th Annual Competition Conference of the International Bar Association. Fiesole, Italy

SPEECH/09/375, 9 September

Policy Developments in competition policy Meeting with the European Economic and Social Committee, Internal Market Section. Brussels

By the Competition Directorate-General staff

9 December

Philip Lowe: Due process in antitrust CRA Conference on Economic Developments in Competition Law. Brussels

07 December

Les aides d'Etat au secteur financier. Cour d'appel de Paris. Paris, France

26 November

Philip Lowe: Making Energy Markets in Europe work better IBC Conference – Competition Law in the Energy Sector. Brussels

17 November

Philip Lowe: Reflections on the past seven years – “Competition policy challenges in Europe” GCR 2009 Competition Law Review. Conrad Hotel, Brussels

01 November

Philip Lowe: Competition policy and the global economic crisis Competition Policy International

29 September

Philip Lowe: Speech at Eurofi Financial Forum Eurofi Financial Forum. Göteborg, Sweden

22 September

Philip Lowe: Competition policy as it has and as it should develop Georgetown University Law Center. Washington, USA

01 September

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

Press releases and memos

From 1 September 2009 to 31 December 2009

All texts are available from the Commission's press release database RAPID <http://europa.eu/rapid>

Enter the code (e.g. IP/09/14) in the 'reference' input box on the research form to retrieve the text of a press release. Languages available vary for different press releases.

Antitrust

IP/09/1984 - 21 December 2009

Commission launches public consultation on review of competition rules for motor vehicle sector

MEMO/09/567 - 17 December 2009

Commission welcomes E.ON proposals to increase competition in German gas market

MEMO/09/566 - 17 December 2009

Commission confirms sending Statement of Objections to alleged participants in bananas cartel in Southern Europe

IP/09/1941 - 16 December 2009

Commission accepts Microsoft commitments to give users browser choice

MEMO/09/559 - 16 December 2009

Commission decision on Microsoft's new web browser Choice Screen - user's guide

MEMO/09/558 - 16 December 2009

Commission accepts Microsoft commitments to give users browser choice – frequently asked questions

MEMO/09/549 - 10 December 2009

Commission welcomes ICom's public FRAND declaration

MEMO/09/546 - 9 December 2009

Commission confirms surprise inspections in the pharmaceutical sector

MEMO/09/544 - 9 December 2009

Commission accepts commitments from Rambus lowering memory chip royalty rates - frequently asked questions

IP/09/1897 - 9 December 2009

Commission accepts commitments from Rambus lowering memory chip royalty rates

MEMO/09/536 - 3 December 2009

Commission accepts commitments by GDF Suez to boost competition in French gas market – frequently asked questions

IP/09/1872 - 3 December 2009

Commission accepts commitments by GDF Suez to boost competition in French gas market

MEMO/09/525 - 26 November 2009

Commission confirms sending Statement of Objections to alleged participants in TV and computer monitor tubes cartels

MEMO/09/518 - 24 November 2009

Commission confirms inspections in Czech electricity sector

MEMO/09/508 - 19 November 2009

Commission confirms sending of Statement of Objections to Standard & Poor's

IP/09/1695 - 11 November 2009

Commission fines plastic additives producers €173 million for price fixing and market sharing cartels

MEMO/09/496 - 11 November 2009

Commission action against cartels – Questions and answers

IP/09/1692 - 10 November 2009

Commission opens formal proceedings against Thomson Reuters concerning use of Reuters Instrument Codes

IP/09/1669 - 4 November 2009

Commission market tests proposed commitments by EDF to increase competition in the French electricity retail market

IP/09/1666 - 3 November 2009

Commission consults on draft guidance for Single Euro Payments Area (SEPA) Direct Debit scheme

IP/09/1632 - 29 October 2009

Commission steps up infringement procedure against Slovakia for not implementing Commission hybrid mail decision

IP/09/1548 - 20 October 2009

Competition: Commission's Online Roundtable on Music opens way to improved online music opportunities for European consumers

MEMO/09/456 - 15 October 2009

European Competition Network publishes report on leniency convergence

IP/09/1513 - 14 October 2009

Commission paves way for more competition in ship classification market by making IACS' commitments legally binding

IP/09/1500 - 9 October 2009

Competition: Commissioner Kroes signs Memorandum of Understanding with Brazil

IP/09/1432 - 7 October 2009

Commission fines producers of power transformers € 67.6 million for market sharing cartel

IP/09/1425 - 6 October 2009

Commission market tests commitments proposed by Svenska Kraftnät concerning Swedish electricity transmission market

MEMO/09/439 - 7 October 2009

Commission market tests Microsoft's proposal to ensure consumer choice of web browsers; welcomes further improvements in field of interoperability

MEMO/09/438 - 7 October 2009

Commission action against cartels – Questions and answers

MEMO/09/435 - 6 October 2009

Commission confirms surprise inspections in the pharmaceutical sector

IP/09/1413 - 5 October 2009

public consultation on revised draft Block Exemption Regulation for insurance sector

MEMO/09/430 - 2 October 2009

Commission confirms sending Statement of Objections to three members of oneworld airline alliance

IP/09/1389 - 30 September 2009

Commission re-adopts cartel decision in concrete reinforcing bar sector and fines eight Italian companies over €83 million

MEMO/09/427 - 30 September 2009

Commission action against cartels – Questions and answers

MEMO/09/420 - 28 September 2009

Commission adopts new Block Exemption Regulation for liner shipping consortia - frequently asked questions

IP/09/1367 - 28 September 2009

Commission adopts new Block Exemption Regulation for liner shipping consortia

IP/09/1347 - 23 September 2009

Commission adopts legislative proposals to strengthen financial supervision in Europe

MEMO/09/409 - 23 September 2009

Commission carries out unannounced inspections in the cement and related products sector

MEMO/09/400 - 21 September 2009

Commission publishes decision concerning Intel's abuse of dominant position

MEMO/09/394 - 15 September 2009

Commissioners welcome French reform proposal for national electricity market

MEMO/09/385 - 10 September 2009

Commission welcomes Court judgment in Akzo Nobel case

MEMO/09/381 - 9 September 2009

Commission welcomes Court of First Instance Clearstream judgement

IP/09/1287 - 8 September 2009

Competition: Commission reappoints Professor Damien Neven as Chief Competition Economist

Merger control

IP/09/1995 – 22 December

Commission approves acquisition of asset management arm of Société Générale by Crédit Agricole

IP/09/1977 – 18 December

Commission clears proposed acquisition of Tronox titanium dioxide plants by Huntsman

IP/09/1976 – 18 December

Commission approves acquisition of Seara by Marfrig

IP/09/1975 - 18 December 2009

Commission approves proposed acquisition of Mahag by Volkswagen

IP/09/1972 - 18 December 2009

Commission approves proposed acquisition of SBI Holding by Bominflot

IP/09/1969 - 18 December 2009

Commission approves acquisition of MPS Group by Adecco

IP/09/1921 - 15 December 2009

Commission approves proposed acquisition of Alcan Packaging by Amcor, subject to conditions

IP/09/1914 - 14 December 2009

Commission approves proposed acquisition of joint control of MET by Normeston and MOL

MEMO/09/551 - 14 December 2009

Commission welcomes Oracle's MySQL announcement

IP/09/1912 - 11 December 2009

Commission approves proposed acquisition of Sa-filo Group by Hal

IP/09/1910 - 11 December 2009

Commission approves proposed acquisition of joint control over Bristol Airport by OTTP and Macquarie Group

IP/09/1875 - 4 December 2009

Commission clears proposed merger of Towers Perrin and Watson Wyatt, subject to conditions

IP/09/1870 - 2 December 2009

Commission approves proposed merger between Renesas Technology and NEC Electronics

IP/09/1857 - 1 December 2009

Commission clears proposed acquisition of Uttam Galva Steels by ArcelorMittal and the Miglani Family

IP/09/1825 - 26 November 2009

Commission approves acquisition of Gatwick Airport by Global Infrastructure Partners

IP/09/1814 - 24 November 2009

Commission approves proposed acquisition of Cargill's animal nutrition business in Spain and Portugal by Nutreco

IP/09/1806 - 23 November 2009

Commission approves proposed Euro TLX SIM joint venture between UniCredit and Banca IMI

IP/09/1741 - 19 November 2009

Commission approves proposed acquisition of Nortel's Enterprise Solutions business by Avaya

IP/09/1672 - 4 November 2009

Commission approves proposed acquisition of joint control by CEZB and JAVYS of newly created joint venture JESS

IP/09/1656 - 30 October 2009

Commission refers examination of the planned acquisition of Keolis and EFFIA by SNCF and CDPQ to France's Competition Authority

IP/09/1588 - 27 October 2009

Commission clears Belgacom's acquisition of BICS and BICS' purchase of certain assets from MTN

IP/09/1586 - 27 October 2009

Commission approves proposed acquisition of PepsiAmericas by PepsiCo

IP/09/1575 - 23 October 2009

Commission clears proposed acquisition of Schering-Plough by Merck

IP/09/1567 - 22 October 2009

Commission approves proposed acquisition of Iberdrola's stake in SAGGAS by RREEF Fund

IP/09/1566 - 22 October 2009

Commission approves proposed acquisition of Baxi by Remeha

IP/09/1499 - 9 October 2009

Commission approves proposed acquisition of Iberdrola's stake in BBG by RREEF Fund

IP/09/1500 - 9 October 2009

Competition: Commissioner Kroes signs Memorandum of Understanding with Brazil

IP/09/1433 - 7 October 2009

Commission clears proposed acquisition of Pražská teplárenská, a.s. by International Power Opatovice, a.s., EnBW AG and the City of Prague

MEMO/09/433 - 2 October 2009

Fortis Bank Nederland and ABN AMRO Bank Nederland - Commission grants further extension of deadline for implementation of remedies

IP/09/1383 - 29 September 2009

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