



EC COMPETITION  
POLICY NEWSLETTER

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## Introduction

*Philip LOWE, Director-General, Directorate-General Competition*

2002 ended with a series of decisions which will have a major impact on the scope and effectiveness of EU competition policy : the Council's adoption of the regulation on modernization of EU antitrust rules, the launching by the Commission of proposals for some radical changes in our merger control system, and finally the historic decision on accession to the EU of ten new Member States. Despite the general downturn in economic activity, 2003 will therefore be a very busy year for DG Competition. We have to prepare for the implementation of the new antitrust rules and create the network of the 25 competition authorities who alongside the Commission will be responsible for antitrust enforcement action under the EU Treaty. We have to take part in the negotiations on the proposed recast Merger Regulation and complete consultations on draft merger guidelines as well as on Best Practice guidelines on the conduct of merger control procedures. We also have to give priority to the anti-cartel enforcement action, which is growing in importance and effectiveness on the basis of the revised Leniency rules.

At the same time the Commission's role in monitoring and controlling the impact of public intervention on competition and trade inside the European Union will have equal priority with our efforts in the merger, cartel and other fields concerned with the structure and behaviour of private undertakings. There has been considerable discussion and debate in the Member States and in the EU institutions, including in the Commission itself, about the relevance and effectiveness of EU state aid control and about the length of its procedures.

People in government at national, regional and local level often see the Commission's state aid policy as an illegitimate interference in the use of public money for public policy objectives which has nothing to do with distortion of trade or competition at the European level. Some of this criticism deliberately ignores the effects which some subsidies can have beyond the borders of the region or Member State concerned. However there is certainly a lack of understanding of what state aid control is trying to achieve. And there is the impression that we are simply applying rules which aim to curtail state aid as such rather than concentrating on controlling aid which really distorts the European single market.

The task of ensuring that we have less and better targeted state aid, as the Barcelona European Council requested one year ago, falls on both the Commission and the Member States. The Council had already requested the Member States to continue their efforts to reduce aid levels, in terms of percentage of GDP, and as a priority to reduce and ultimately eliminate aid which has the greatest distortive effects. The Commission was then invited to intensify the assessment of the impact of aid on competition, on the basis of economic criteria. In its report to the Copenhagen Council of last December, the Commission renewed its commitment to ensuring that its State aid control policy is based on sound economic criteria and that it addresses real distortions of competition having an impact on trade between states.

The Commission has already undertaken a large number of initiatives, which cover both procedures and substance. On the procedural side, the Commission has recently undertaken a detailed internal review with the aim of identifying the possibilities for simplifying procedures and reducing their duration. Some initial findings have been presented to and discussed with the Member States in December last year. Any significant change will require the active commitment and investment of the Member States themselves. On the substantive side, many improvements have already been made in the last years by adapting the existing policy instruments and introducing new ones, such as block exemption regulations, in order to bring state aid control in line with the changes of the economic and political realities.

In the last five years the Commission has significantly tightened up the control of state aids. We have to build on these achievements and further improve the enforcement of the state aid policy. At the same time, there is a need to rethink more substantially the role of this Community policy in the perspective of the accession of ten new countries to the Union.

In an enlarged Union, the scope for the control of state subsidies by the Commission has to be adapted to new realities. Even greater priority will have to be given to the assessment of those public measures that have the largest negative impact on competition and intra-community trade.

This requires additional work on the economic basis for a distinction between aid which is particularly harmful and one that does not raise major concerns. Simplified procedures could then be envisaged for cases, which — although fulfilling the legal definition of aid in Art 87.1 — do not significantly distort competition and trade. Such an approach could help provide better means, to determine priorities for enforcement in the state aid field, instead of being driven by the notification/complaint process. At the same time, the reflection should help to identify the key elements that the Commission ought to look at in its economic assessment of the impact of more serious state aids. It should also contribute to procedural reform by facilitating the examination of less important cases, as well as to helping justify state aid control by demonstrating that we focus on those cases which imply major distortions of competition.

In line with the requests from the European Council, high priority will be given to the establishment of guidelines concerning the compensation for the cost of providing services of general economic interest, while the need for a block exemption regulation will be kept under review in the light of developments in the case law of the Court of Justice. But the outcome of the present debate at the Court — which focuses on whether public financing strictly limited to the compensation of the public service costs falls under the definition of state aid and is thus subject to the notification obligation — may not give all the expected and desired answers.

The approach to the supply of services of general economic interest has profoundly changed over time. Today, governments rely to a much greater extent on market mechanisms and on commercial providers, which has often brought about greater efficiency, lower prices and better services for the citizens. There is also a need to reflect on the incentive structure of these operators, on the

effects of state funding on their growing commercial activities and on the development of increasingly transnational markets for the provision of these services.

This requires both the Commission and the Member States to rethink their approach to services of general economic interest. On the one hand, the role of the Commission in ensuring that competition and trade are not distorted to an extent contrary to the interest of the whole Community should be enhanced. This however calls for clear and commonly agreed methods of analysis, prompt assessments and focus on cross-border effects.

On the other hand, Member states themselves must take greater care in designing means of intervention that achieve the desired goal with the least possible distortion of purely commercial activities. Some Member States have already put in place systems and procedures that alleviate major problems. Examples of such procedures are the use of a public competitive tender procedure in the attribution of a public service and an appropriate judicial mechanism for dispute settling.

The distribution of tasks between the Commission and the Member States in this area must be clear. It is for the Member States' public authorities to determine whether there is a need to define a public service mission and entrust a particular operator with it. It is the Commission's task, however, to ensure that the restrictions imposed are limited to what is necessary to carry out this mission. The Treaty already provides a good balance between these basic principles.

More broadly, there is a tangible need to better integrate state aid policy with the other Community policies. In many fields, ranging from fiscal to structural policies, the effectiveness of the control of state aid will benefit from a better definition of the synergies and the boundaries between different policy instruments.

## Regulation 1/2003: a modernised application of EC competition rules

In February 1997, DG Competition started internal works on the reform of Regulation 17. The starting point of these works was a threefold finding: enlargement will take place in the near future, the notification system is no longer an effective tool for enforcing competition rules and the development of Community competition law allows companies to assess themselves the legality of their agreements and practices. It quickly became obvious that a simple improvement of the existing administrative procedures would not suffice to face the upcoming challenges competition law was facing and a profound change was required to ensure an efficient protection of the rules of the Treaty in an enlarged Community.

These considerations led to the publication in April 1999 of the White Paper on modernisation of the rules implementing Articles 81 and 82 of the Treaty. It was followed by an intense public debate in which not only Community institutions but also industry, lawyers and academics took part. The various contributions made were taken into account by the Commission in drafting its formal proposal. That proposal, which has now been adopted without major changes by the Council, will allow an efficient enforcement of the competition rules by focussing the action of the Commission on the serious violations of the rules and by involving more national authorities and courts in the enforcement of Community rules.

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### I. Introduction

On 16 December 2002, the Council adopted a new Regulation on the implementation of Articles 81 and 82 EC: Regulation 1/2003 (OJ 2003, L1/1). This Regulation replaces Regulation 17, which for over 40 years determined the application of Articles 81 and 82 EC by the Commission and, to a lesser extent, by the national competition authorities. Because the enforcement system as spelled out in Regulation 17 could jeopardise the effective enforcement of the EC competition rules in an enlarged European Union, it was decided to modernise the system.

Central to this modernisation is the abolition of the Commission's exemption monopoly and the introduction of the legal exception system. The former modification will increase the application of Articles 81 and 82 EC by national competition authorities and by national courts. It will thus contribute to a wider application of EC competition rules. Of course, a system of more enforcers asks for more co-ordination within the system. Therefore, Regulation 1/2003 establishes a network of European competition authorities and it enhances the co-operation between the competition authorities and the national courts. Complementary to this enhanced enforcement, the legal exception system will allow the European competition authorities to focus their action on the most severe infringements of Articles 81 and 82 EC. As a result, not only will

Regulation 1/2003 allow for more enforcement of EC competition rules, it will also increase the efficiency of that enforcement. In doing so, Regulation 1/2003 constitutes a necessary contribution to welfare of consumers and the competitiveness of European business.

### II. Towards a system of more vigorous enforcement

#### A. *The emergence of a new antitrust culture in the EU*

##### 1. *The legal exception system: a new environment for enforcers and companies*

The central feature of Regulation 1/2003, as set out in its Article 1, is the direct application of Article 81(3). It implies that undertakings are no longer called upon to notify agreements to the Commission with a view to obtaining an exemption decision. Under the new regulation, agreements that fulfil the conditions of Article 81(3) are legally valid and enforceable without the intervention of an administrative decision. Undertakings will be able to invoke the exception rule of Article 81(3) as a defence in proceedings conducted by the Commission, national competition authorities and national courts.

The new system will change the focus of the Commission's enforcement action. The Commis-

sion will in future concentrate on pro-actively investigating serious infringements, following complaints or on its own initiative. The new culture does however not stop at the Commission. It crucially involves undertakings and their legal advisors. The direct application of the exception rule gives them greater responsibility.

Under Regulation 17, the assessment that undertakings carried out of their agreements could focus on the notification process. Under the new system, it must be carried out with a view to ensuring that an agreement or practice complies with the law as such, i.e. demonstrably fulfils the conditions of Article 81(3). In reality, given the well-known problems of the notification system, many undertakings and law firms actually moved to this approach a long time ago. Under the new regulation however, it will be clearly the line to follow for everybody.

Regulation 1/2003 abolishes the function of examining agreements submitted for authorisation. Among the types of decisions taken by the Commission (Articles 7 to 10) there is none to substitute for the exemption decisions of the past. In particular, decisions that make a finding of inapplicability (Article 10) are designed to address the issue of coherent application and can only be taken by the Commission on its own initiative, not on application (see also point B.1.c on this type of decisions). The focus on pro-active enforcement also applies to the Member States' competition authorities. The basic types of decisions they adopt for the application of Articles 81 and 82 are enumerated in Article 5 of the Regulation. Under this provision, no exemption decisions or decisions with similar effects can be taken by Member States' competition authorities. An authority may, in a decision closing a file, find that there are no grounds for it to act. This statement will have no binding effect on other public enforcers or on national courts.

## 2. *An adequate level of legal certainty*

The abolition of notifications does not entail a loss in legal certainty for companies. This perception is mistaken. By extending validity and enforceability to all agreements that fulfil the conditions of Article 81(3), the new regulation ensures legal certainty for a large number of agreements that remained in a legal limbo under the old system inasmuch as only a minuscule number of agreements were covered by a formal exemption decision of the Commission.

For undertakings to verify that their behaviour complies with the applicable legal requirements is the normal practice in many areas of law. In these

circumstances, legal certainty does not depend on a certain type of procedure, but on the standards for assessment and the orientation provided by the framework of legislative and/or regulatory texts, interpretative notices, case law and practice. This is the reason why the Commission has, alongside the reform of the implementing regulation, overhauled the totality of block exemptions and produced extensive guidelines on vertical and horizontal restrictions in recent years. It intends to continue putting emphasis on this work (see below for the notices envisaged in the phase until the new Regulation becomes applicable).

Finally, the Commission will remain open to discuss specific cases with the undertakings where appropriate. A limited number of individual cases may present novel or unresolved questions for the application of Articles 81 or 82. The Commission is therefore preparing a Notice which will set out the circumstances under which guidance in the form of written 'opinions' could be provided by DG COMP. Such opinions would be published. They could not have any other than a *de facto* effect on other enforcers.

Issuing opinions is not excluded by Regulation 1/2003, as expressed in Recital 38. It is however clear that the Regulation gives priority to enforcement tasks. The Commission will therefore ensure that the preparation of opinions will only be envisaged where this can be reconciled with its enforcement tasks. To be faithful to the new Regulation, the Commission will have to build a selective practice that limits opinions to such situations where a genuine need for guidance on unresolved questions exists. Undertakings and lawyers can contribute to this by limiting requests to situations that — on critical scrutiny — appear appropriate. By no means should this instrument be mistaken for a substitute of the notifications of the old system.

## *B. New instruments for an effective enforcement*

### *1. New types of decision*

#### **a) Article 7: clarifying the power to impose structural remedies**

Article 7, which relates to prohibition decisions, contains two clarifications. First, it makes explicit the Commission's power to impose any remedy of a behavioural or structural nature, which is proportionate to the infringement and necessary to bring it effectively to an end. In accordance with the principle of proportionality it is made clear that the Commission can only impose a particular remedy,

if no other *equally* efficient remedy is available. Where several equally efficient remedies are available, it is for the undertaking concerned to make the choice. Secondly, it is made clear that the Commission has the power to adopt decisions, finding that an infringement has been committed in the past, provided that it has a legitimate interest in doing so. Such a legitimate interest may for example exist where there is a risk of repetition of the terminated infringement or where a decision is necessary in order to develop Community competition policy or to ensure its consistent application.

## b) Article 9

The new Council Regulation creates a new type of decision: decisions accepting commitments. These decisions should allow the Commission to handle efficiently and swiftly cases where companies offer commitments sufficient to solve the competition problem identified. Commitment decisions would close the Commission's proceedings without making a finding of infringement and without stating the compatibility of the agreements with Article 81 or 82. They would merely make the commitments legally binding on the parties so as to ensure that they will effectively be complied with. Substantial fines and periodic penalties are foreseen by the Regulation in cases where companies are found to be in breach of the commitments. Furthermore, claim for execution of the commitments or damages for their in-execution could be brought by victims before national courts. Commitment decisions would obviously only be appropriate in cases where the Commission does not intend to impose a fine.

## c) Article 10: set policy and ensure coherence

Article 10 equips the Commission with the power to adopt decisions finding that an agreement or practice does not infringe Articles 81 or 82. Regulation 1/2003 reserves this power to the sole Commission (see Article 5 for the types of decisions by national competition authorities). Decisions pursuant to Article 10 have the effects laid down in Article 16, i.e. national courts and competition authorities may not adopt decisions that would run counter to a decision of the Commission on the same case. However, the Commission can only take such decisions on its own initiative and where the Community public interest in the application of Articles 81 and 82 so requires.

Article 10 has a specific function in the framework of the new regulation. Decisions pursuant to Article 10 are instruments by which the Commission is able to ensure coherent application, given the effect of these decisions on the other enforcers. However, the Commission does not have to wait

that a problem of coherent application arises to use the instrument. It may adopt a decision pursuant to Article 10 with a view to define enforcement policy (see Recital 14 *in fine*).

The inclusion of the words 'in the application of Articles 81 and 82' clarifies that 'Community public interest' is strictly linked to the public interest of effective and coherent implementation of the competition rules; it cannot be construed as relating to wider 'public policy' goals. Conversely, the adjective 'public' is not without meaning. It must be seen in conjunction with the fact that the Commission adopts Article 10 decisions on its own initiative only. By this, the regulation intends to exclude that a 'private interest' could trigger the adoption of an Article 10 decision. Such decisions are thus not intended to be a replacement for the exemption decisions of the old system or to function as an instrument to 'bless' individual agreements absent any issue of coherent application or policy.

## 2. New powers of investigation backed up by more deterrent fines

In order to ensure an efficient enforcement of competition rules, it was also necessary to adapt the Commission's investigative powers. The new regulation improves slightly on the current powers without however increasing them substantially. Three new aspects are worth being mentioned.

Firstly, the officials authorised by the Commission will be empowered to seal premises for the period and to the extent necessary for the inspection. This will improve the effectiveness of the inspections, in particular when they are being carried out during several days.

Secondly, the power to ask oral questions during an inspection has been dislinked from documents: the limit will be the scope of the investigation as defined in the decision or in the mandate. This remains subject to the case-law of the Community Courts relating to non-self-incrimination (see e.g. Cases 374/87 *Orkem* and T-112/98 *Mannesmannröhren Werke*).

Thirdly, the officials authorised by the Commission will be empowered to enter non-business premises when there is a reasonable suspicion that books and other records relevant for the inspection are being kept there. This power will be exercised only where the suspected violation is serious and will be exercised under the control of national courts. Both for inspections at business and at non-business premises, the case-law of the Court of Justice in the recent *Roquette Frère* case (C-94/00) has been codified in the Regulation.

In order to make sure that these inspection powers can be carried out effectively, sanctions for breaches of these rules by the investigated companies have been increased up to 1% of their total turnover for fines and up to 5% of their average daily turnover for periodic penalties.

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In the new system, the Commission will remain an enforcer. The new Regulation does by no means withdraw the Commission from the enforcement field. On the contrary, it gives the Community institution more effective tools to carry out the function it has been entrusted with by the Treaty, i.e. ensuring that the principles of Articles 81 and 82 are respected and that private impediment to the movement of goods and services do not replace State barriers. This in itself would however not have been sufficient to maintain a high level of protection of competition in an enlarged Community. It was essential to also involve more national authorities and courts in the application of Community competition rules.

### **III. Towards more decentralised application of Community law**

#### *A. More application of EC law and more level playing field for companies*

One of the main concerns expressed during the reform process by the European Parliament, which was echoed by industry, was the risk that the abolition of the Commission's monopoly over Article 81(3) would lead to re-nationalisation of Community competition policy. It was in order to counter this risk and to ensure that the reform would lead to real application of Community competition law at national level that the Commission proposed in Article 3 to regulate the relationship between Community competition law and national competition law. Article 3 as adopted by the Council imposes two fundamental obligations on the courts and competition authorities of the Member States.

First, Article 3(1) imposes an obligation to also apply Articles 81 and 82 where national competition law is applied to agreements and abusive practices which may affect trade between Member States. This means that whenever an agreement or practice is subject to Articles 81 and 82, national competition law cannot be applied on a stand-alone basis. This obligation ensures that cases are argued from the outset on the basis of Community law and that the various mechanisms of the network are effectively applied, including the

various mechanism that aim at ensuring consistent application. In this regard it is particularly important to take note of the relationship between Article 3 and Article 11(6) according to which the competence of national competition authorities to apply Articles 81 and 82 is withdrawn when the Commission opens proceedings in the same case. In that case the national competition authorities can no longer comply with their obligation under Article 3(1) to apply Community competition law, which means that any case based on national law must also be closed. The only exception is where the application of stricter national competition law is not excluded. This question is covered by the second fundamental obligation of Article 3.

Article 3(2) obliges the competition authorities and courts of the Member States not to prohibit under national competition law agreements, decisions of associations of undertakings and concerted practices, which may affect trade between Member States, but which are not prohibited by Community competition law. Accordingly, an agreement, which is legal under Article 81 and 82, cannot be prohibited by national competition law. This convergence rule, which extends the current primacy rule developed by the Court of Justice in *Walt Wilhelm* to the non-prohibition side of Article 81(1), creates a level playing field for agreements throughout the internal market. Member States, on the other hand, are free to apply stricter national competition laws to unilateral conduct engaged in by undertakings. The Council did not accept to extend the convergence rule into this area. It follows that in this field national law, which is stricter than Article 82, can be applied on a stand-alone basis.

Finally, it should be noted that Article 3 does not in any way limit the scope of application of the fundamental principle of primacy of Community law. Agreements and practices that are prohibited by Articles 81 and 82 cannot be blessed by national law.

#### *B. More involvement of national authorities and courts*

##### *1. Involvement of national authorities: the network*

In an enlarged Community, it was also essential to involve national public enforcers in the application of the rules. This is what the Council regulation has done by empowering national competition authorities to apply Article 81 as a whole and Article 82. Public enforcement is therefore not only entrusted to the Commission but also to



twenty-five competition authorities. In order to facilitate co-operation, a network has been set up: the ECN — European Competition Network.

The new system will be a system of parallel competences. Unlike in the merger field where the Member States are exclusively competent below a given threshold and the Commission alone can deal with cases above that threshold, Regulation 1/2003 does not preclude the Commission from dealing with any case affecting trade between Member States. This is a requirement set out by the Treaty as interpreted by the settled case law of the Court of justice (see e.g. case C-344/98 *Masterfoods*). It will do so to enforce the rules efficiently where needed but also to develop Community competition policy and to ensure its consistent application throughout the Community.

National authorities can take up any case provided that they are able to collect the evidence necessary, to bring the infringement effectively to an end and to sanction it in an appropriate way. Indications which will be given on case allocation in the future Commission notice on the functioning of the network will therefore be indicative and not legally binding. This flexibility is needed in order to ensure that competition infringements are prosecuted efficiently.

The Council Regulation also creates mechanisms of mutual information and consultation so as to ensure a consistent application of Community rules. In last instance, if there is a persistent disagreement on the allocation of a given case or the adequate outcome of a certain procedure, the Commission may open proceedings with the effects of relieving national authorities from their competence to apply Community law in that particular case (Article 11(6)). This mechanism should however be applied exceptionally, where no other satisfactory solution can be found.

Finally, the Council Regulation creates the basis for an increased horizontal co-operation between national authorities: it empowers them to exchange and use in evidence information collected but also to conduct investigations on behalf of one-another for the application of Articles 81 and 82.

## 2. Involvement of national courts

Although the Court of Justice established the direct effect of Articles 81(1) and 82 EC already a long time ago, national courts are seldom seen to apply those provisions. Part of the explanation of this limited application of EC competition rules by national courts lies in the exclusive power for the Commission to apply Article 81(3) EC. Indeed,

any private action before a national court may be paralysed by a notification by the defending undertaking of its agreement to the Commission. Because of the binding effect of the latter's decision on all national authorities, the national court would have to suspend the proceedings pending before it until the Commission has taken its decision.

Of course, this can only be part of the explanation, because subsequent to the Commission's decision, one could start a complementary proceeding before a national judge in order to obtain damages for the infringement of EC competition rules, something a competition authority cannot grant. And still, this type of private enforcement remains limited. It was not the ambition of Regulation 1/2003 to tackle all issues which could remedy the limited private enforcement. However, it is believed that the abolition of the Commission's exemption monopoly and the confirmation that national courts are empowered to apply Articles 81 and 82 EC, constitute a first necessary step to improve the private enforcement of EC competition rules.

In order to assist the national courts in the application of EC competition rules, Regulation 1/2003 confirms the existing forms of co-operation between the courts and the Commission as they follow from Article 10 EC. The national court may thus ask the Commission for its support in the application of Articles 81 and 82 EC (see also the Commission's notice of 1993 on co-operation with national courts). In addition, the Regulation also provides for the possibility both for national competition authorities and for the Commission to assist national courts as *amicus curiae*. To that end, the competition authorities may submit written and — with the permission of the court — oral submissions to the court on the case pending before it. This type of active assistance to national courts will undoubtedly contribute to the full and coherent application of EC competition rules. The codification of the *Masterfoods* case-law in Regulation 1/2003 constitutes a guarantee for coherent application of EC competition rules as it prevents national courts from taking a decision which would run counter to a Commission decision in the same case and it imposes on national courts a duty to avoid taking a decision which would conflict with a decision the Commission intends to take.

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The Council Regulation will promote the application of one single set of rules throughout the Community by the Commission, national judges acting as 'Community judges' and national competition authorities embodied in a network of

close co-operation. It brings thereby Community law closer to the citizen and will contribute to strengthening a common competition culture in the Union.

#### **IV. Conclusion**

Regulation 1/2003 takes a firm step in the direction of stronger and more efficient enforcement of EC competition rules. The multi-faced co-operation between the Commission, the national competition authorities and the national courts will ensure that the new enforcement system produces also coherent enforcement. It is such coherence that can establish a solid legal environment in which European business can function adequately.

Regulation 1/2003 is a central, but only a first phase in the modernisation process. Before the Regulation will become applicable on 1 May 2004, European business will have to prepare itself for the new environment, Member States have to set in place all necessary instruments in order to be able to effectively apply the new Regulation and the Commission has to adopt the appropriate implementing measures and a number of supporting notices. And even that will not complete modernisation, because modernisation is more than just rules. Modernisation establishes a new partnership amongst public enforcers and between those enforcers, industry and consumers. Modernisation is thus a common responsibility for the years to come.

## Reform of the EU Merger Control System — a comprehensive package of proposals

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On 11 December 2002, the Commission decided upon a comprehensive reform of the EU merger control system, including the adoption of proposals for legislative change and for substantive guidance on merger analysis. These proposals follow a year of consultation and debate on the Green Paper <sup>(1)</sup> on the Review of Council Regulation (EEC) No 4064/89, the Merger Regulation <sup>(2)</sup>. The Paper called for views on how the effectiveness of the legal framework for EU merger control might be improved, adapting it better to the realities of a globalising economy, against the backdrop of an enlarging and increasingly integrated Community. The Merger Regulation foresees a regular review of certain of its provisions, notably those concerning the scope of the Commission's competence in merger control <sup>(3)</sup>. Since its adoption in 1989, the Merger Regulation has been amended once, in 1997 <sup>(4)</sup>. The present reforms include proposals, however, which go beyond jurisdictional matters, and constitute a more comprehensive and forward-looking review of the functioning of the EU's merger control regime as a whole. The reforms comprise: a proposal for amendment of the current Merger Regulation <sup>(5)</sup>; a draft Commission Notice on the appraisal of horizontal mergers, which is the subject of public consultation until the end of March 2003; and certain best practice recommendations and other administrative measures designed to enhance transparency and fairness in the conduct of merger investigations within DG Competition.

### Objectives of the reform

The revision proposals build on the Commission's experience in applying the Merger Regulation over more than twelve years. They are designed to improve the Regulation's effectiveness, and to take account of changes which have occurred in that period both in terms of the increase in the number of cases, their greater economic complexity and

the higher levels of industrial concentration which have necessitated greater sophistication in the economic analysis contained in the Commission's reasoned decisions. The proposed reform also seeks to redress perceived shortcomings that have emerged over the years. In this regard, particular account has been taken of the three recent judgments of the European Court of First Instance over-turning on appeal the prohibition decisions the Commission had taken in *Airtours/First Choice*, *Schneider/Legrand* and *Tetra Laval/Sidel*.

The reform pursues the two-fold objective of, on the one hand, consolidating the successful features of the EU merger control system, and, on the other, of seeking to ensure the continuing effectiveness of the Merger Regulation as an instrument of merger control in meeting the new challenges faced by the economy of the European Union, notably including its pending enlargement.

### The proposed reform

#### *Substantive issues*

##### *Amendment to Substantive Test in Merger Regulation*

The Commission's Green Paper launched a reflection on the merits of the substantive test enshrined in Article 2 of the Merger Regulation (the dominance test). In particular, it invited comment on how the effectiveness of the test compares with the 'substantial lessening of competition' (SLC) test used in several other jurisdictions (and notably in the USA). The consultation spawned a wide range of commentary pleading both for and against change. The main thrust of the arguments of those pleading for a change to an SLC-type standard is that such a test would be inherently better-suited to dealing with the full range and complexity of competition problems that mergers can give rise

<sup>(1)</sup> COM(2001) 745 final, of 11.12.2001.

<sup>(2)</sup> OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.

<sup>(3)</sup> In its Report of 28 June 2000 to the Council on the application of the Merger Regulation thresholds, the Commission concluded that there were strong indications that the existing thresholds should be revised, so as to better cover all concentrations with a Community interest. It moreover set out a number of other jurisdictional, substantive and procedural issues that would merit a more in-depth discussion (see COM(2000) 399 final — 28.6.2000).

<sup>(4)</sup> Council Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p. 1, corrigendum in OJ L 40, 13.2.1998, p. 17.

<sup>(5)</sup> COM(2002) 711 final, of 11.12.2002.

to, and in particular that there may be a ‘gap’ or gaps in the scope of the test in Article 2.

The Commission has concluded however, based on its experience to date, that these potential drawbacks to retention of the dominance test were over-emphasised and that, in practice, the dominance and SLC standards have produced broadly convergent outcomes, especially in the EU and US in recent years. With a view, however, to ensuring legal certainty and enhancing transparency regarding the scope of the current test, the Commission proposed a clarification of the notion of dominance contained in the current substantive test to be added to the text of Article 2 (by the addition of a paragraph in Article 2 and of further recitals to the Regulation) <sup>(1)</sup>, so as to make it clear that the test also applies where a merger results in so-called ‘unilateral effects’ in situations of oligopoly, a potential ‘gap’ to which some commentators have pointed. The clarification proposed is consistent with how the European Court of Justice has defined dominance in merger cases <sup>(2)</sup>, but is intended to more closely focus on the dynamic impact of concentrations.

### *Draft Notice on the Appraisal of Horizontal Mergers*

In addition to this clarification of the scope of Article 2 of the Merger Regulation the Commission also adopted a draft Notice on the appraisal of ‘horizontal’ mergers, thereby providing transparency and predictability regarding the Commission’s merger analysis, and consequently greater legal certainty for all concerned. The Commission also announced that it intends to adopt, at a later stage, further guidance on its approach to the assessment of ‘vertical’ and ‘conglomerate’ mergers.

The first set of draft guidelines have been drawn up with a view to setting out a sound economic framework for the assessment of concentrations where the undertakings concerned are active sellers on the same relevant market or potential competitors on that market (horizontal mergers). The draft Notice sets out three main ways in which horizontal mergers may give rise to competition concerns: where the merger is likely to create or strengthen a so-called ‘paramount market position’; where the merger is likely to diminish competition in an oligopolistic market by eliminating competitive constraints on one or more sellers in that market; or where the merger is likely

to create or enhance the likelihood of collusion between competitors in an oligopolistic market. The draft guidelines also deal with particular factors that could mitigate an initial finding of likely harm to competition — factors such as buyer power, ease of market entry, the fact that the merger may be the only alternative to the demise of the firm being acquired, and efficiencies.

### *The treatment of efficiencies*

As regards the treatment of efficiencies the draft Notice states that the Commission intends to carefully consider any substantiated efficiency claim in the context of the overall assessment of a merger, and may ultimately decide that, as a consequence of the efficiencies the merger brings about, the merger does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

In so doing, the Commission takes the view that efficiencies can be taken into account, as an integral part of the competition assessment under Article 2, without changing the present wording of the substantive test in the Merger Regulation. Indeed, Article 2(1)(b) of the Merger Regulation states that the Commission shall take account in its competition assessment, inter alia, of ‘the development of technical and economic progress provided it is to consumers’ advantage and does not form an obstacle to competition’.

The draft Notice cautions, however, that efficiency claims would only be accepted when the Commission is in a position to conclude with sufficient confidence that the efficiencies generated by the merger will enhance the incentive of the merged entity to act pro-competitively for the benefit of consumers, because the efficiencies generated by the merger will either outweigh any adverse effects on consumers or make these effects unlikely. For the Commission to reach such a conclusion, the efficiencies would have to be of direct benefit to consumers, as well as being merger-specific, (i.e. they could not be achieved by means other than via the merger) substantial, timely, and verifiable. The burden of proof would rest on the parties, including the burden of demonstrating that the efficiencies are of such a magnitude as to outweigh the negative effects of the merger on competition. The draft Notice also indicates that it is very unlikely that efficiencies could be accepted as sufficient to permit a merger leading to monopoly or quasi-monopoly to be cleared.

<sup>(1)</sup> The proposed clarification would apply only to the concept of dominance in the Merger Regulation, and not more widely.

<sup>(2)</sup> Case T-102/96, *Gencor/Commission*, T-102/96, [1999] ECR II-753, para. 200.

## *Reform of The Merger Control Process*

As indicated above, the reform involves changes to the Merger Regulation itself, as well as a series of non-legislative measures. These measures are designed to ensure that the Commission's merger investigations are conducted in a manner which is more thorough, more focused, and more firmly grounded in sound economic reasoning. As a result, the soundness of the Commission's decisions in merger cases should be enhanced.

### *Legislative measures*

#### *Time limits*

The Commission proposes a number of significant amendments to the timing provisions in the Regulation. First, the period during which merging parties may offer commitments in Phase I would be extended from 3 to 4 weeks. Second, the submission of a remedy offer in Phase II will, unless it is made early in the procedure (before the 55th working day), lead to an additional 3 weeks being added, thereby allowing more time for the proper consideration of remedies, including the consultation of Member States. Thirdly, the draft Regulation proposes that up to 4 weeks could be added to Phase II for the purpose of ensuring a thorough investigation in complex cases. The parties would have an initial right to add such extra time. It could, however, also be added at the request of the Commission (but with the agreement of the merging parties), where the Commission is convinced that additional investigation time is warranted. Finally, the draft Regulation foresees the introduction, by means of a Commission Regulation, of generalised exemptions from the prohibition on the implementation of a transaction pending clearance for non-problematic cases.

#### *Timing of notifications*

A further proposal relates to the need for more flexibility as regards the timing of notifications to the Commission. The proposed amendment would make it possible to notify prior to the conclusion of a binding agreement. It is also proposed that the current deadline for notification of one week after the conclusion of such an agreement be removed, provided no steps are taken towards its implementation. The more flexible rules should allow companies to better plan their transactions, without having to fit their planning around unnecessary regulatory rigidities, and would at the same time facilitate international cooperation on merger cases, particularly when it comes to synchronising

the timing of investigations by agencies in different jurisdictions.

#### *Enhanced fact-finding powers*

With regard to the Merger Regulation's fact-finding provisions, the Commission proposes, with some exceptions, to align its fact-finding powers, including the fining provisions, with those proposed in the new implementing Regulation for Articles 81 and 82 EC <sup>(1)</sup>. This will enable the Commission to obtain information more easily for the purposes of an investigation and includes the possibility of imposing higher fines for failure to comply with requests to supply such information. These measures are important, not least with regard to the high evidentiary burden incumbent upon the Commission in cases where it proposes to intervene. Nonetheless, certain powers foreseen in the context of Articles 81 and 82, and notably the power to conduct home searches and sector enquiries, are not proposed to be included in the Merger Regulation.

#### *Simpler and more flexible allocation of cases*

Another of the main objectives of the reform is to optimise the allocation of cases between the Commission and national competition authorities, in the light of the principle of subsidiarity, while at same time tackling the persistent phenomenon of 'multiple filing' (i.e. parallel notification to more than one competition authority within the EU).

In the Green Paper, the Commission put forward for discussion the possibility of providing for exclusive Commission jurisdiction over all merger cases that are notifiable in at least three Member States (the so-called '3+ proposal'). The aim of strengthening the application of the principle of subsidiarity in case-allocation was widely supported in feedback to the Green Paper. However, the results of the public consultation have revealed a series of potential drawbacks associated with the initial proposal, in particular the legal uncertainties it might bring about. In the light of this feedback, the Commission has decided not to pursue the '3+ proposal', and instead is proposing a simplification of the referral mechanism, while at the same time rendering it more flexible.

The Commission is now proposing first to simplify the criteria for referral, including a closer alignment of the criteria for referral in both directions (from the Commission to Member States and vice versa), and secondly to allow referrals to be made at the pre-notification stage. Notifying parties

<sup>(1)</sup> Council Regulation 1/2003.

would be given the exclusive right of initiative at this early stage, and could, depending on whether they consider that a merger involves a significant cross-border impact, make a reasoned request for a pre-notification referral of the case in either direction. The request would have to be acceded to by both the Commission and the national competition authorities concerned within short deadlines, thereby excluding situations of deadlock. The Commission further proposes that, if at least three Member States agree to a case being referred to the Commission, the case should be deemed to fall under exclusive Community jurisdiction. These amendments to the Merger Regulation would be complemented by a set of guiding principles regarding the criteria upon which referral decisions should be based, and which would in due course be submitted for the approval of the Commission.

### *Non-legislative measures*

#### *Enhancing DG COMP's economic capabilities*

The Commission intends to create a new position of Chief Competition Economist within the Competition D-G, with the staff necessary to provide an independent economic viewpoint to decision-makers at all levels, as well as guidance throughout the investigative process. He or she would be an eminent economist, on temporary secondment to the Commission, thus ensuring that the holder of this post is someone who is in touch with the latest thinking in the field of industrial economics. The role of the Chief Economist would not be limited to his/her involvement in merger control, but would also extend to competition law enforcement generally, including the control of State aids.

It is also intended to accelerate DG Competition's recruitment of industrial economists and that greater use be made of outside economic expertise. In particular, it is envisaged that independent econometric studies would more frequently be commissioned in Phase II merger investigations.

#### *Enhancing peer review*

A further change is an enhanced and more systematic use of a peer review 'Panel' system in Phase 2 merger cases. A Panel composed of experienced officials would be appointed for all in-depth investigations, and would have the task of scrutinising the case team's conclusions with a 'fresh pair of eyes' at key points of the enquiry. To this end, it is intended to create a new Unit to providing the necessary support and structure to allow these Panels to become a real and effective internal

check on the soundness of the investigators' preliminary conclusions. It is moreover intended that this Panel system would be deployed throughout the Directorate-General, to the equal benefit of the Commission's decision-making in the antitrust and State aid areas.

#### *New Best Practice Guidelines — Enhancing due process generally*

It is also intended to further increase the transparency of merger investigations. First the merging parties would be given the opportunity to examine the file shortly after the opening of an in-depth investigation (i.e. following the issuance of a decision pursuant to Article 6(1)(c) of the Regulation). Secondly, it is intended to ensure that merging parties are given ad hoc access throughout the investigation to the main third party submissions running counter to the merging parties' views — respecting, of course, legitimate claims to the protection of confidential information. This will enhance even further the transparency of procedures and allow the parties to contest these submissions at early stages of the investigation and not, as presently, only once a Statement of Objections is issued.

An opportunity should, it is proposed, furthermore be provided for the merging parties to discuss contentious issues with 'complaining' third parties at a meeting which should ideally be held prior to the issuing of a Statement of Objections. This would enable an earlier confrontation of opposing arguments relating to the likely effects of proposed merger and therefore assist in the preparation of a more focused Statement of Objections.

It is also intended to introduce some further discipline and transparency in the conduct of investigations, by offering merging companies the possibility to attend so-called 'State-of-Play' meetings with the Commission at decisive points in the procedure. This should guarantee that the merging parties are kept constantly updated on progress in the investigation, and that they are given an ongoing opportunity to discuss the case with senior Commission management.

These non-legislative measures are contained in a draft set of best practices on the conduct of merger investigations, which will be discussed with the legal and business community before they are finalised. These best practices should deal with the day-to-day handling of merger cases by DG Competition, as well as the Commission's relationship with merging parties and interested third parties, and would in particular concern the timing of meetings, transparency, pre-notification contacts, and due process in merger proceedings.

The draft best practices are published for comments on the DG Competition web-site <sup>(1)</sup>.

#### *Re-enforcement of the Hearing Officers*

A further strengthening of the Hearing Officers is also a part of the envisaged reforms. It is intended that the Hearing Officers should be equipped with resources, including A grade officials, sufficient to enable them to fully discharge their responsibilities. A strengthening of the Hearing Officers was widely called for in feedback to the Green Paper.

#### *Participation of consumers and other interested third parties*

Other reforms include the creation of a Consumer Liaison function within DG COMP, to encourage and facilitate the involvement of consumer associations, which are often poorly resourced bodies. The purpose here is to enhance consumer involvement in competition proceedings. Despite the fact that the ultimate goal of merger control is the protection of consumer welfare, consumers and their organisations rarely express views to the Commission about the likely impact of specific mergers.

The Commission also intends to amend the merger notification form so as to include a reminder to companies of the need to respect their obligations under national and EU law with regard to the consultation of worker representatives.

#### *Judicial review*

The Commission has also announced that it intends to continue to press for speedy review of its decisions by the Courts. The introduction by the CFI of a fast-track procedure represents an important step forward, demonstrating that judicial review can be delivered with relative speed: the efficiency with which the CFI disposed of the appeals in *Schneider/Legrand* and *Tetra Laval/Sidel* represents real progress.

The Commission, in parallel with the discussions in the Council of Ministers on the revision of the Merger Regulation, has announced its intention to explore with the Member States the various options available which would ensure speedier judicial review in merger cases. The Commission will also pursue contacts with the ECJ and the CFI on this matter.

<sup>(1)</sup> <http://europa.eu.int/comm/competition/mergers/>

## Retail banking, social inclusion and public service

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Three recent notifications under article 87(3) deal with the financing by the State of services of general economic interest defined as ‘country-wide access to over-the-counter cash and payment services through post office counters’. The measures notified are more specially targeted at enabling access for those citizens living in remote rural locations or on social security. In the three cases presented — the Irish, Swedish and British — the Commission has decided not to raise objections as the measures are compatible with the common market in so far as the compensation is commensurate with the net cost of providing the public service. According to the recent Court jurisprudence, this means that no State aid is involved as there is no overcompensation.

These notifications come from Member States as diverse in their socio-economic structure as the UK, Sweden and Ireland. They raise questions as to why the issue of enabling access to basic banking and payment services has become so topical. This will be examined in the first part of this paper, dealing with financial inclusion at EU level. The second part will focus on the reasoning behind the Commission's decisions within the context of each Member State.

### 1. The ‘un-banked’

While the number of EU citizens with a bank account has risen in line with increasing welfare, new technology has drastically reduced the cost of banking transactions conducted on a remote electronic basis. As a result, the relative costs of concluding banking transactions over-the-counter have increased. Simultaneously increased competition has meant that current account cross-subsidies are being dismantled. Typically, 80% of current accounts which used to be loss-making were financed by the remaining 20% which were profitable thanks to high balances.

Cost-based pricing added to reduced geographical presence of bank branches means that there is a risk of increasing exclusion among those in the lower social strata who are not at ease with remote banking transactions. Those most affected include old age pensioners, those living on benefits and those based in isolated locations. Yet in our modern societies, being banked is becoming increasingly essential for everyday life:

- to receive salary (not to mention obtain employment) and social security payments
- to cash cheques and pay bills without extra fees or even with a discount (the latter being applied for example to utilities payments through direct debit)
- as a protection against theft
- as a gateway to other financial services, such as insurance, long term savings, credit and mortgages.

The negative consequences of not having an account have been further exacerbated by anti-laundering measures which penalise those without a fixed address and identity cards. This affects in particular countries such as the United Kingdom where identity cards are not compulsory.

National data on the number of citizens without current accounts are fragmented and incomplete. However, the 2000 Eurobarometer survey gives a rough indication of the extent of the problem.

*Availability of a personal current account, giro account or similar*

Country	Yes	No	N.a
<b>Dk</b>	99.1	0.7	0.2
<b>Nl</b>	98.9	0.5	0.6
<b>S</b>	98.0	1.6	0.4
<b>Fin</b>	96.7	1.5	1.7
<b>D</b>	96.5	2.9	0.6
<b>F</b>	96.3	2.8	1.0
<b>Lux</b>	94.1	3.9	1.7
<b>B</b>	92.7	5.1	2.0
<b>Sp</b>	91.6	6.9	1.5
<b>UK</b>	87.7	10.6	1.6
<b>P</b>	81.6	16.7	1.8
<b>A</b>	81.4	13.5	5.1
<b>IRL</b>	79.6	16.7	3.7
<b>Gr</b>	78.9	17.9	3.2
<b>It</b>	70.4	22.4	7.2
<b>EU 15</b>	<b>8.6</b>	<b>8.6</b>	<b>2.2</b>

Source: Eurobarometer 52, financial services, Europeans and financial services — May 2000 (based on 1999 survey).



In terms of financial exclusion, measured by number or people without current accounts, there are three distinct groups of countries:

- the giro Nordic and German countries in which financial exclusion is limited to between 0.5 and 3% of the population, with the exception of Austria
- the British Isles in which financial exclusion is over the EU average
- the Mediterranean countries whose retail financial services have only recently become mass market. As shown in the table, Spain and Portugal are rapidly closing the gap in current account ownership. Apart from Italy, what these countries have in common is their lower GDP per inhabitant. But the Italian figures hide a strong disparity between the north and the south.

The results are in line with the hypothesis according to which the two correlating factors for financial inclusion at national level are the level of development as measured by the GDP per inhabitant and the degree of inequality within the country considered measured, for example, by the Gini coefficient <sup>(1)</sup>. The higher level of inequality partly accounts for the lower level of current account ownership in the British Isles. Austria, a giro-based society with a high GDP per inhabitant and relatively little inequality, is an exception to the rule, possibly because of the popularity of savings accounts over current accounts. France, a predominantly cheque-based society, is also an exception to the rule, due to peculiarities in its legislation which privileges cheque use and prevents both cheque charging and interest-bearing current accounts.

In several countries, among them France, Germany, Sweden, Belgium and the UK, the issue of access to current accounts has been publicly debated. Interestingly, the subject is not such a high priority in Italy and Greece where the number of un-banked is the highest. Where a significant proportion of the population lives on a cash-based system, the sense of exclusion is diminished. Cash or non-bank payment systems are commonly used by a large section of the population and as a result, the charges for transactions not effected on current accounts may still be lower than those on current accounts. On the other hand, in countries where financial inclusion is high, not having an account can render one an outcast. Being un-banked in a low GDP country tends to be associated with

economic poverty. In a high GDP country, the phenomenon becomes one of the many facets of social exclusion.

The other factor which has contributed to the topicality of the issue of non-inclusion is the reduction in the actual number of bank and post office branches — especially where no measures have been taken to address the issue of reduced over-the-counter access. The debate has come to the fore in the UK, Sweden, Belgium, France and Germany — countries which have all experienced a reduction in the number of traditional payment outlets.

Once the problem has been acknowledged, a variety of solutions — often used in conjunction — have been gradually developed within Member States. These are:

- voluntary bank charters
- use of post office counters as country-wide outlets for over-the counter payment and transactions
- right to a basic bank account for all citizens
- establishment of a single regulator for financial services responsible for consumer education for all citizens, including non-customers of financial services
- conferment by the State of a service of general economic interest to one or several undertakings.

## 2. Assessment of the measures notified to the Commission

In order to assess whether or not a measure includes incompatible elements, the Commission has first to establish whether the measure could potentially constitute a State aid under article 87(1), the general principle being that aids are incompatible with the common market. The five criteria to be fulfilled for the measure to constitute potentially an aid are:

- the measure must be attributable to the State
- it must involve a transfer of State resources
- it must distort competition
- it must affect intra-community trade
- it must confer an advantage to an economic activity

<sup>(1)</sup> ‘Banking failure or a failure to bank? An international comparison of banking exclusion — Elaine Kempson — in Rapport moral sur l’argent dans le monde — Association des économistes financiers — Paris — Caisse des Dépôts et Consignations, 2001’.

If the measure meets the five criteria, an exception to the general principle can be applied when the undertaking has been entrusted with a service of general economic interest. According to article 86(2), the measure is compatible if the State resources applied do not exceed the net cost of the public service and if the measure does not harm Community interest. In such a case, the measure is deemed not to be an aid in the light of the latest jurisprudence. This jurisprudence overturned the previous jurisprudence under which the same measure would have been deemed to be an aid compatible with the common market.

The separation of accounts which has to be applied by undertakings active in the competitive field and to which a service of general economic interest has been conferred is key to the assessment of proportionality. The purpose of this assessment is to ensure that there is no distortion of competition beyond what is strictly necessary to ensure the delivery and continuity of the public service. This distortion would consist in an overspill of Government payments into the competitive activities of the undertaking entrusted with a service of general economic interest.

In a report to the Council of Ministers issued in 1998, the Commission made clear that these principles should be applied to the banking sector <sup>(1)</sup>. The Commission also knew that Sweden already had in place a system to provide for compensation for the delivery of basic banking services through post office outlets and rural postmen.

## 2.1. *The UK case*

### 2.1.1. *Context*

The Labour Government has made the fight against exclusion its priority from its election in 1997 onwards. It has adopted the role of a mediator and resisted imposed solutions, such as a universal banking obligation, in favour of those agreed on a consensus basis. The Office of Fair Trading (OFT) conducted an initial inquiry into the subject. The 1999 resulting report was prefaced by the OFT Director in the following terms:

‘It is often claimed that those who fail to take up even the most basic of financial services have done so out of choice. My scepticism of such claims has been confirmed by the analysis and research in this report. The take-up of bank current accounts, household insurance and short-term credit is inconsistent with the exercise of any meaningful choice. In the case of long-term savings, the means simply

do not exist for those who can afford only to save modest amounts to earn an acceptable return. When concern about who benefits from financial services regulations and who pays for it are added to these findings, the conclusion that financial regulation, in its widest sense, has failed to reflect the interest of vulnerable consumers is almost inescapable’.

Following the Social Exclusion Unit’s report on deprived neighbourhoods, the Policy Action Team (PAT 14), a mixed group of civil servants and outside experts, looked into the possibility of widening access to financial services. PAT 14’s main conclusion was that the most suitable option would be a free current account with risk-less payment. This would open the door to financial services and facilitate payments without any risk to the bank and the current account holder.

More or less simultaneously, the Chancellor of the Exchequer ordered a survey into competition in UK banking, conducted by the former telecom regulator, Don Cruikshank. Cruikshank alleged that the banking industry was making an oligopoly surplus profit in three main areas: financial services for consumers and for small businesses, and money transmission. All, but one, of the report recommendations have been adopted including those regarding access to current account which were in line with PAT 14’s recommendations.

In the meantime, regulation and competition law were being overhauled. The supervisory functions of the Bank of England were transferred to the Financial Services Authority (FSA) which covers the remit of the nine previous regulators. One of the four statutory objectives of the FSA is consumer protection and education. To comply with this objective, the FSA is responsible for promoting the understanding of financial services among all citizens, including the underprivileged - those least likely to be clients of financial services institutions.

The Government decided to modernise social security payments by transferring all payments to bank accounts through automated credit transfer, rather than through a magnetic card not linked to a bank account, as originally planned. As a sizeable proportion of those genuinely un-banked still do not want to open current accounts with banks, a consensual solution which would suit all the un-banked benefits recipients was adopted. Those who do not want an account with a bank will be able to open a simplified postal account from the beginning of the migration process in April 2003. Procedures for payment benefits with the post

<sup>(1)</sup> See [http://europa.eu.int/comm/competition/state\\_aid/others/report\\_bank/report\\_bank\\_en.html](http://europa.eu.int/comm/competition/state_aid/others/report_bank/report_bank_en.html)

office card account mimic the previous cash benefit withdrawals at the post office, the difference being that giro-cheques and order books are replaced by a magnetic card. Those benefits recipients willing to open a bank account can open a standard account or a basic bank account (free, no credit facilities and associated risk-less payments) and go on conducting their transactions at the post office, if their bank has concluded an agreement to this effect.

The British Bankers' Association committed itself to advertising the new basic banking services and amending its code of conduct (most notably, by giving an eight week notice before branch closure and indicating how banking services will be provided after the closure). It also published an annual report on the progress of financial services inclusion. In the meantime, the FSA has compiled the information sources on financial service exclusion <sup>(1)</sup>. As part of its remit to work in close co-operation with the various stakeholders to develop financial education with the most vulnerable consumers, it has also published a brochure on the benefits of opening a bank account <sup>(2)</sup>. Most banks have decided to contribute, on a voluntary basis, to the cost of the post office card accounts. However, the Banking Code Standards Board which monitors the voluntary Banking Code has just published a report showing how poorly banks advertise the availability of basic bank accounts, which confirms earlier research by the FSA consumer panel.

### *2.1.2. The notification: Universal Banking Services — N514/2001*

In July 2001, the UK authorities notified an array of measures under the headline of 'universal banking services'. These measures were aimed at enabling the compulsory migration of social security benefits to automated credit transfer between 2003 and 2005 (part of the Government modernisation policy). They also were aimed at facilitating access to current accounts for those who are 'un-banked' — as part of the Government financial inclusion policy. More than 6 million people in the UK do not have current accounts, i.e. between 14 and 18% of the population. The post office retail network which caters especially for the lower socio-professional categories, Post Office Limited (POL), has a wider reach than the banks with 50% more retail outlets overall. POL is present in particular in remote rural and underprivileged urban areas which have been deserted by banks.

POL is highly trusted by those un-banked, not the least old age pensioners and the unemployed.

Agreements have been individually negotiated between banks willing to take part in the scheme and Consignia (now named Royal Mail), the postal incumbent which fully owns POL, for the delivery of what are known as 'basic bank accounts' — bank accounts tailored to the needs of the un-banked. Basic bank accounts are free of charge and do not offer credit facilities. This avoids the risk, dreaded by the un-banked, of falling inadvertently into the red. The costs of an overdraft are prohibitive for those benefits recipients who are among the most vulnerable in society.

For the un-banked who do not even want a basic bank account available through post offices and prefer to have recourse to the old system of cash payments at the post office counter, a new Post Office Card Account (POCA) will be offered. The only apparent difference with the old system is that a magnetic stripe card will replace the previous paper-based order books and giro-cheques. A dedicated ring-fenced and virtual bank, wholly-owned by POL, will be established in preparation for the transfer to the new card-based system.

The overall Government remuneration, including the agency payments, will be equal to the net cost of the POCA bank — and therefore to its losses as it does not generate any revenues. The losses will be reduced by the contributions most banks have agreed to pay on a voluntary basis as evidence of their social responsibility. The back office operations have been tendered for a limited period on an open competitive basis to EDS/Citibank, thus ensuring that costs be kept to a minimum. POL will open the POCA account and carry out the related transactions. The front office compensation to POL is being negotiated between the Government agencies and Consignia in the context of the remuneration obtained for similar services from banks. The aim is to cover all the direct costs and some of the indirect costs of keeping structurally loss-making post offices open.

Neither the delivery of bank accounts through post offices, nor the voluntary contributions by banks to the funding of the POCA banks, involve any State resources. They therefore do not involve any element of State aid. The mechanisms are being put in place to ensure that the net cost of the services of general economic interest conferred to Consignia through the POCA Bank and POL will not be overcompensated. The POCA bank will be

<sup>(1)</sup> 'In or out? Financial exclusion: a literature and research review' — Financial Services Authority consumer research — Elaine Kempson — July 2000.

<sup>(2)</sup> 'No bank account? Why it could pay to have one' — Financial Services Authority Consumer Publication — October 2001.

legally and accountably separated and the financing will be limited to the net costs once deducted the voluntary contributions from the commercial banks. Specific accounting identification of costs linked to POCA has been put in place for POL. On these grounds, the remaining universal banking services proposals are compatible with the common market. The Commission decided on 13 February 2002 not to raise any objections to the notified proposals for universal banking services.

## 2.2. *The Swedish case*

### 2.2.1. *Context*

In Sweden, banks have to accept deposits from the public and therefore to open accounts. But they are not obliged to provide associated payment services. The bank practice of refusing to deliver cards to withdraw cash on an account not providing credit facilities has been condemned by the Financial Supervisory Board although it continues. However, the post office has always provided for over-the-counter cash transaction facilities. With the increasing use of internet and telephone banking, the number of cash payment transactions over the post office counters has been reducing. This has caused a constant rise in the net cost of providing the service as the revenues have been diminishing while the related costs cannot be proportionally reduced.

After ordering an inquiry in 1998 into the best way to deliver the universal cashier service, the Government decided in 2000 to go against the Committee's recommendations to put the service up for tender at regional level. This is because the Government believes that access to cash facilities at uniform prices through the most widespread and experienced network in this field is necessary to ensure social and territorial cohesion.

Once the principle of the sale of Postgirot — the post office dedicated payment bank — was agreed, the obligation was conferred again to Posten AB, the Swedish licensed universal service operator, until 2005. The proposed Government compensation is close to the net extra cost for providing the service. In the meantime, the postal counter network has been re-deployed (sale of the counters owned by the post office, creation of post offices dedicated only to business customers and point of sales all over the country in alliance with other retailers). The financial services counter network is increasingly based solely in locations where no other economic operator is present. The postal network and the retail financial services network have been structurally separated.

### 2.2.2. *The notification: Posten AB's universal cashier service N749/01*

Posten AB, which is wholly-owned by the State, is entrusted with a new universal basic cash service for which it will receive an annual State compensation through a budget appropriation. It notified the Commission of this new entrustment in November 2001. Cash services such as bill payments or bank account deposits and withdrawals through Posten AB are offered at a uniform price. These services are provided through counters and through the rural postmen service dedicated to the 700,000 individuals and 5,000 companies based in isolated locations. This entrustment follows a previous entrustment to Posten AB conferred prior to Sweden joining the EU — which also involved an annual budget compensation. The previous service was different in nature in that it did not give potential access to all bank current accounts for deposits and withdrawals. The cash facilities were provided essentially by the dedicated payment bank, Postgirot, which was sold in 2001. Other financial institutions provided complementary financial services — all of which will be discontinued.

The basis for compensation, for both measures, is the net additional cost of providing universal cash facilities where there is no alternative and it is not commercially justified to carry out the activity. This applies to around 350 counters and 2,750 rural postmen. Revenues come from the network fee per transaction negotiated individually between Posten AB and each bank for access to their accounts through the network. They also come from the charges paid by customers for the giro payments. Costs are attributed to the universal service on a fully-distributed basis. The network fees and charges to customers cover more than the direct costs, but not the full costs. The projected minimum annual net additional cost of the universal cash facilities which has been validated by PricewaterhouseCoopers is likely to be of the order of SEK 400M (€ 44M), which is the amount of the planned budgetary compensation for the four years to come, starting in 2002. In order to ensure that there is no overcompensation and in accordance with the Transparency Directive (2000), separate accounts have been drawn up for State financed activities. A separate company integrating the cash payment services was formed on 1 June 2002, Kassaservice AB, with a dedicated balance-sheet and a separate Board. The Swedish State has committed itself to clawing back any overcompensation on an annual basis, should it occur. Over the period preceding the notification, the net additional cost of providing the previous

universal service was clearly not overcompensated.

As the previous measure did not involve any overcompensation and as the mechanisms are in place to ensure that the new notified measure does not incur any overcompensation, no element of aid is involved. Consequently, the Commission decided not to raise any objections on 2 July 2002.

### 2.3. *The Irish case*

#### 2.3.1. *The context*

In Ireland, the debate surrounding access to financial services has focused on two issues: the Government's commitment to develop an information society and the national anti-poverty programme launched in 1997 in a country which had been poor in the past but whose economy was growing at the fastest rate in Europe. The anti-poverty programme is targeted mainly at the long-term unemployed, handicapped, lone parents and the travellers. Every new piece of legislation has to be proofed in terms of its effect on social inclusion.

The 1999 Boston Consulting Group research tendered out by the Government revealed that 53% of Irish adults did not use a current account associated with payment settlement facilities. On the other hand, 90% had an account (savings or current) with either a bank, a building society, a credit union or the post office. Banks have now produced a code of good practice on branch restructuring <sup>(1)</sup> and are heavily promoting the use of electronic payments — in preference to cheques and cash — through a nation-wide campaign accompanied by a consumer education programme <sup>(2)</sup>.

The Central Bank and Financial Services Authority Bill (2002) ensures that the function for a single regulatory authority for financial services will be carried out within the overall structure of the 'Central Bank and Financial Services Authority of Ireland'. As in the UK, this new regulatory authority will have a major role in promoting the interest of all citizens. The regulatory authority is specifically responsible for monitoring both access and rationalisation of the branch structure from a citizens' perspective.

#### 2.3.2. *The notification: one off equity injection into An Post aimed at enabling the redevelopment of the Post Office network N650/01*

The Irish Government has reiterated its former entrusting to An Post, the postal incumbent, with a country-wide counter cover service of general economic interest. To this effect, it notified its intention to proceed with a one off € 12.7M equity injection in October 2001. This country-wide counter service of general economic interest is doubled with an obligation that An Post deliver payment and Government services through its counters. Physical access to counters is key to those, whether aged or on living on social benefits, who are based in remote areas, as banks and retailers have reduced their rural presence. In Ireland, the number of post office counters per inhabitant is by far the highest in Europe (twice the European average). The revenues to the postal counter network from the delivery of services of general economic interest (postal, financial and Government) represent about 80% of the network turnover.

However, on present trends, the losses of the post office network on its own in 2004 could amount to three times the whole of An Post's profits in 2000. This threatens the very viability of An Post as a whole. The sudden deterioration of a retail network which had until recently balanced out, is due to both a decline in revenues (demographic changes, lowering in network fees, constant reduction in the number of over the counter transactions) and constant increases in staff remuneration linked to the Government Fairness in Prosperity programme. Furthermore 800 rural counters out of the 1,800 counters which are run by agents (1,900 counters for the whole network including the counters owned by An Post) produce only 4% of the network revenues. Those loss-making agent-run outlets would not be kept open by a market investor. Besides these immediate causes for the loss of viability of the Post Office Division, the Government has identified two other contributory factors. Firstly, the contract with the existing postmasters is not conducive to entrepreneurship as half of the agents are paid a minimum — but low revenue — irrespective of the work effectively carried out. Secondly, a high number of rural counters are still run on a stand-alone basis whereas they would benefit from the additional revenues of a supplementary business.

<sup>(1)</sup> 'Code of practice on branch restructuring: customer communications' — Irish Bankers' Federation and Irish Mortgage and Savings Association, 2002.

<sup>(2)</sup> 'Banking inside out — a promotional and educational campaign by the Irish Bankers' Federation and the Irish Mortgage and Savings Association, 2002.

A reconfiguration over the following three years based on a new contract (remuneration per transaction) and appropriate relocation of post office counters was therefore decided. The aim is to return the network to sustainability and stop the trend towards outlet closures as existing low revenue flows are not enticing to new agents taking up vacant post offices. The reconfiguration implies redesigning the agents' contracts and facilitating the re-location of those agents who will have accepted the new terms.

The amount of the € 12,7M proposed equity injection will be significantly lower than the costs attributable specifically to An Post universal cover obligations. These costs include the severance indemnities, the counter redevelopment costs and the net cumulated operational losses of the uneconomic part of the network (costs reduced by the positive contribution of the activities in competition). An Post has committed itself to a separation of accounts which takes into account the services of general economic interest offered through the Post Office Division. The Commission therefore decided on 12 March 2002 not to raise any objections to the proposal as the compensation received is no higher than the net extra cost of the related general economic interest service of country-wide country cover and, as such, is compatible with the common market.

## Conclusion

State aid control policy in the area of financial services is expanding its scope. Traditionally, the Commission has been involved in rescue and restructuring cases for individual banks (such as *Crédit Lyonnais*, *Banco di Napoli*, ... <sup>(1)</sup>). Alternatively it has been involved in government measures favouring a significant number or financial services institutions (for example fiscal aid to

banks undertaking mergers and corporate restructuring in Italy <sup>(2)</sup>). More recently, the Commission has enlarged its action to operating aid schemes for the public banks of some Member States (like Germany <sup>(3)</sup>). The cases above represent a new development in so far as they represent the first applications of the State aid rules on services of general economic interest to aid schemes which have led to positive decisions in the area of retail financial services. <sup>(4)</sup>.

In applying State aid rules to public services in the area of banking, the Commission acknowledges that the Member States have wide discretionary powers when it comes to defining their public services in the light of their political choices and in line with the general principles of the Treaty. On the other hand, the Commission has the duty to ensure that the financing of the public services does not distort competition in a way which is contrary to the common interest. In particular the aid must be limited to the net additional costs of the public service tasks and there should be no adverse repercussions on markets open to competition outside the public service area.

Transparency ensures a high level of compliance with State aid rules in various ways and confers legal security to Member States' decisions to compensate an undertaking entrusted with a service of general economic interest. Transparency is achieved firstly through the conferment of the public service, secondly through clarity of the State's financing and thirdly through a clear allocation of costs between the public service activities and activities which are open to competition. All these requirements are particularly important in the banking sector where market integration and the single currency enhance competition at Community level.

<sup>(1)</sup> For a review of the most important cases see 'Crises bancaires: un bilan de l'application des règles de concurrence en matière d'aides d'Etat. Leçons de la crise du *Crédit Lyonnais*', by Nicola Pesaresi, and Christophe Pavret de la Rochefordière, in *Competition Policy Newsletter*, n° 3, October 2000.

<sup>(2)</sup> See 'The restructuring of the Italian banking sector: State aid cannot assist mergers', by Sandro Santamato, in *Competition Policy Newsletter*, n° 1, October 2002.

<sup>(3)</sup> See 'State guarantees to German public banks: a new step in the enforcement of State aid discipline to financial services in the Community' by Stefan Moser, Nicola Pesaresi, and Karl Soukup, in *Competition Policy Newsletter*, n° 2, June 2002.

<sup>(4)</sup> Another important application of the State aid rules to an individual case of a public service is the case of the *Livret Bleu* of the French bank *Crédit Mutuel*. See '*Crédit Mutuel — Livret Bleu*: Making sure that public services benefit consumers and not intermediaries' by Rosalind Bufton, in *Competition Policy Newsletter*, n° 2, June 2002.

## Commission adopts Regulation exempting State aid for employment from notification under Article 88(1)

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On 12 December 2002, the Commission adopted a further Regulation <sup>(1)</sup> exempting state aid from notification, following those adopted in January 2001. While those first three regulations had dealt with training aid, so-called *de minimis* aid and aid to small and medium-sized enterprises <sup>(2)</sup>, the new regulation, under the same legal base of Regulation (EC) 994/98 <sup>(3)</sup>, covered state aid for employment.

The aim of the regulation is to facilitate Member States' employment initiatives by relieving them of the burden of notifying, and the Commission of examining, certain state aid with employment objectives. It provides this exemption, under specified conditions, to aid for the creation of new jobs, to aid for the recruitment of disadvantaged and disabled workers and also to aid to cover continuing costs of employing disabled workers. It is thus in line with the conclusions of various European Councils, which call for a shift in emphasis from supporting individual companies or sectors towards tackling horizontal objectives of common interest.

All provisions covering employment have an obvious political importance, given stubbornly high unemployment levels and the employment targets set at the Lisbon European Council in 2000. This remained the case for the state aid regulation even though, according to figures published by the Commission on the basis of data provided by Member States, state aid for employment represents a much smaller proportion of state aid than aid for research and development, for the environment or for training <sup>(4)</sup>. In addition two particular features of state aid for employment meant that this regulation needed very careful consideration both within the Commission and in the advisory committee on state aid, which discussed drafts of the regulation on two occasions. These two features also serve to explain why a regulation covering employment aid was not included in the 'first wave' of regulations adopted in 2001.

The first feature is the sheer variety of employment measures which Member States have devised, depending on the particular objectives being pursued and the labour market context with which they are confronted. No regulation could hope to cover or provide an exemption for measures of every kind, so there was a need to decide what the scope of the regulation should be. A further consideration was that in order to avoid a multiplicity of texts the regulation was intended to replace and not merely complement the 1995 employment aid guidelines, which had wide scope even if they did not lay down criteria precise enough for a regulation. The text therefore needed to make some provision for measures which were not exempted.

The second feature is the fact that the distinction between state aid and general measures (which fall outside the definition of state aid in Article 87(1) of the Treaty) is particularly difficult to draw in the employment sphere. The Commission has previously taken a number of decisions that employment measures notified to it do not, in fact, constitute state aid at all, for example because they apply without distinction to all employers in a particular Member State. The definition of state aid covers only selective measures, for example those which apply only in certain regions or to certain sectors. Again, the aim being to replace both the 1995 guidelines and 1996 notice on state aid and the reduction of labour costs, both of which treated the aid/general measure distinction, the Commission needed to ensure that a regulation in this area did not appear to disturb the scope of Article 87(1). At the same time, it is clear that the regulation could not solve long-running issues over the state aid definition arising from the handling of certain policy areas, including employment policy, at sub-national level in certain Member States. Text covering this issue was included in recital 6 of the regulation as adopted.

(1) OJ L 337, 13.12.2002, p. 3. Note that the Commission announced the adoption on 6 November 2002: the discrepancy in dates is due simply to the linguistic revision of the adopted text after the decision of principle.

(2) OJ L 10, 13.1.2001, p. 20 ff.

(3) OJ L 142, 14.5.1998, p. 1.

(4) It should be noted that while much state aid has an ultimate objective of promoting employment, 'state aid for employment' is understood in this article to mean state aid whose granting is linked directly to the employment of certain workers or the creation of a specified number of jobs.

The remainder of this article describes the operative text of the regulation.

### **Scope, definitions, conditions for exemption (Articles 1 to 3)**

As noted above, the outcome on scope (Article 1) was that the regulation exempts the types of employment aid that the Commission has encountered most frequently in recent years, in particular aid to create new jobs and aid to promote the recruitment of disadvantaged and disabled people. Article 2 provides definitions of which most are standard from other state aid texts: the definitions of disadvantaged and disabled people (see below) are however different from those in the training aid regulation, for various reasons of which the main one is that while workers being trained are by definition already employed, those being recruited may frequently not be. Article 3 provides that the exemption is subject to conditions: in practice these are expressed in terms of certain ceilings, which are meant to preserve an appropriate balance between the need to provide incentives to employment and the risk of deadweight effects (subsidies paid to employers who would recruit anyway) and substitution effects (subsidies paid to beneficiaries at the expense of non-beneficiaries).

### **Job creation aid (Article 4)**

The aid rates for aid for job creation are aligned with those already existing for aid to create employment linked to investment, in the regional and SME aid rules. (It should be noted that the regulation thus largely eliminates the often difficult and rather artificial distinction between employment linked and not linked to an investment project.) In order to stimulate the creation of new jobs, the regulation allows a small company in an assisted area to save, e.g. in eastern Germany, 50% of the new employees' wage costs over a two-year period. The amount of permissible aid depends on whether the job is created in an assisted area and on the regional aid ceiling applicable to each of these areas.

Member States may also want to encourage job creation in non-assisted, i.e. rich, areas. In view of the higher cost that small firms have to bear in hiring new personnel, these firms will be entitled to more aid than medium-sized firms. As they do not face these extra burdens, no aid is allowed for large companies located outside the assisted areas.

### **Disadvantaged workers (Article 5)**

In order to encourage the hiring of long-term unemployed persons and other disadvantaged

workers Member States may compensate companies for up to 50% of one year's wage costs and compulsory social contributions.

Disadvantaged persons include:

- all persons under 25, or within 2 years of completing full-time education who have not previously obtained a job;
- all persons over 50 who do not have a job, or are in danger of losing it;
- any one who has not obtained an upper secondary educational qualification and who does not have or is in danger of losing his/her job;
- long-term unemployed (defined as 12 months unemployment out of the last 16 months);
- migrant workers and members of ethnic minorities;
- single parents;
- drug addicts and former prisoners;
- others who are returning to the labour-force after an absence of more than two years (for example to bring up a child or to look after a family member);
- women in areas of disproportionately high female unemployment.

A reserve clause in Article 9 (see below) allows the Commission to consider other categories of people as disadvantaged after a notification by the Member State concerned. It should be noted that where a disadvantaged worker is recruited into a newly created job, aid under Article 5 can be given in addition to aid available under Article 4.

### **Disabled persons (Articles 5 and 6)**

In order to foster an increased hiring of disabled persons, the State may also assume up to 60% of one year's wage cost and social security payments, should a company decide to do so. The definition of disabled persons in Article 2 is subordinated to the national law of Member States. In addition, aid can be granted to compensate for reduced productivity as well as for adaptation of premises and special assistance. In response to comments received during the public consultation period, the Commission also introduced special provisions for so-called 'sheltered employment' where the majority

Some comments received suggested that financial support which simply compensates firms for additional costs of employing disabled or even



disadvantaged workers should not be considered state aid at all, on the basis that no advantage is provided to the firm concerned. Readers may note the parallelism between this issue and those raised in the Ferring jurisprudence over public services. In the regulation the Commission did not in any sense prejudice the scope of Article 87(1) but decided that if any measures meeting the conditions set out did constitute aid, it would in any event be manifestly compatible with the common market and could therefore be exempted.

### **Necessity and cumulation (Articles 7 and 8)**

These articles aim to ensure that aid has an incentive effect by providing that it cannot be applied for after the event, and set out the rules for different types of employment aid to be cumulated with each other.

### **Measures not covered by the exemption (Article 9)**

There are, of course, other types of employment aid, such as aid to maintain people in existing jobs

or aid to encourage job-sharing. The regulation does not prohibit these types of aid. They must simply be notified to the Commission in order to assess the effect of the aid on competition. For example, aid to maintain people in existing jobs is sometimes granted to companies in financial difficulty and it is therefore necessary to check that the aid does not harm rival firms.

Article 9 specifies certain types of aid which remain notifiable to the Commission. The text, and in certain cases the recitals, gives some indication of the basis on which the Commission will assess any such notifications.

### **Final provisions (Articles 10 and 11)**

These are broadly in line with the existing exemption regulations, though an innovation is the requirement that Member States annual reports to the Commission on the schemes they implement using this regulation must be provided electronically, not simply on paper. The Regulation will expire in 2006, which coincides with the expiry date of the current rules on the European structural funds and with that of the other exemption regulations in existence.

## Accession negotiations brought to successful conclusion

*Janne KÄNKÄNEN, Directorate-General Competition, unit A-4*

Last autumn was critical for the whole enlargement process. A historic result was finally confirmed in the Copenhagen summit in December 2002 on the enlargement of the European Union with 10 new member states set to join in May 2004. For competition policy, the year 2002 also witnessed a conclusion of the negotiations with the remaining six candidate countries, i.e. Cyprus, the Czech Republic, Malta, Slovakia, Poland and Hungary. With Estonia, Latvia, Lithuania and Slovenia, the negotiations on competition were provisionally closed already in late 2001. These results are to be certified upon signature of the Accession Treaty in Athens in April this year.

For Bulgaria and Romania, the Copenhagen summit confirmed specific roadmaps in order to advance their accession process. On the basis of intensified efforts and increased assistance, further progress can be expected with these countries also in the field of competition policy. With Turkey, the start date of the overall negotiations is still open: it was agreed in Copenhagen that if the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the political criteria for the membership, the European Union will open accession negotiations with Turkey without delay.

### Approach in the competition negotiations

Based on the membership criteria established already 10 years ago by the European Council held also in Copenhagen, the Candidate Countries have been required, before accession, to fulfil both the so-called political and economic criteria. In the political field, this requires that a candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The economic criteria call for the countries to demonstrate the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. This 'economic criterion' of the accession negotiations was in the field of competition policy translated into a principle whereby the Candidate Countries can be regarded to be ready for accession only if their companies and public authorities

have become accustomed to a competition discipline similar to that of the Community well before the date of accession.

This has led the EU to conduct the negotiations not only on the basis of commitments by the Candidate Countries, but also based on a verification of a concrete enforcement of the rules. Therefore, the negotiations on competition proved more prolonged and demanding than possibly anticipated in the beginning.

In the course of the process, the Candidate Countries were first requested to translate their commitments to accept the competition *acquis* in domestic legislation already prior to accession. Secondly, evidence of an adequate administrative capacity was required, ensuring the ability to implement the legislation. Thirdly, the record of concrete day-to-day enforcement of the competition disciplines had to show a high degree of similarity with the enforcement practice in the EU.

Concretely, the EU deemed it necessary that three elements be in place before the competition negotiations could be closed:

- the necessary legislative framework;
- an adequate administrative capacity; and
- credible enforcement record of the *acquis* in all areas of competition policy.

It would obviously be impossible for any of the Candidate Countries to accomplish full application of the EU competition rules from one day to the next. The insistence on adjustment well before accession stems not only from the willingness on the EU side to preserve the internal market discipline after enlargement. What was also considered necessary was to avoid an abrupt application of the competition rules that — in the absence of a solid pre-accession preparation — would be difficult to withstand for the companies in the Candidate Countries.

It should be stressed that the obligation in the competition field to follow the EU modelled competition rules, as far as the Candidate Countries from Central and Eastern Europe <sup>(1)</sup> are concerned, was not simply 'invented' for the purposes of the negotiations. Indeed, in the area of competition policy, the bilateral Europe

<sup>(1)</sup> Including Bulgaria and Romania, but excluding Cyprus and Malta.

Agreements the EU had concluded with each of the ten Candidate Countries from Central and Eastern Europe, have already provided a solid legal basis for the accession preparation.

As to the control of State aid, a basic principle in each of the Europe Agreements reflects Article 87 of the EC Treaty providing that any State aid which threatens to distort competition is incompatible with the Agreements insofar as these practices may affect trade between the Community and the associated country. As to the antitrust rules, the Europe Agreements equally reflect Articles 81-82 of the EC Treaty by providing that all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, as well as an abuse by one or more undertakings of a dominant position, are incompatible with the Agreements insofar as they may affect trade between the Community and the associated country.

A basis to assess practices contrary to these principles is the criteria arising from the application of the Community competition rules, i.e. Articles 81, 82 and 87 of the EC Treaty. Furthermore, the Europe Agreements have also specifically obliged the Candidate Countries to approximate their competition legislation with that of the European Union.

The Agreements have overall constituted an essential pre-accession instrument in the competition field, by establishing a clear yardstick to be followed which has significantly helped to steer the accession process forward. The legal frameworks established under the Europe Agreements have furthermore facilitated internal law making and the setting up of State aid and antitrust authorities. In the absence of such frameworks necessary preparatory efforts could have been, in many of the countries, significantly delayed.

### Assessment in view of conclusion of the negotiations

The Commission has recurrently evaluated, on the basis of the above mentioned three elements and for each country, whether the situation would allow for the provisional closure of the negotiations. Before the negotiations could be closed, an assessment was carried out showing the degree to which the Candidate Countries actually meet these requirements. The results of this assessment and the consultations on the requested transitional arrangements were the key elements of the

recommendations the Commission submitted to the Council on the conclusion of the negotiations.

The Commission's assessment showed that all ten acceding countries have, in the context of the accession process and in accordance with their obligations under the pre-accession agreements, adopted basic legal frameworks for competition policy and set up competition authorities to implement this legislation.

As regards the area of antitrust, the EU was able to conclude that the competition laws of the Candidate Countries contain the main principles of the Community antitrust rules, as regards restrictive agreements, the abuse of dominant position and the merger control. Therefore, a satisfactory level of approximation with the *acquis* has thus been achieved in these countries. Furthermore, it was concluded that the countries' administrative capacity to ensure the implementation of the antitrust *acquis* is satisfactory. The EU also concluded that the record of enforcement of the competition authorities has reached a satisfactory level.

In spite of the satisfactory efforts, there obviously remains room for further work in most countries. In particular, continuous attention should be paid to ensuring a level of resources with which the authorities are in a position to further develop their activities. Furthermore, work should continue to further strengthen the enforcement, in particular with a view to focusing on own initiative investigations and on cases that may be important for the market structure, such as cartels.

As regards State aid policy, the countries have adopted national legislation on the control of aid as well as established monitoring authorities to oversee the implementation of the legislation. On the basis of the actions taken by the Candidates, the EU side concluded that the national State aid control frameworks contain the main principles of the Community State aid policy and that a satisfactory level of approximation with the *acquis* has thus been achieved. As in the antitrust area, the countries' administrative capacity for the implementation of the State aid rules was found to be satisfactory.

However, development of a proper enforcement system has been markedly slower in the State aid field than in the antitrust. Many of the countries started proper enforcement activity only from 2001 onwards. Despite this belated start, the national State aid authorities are now screening systems of public assistance in order to determine whether or not they constitute State aid as defined under Article 87 of the EC Treaty and whether they are compatible with the *acquis*. By the end of the

year 2002, it was possible, therefore, to conclude that the ten countries in question have started to control State aid in line with criteria comparable to those of the European Union.

## Results and problem areas

Reflecting the above progress, the closure of the negotiations was in all countries a consequence of the satisfactory efforts undertaken to adopt appropriate legislation, to set up relevant authorities to ensure implementation as well as to actually establish a record of enforcement of the competition rules.

The negotiations did go in great length in ensuring that the Candidate Countries' competition regimes as well as various State aid measures in use in the countries comply with the *acquis*. Requests for transitional periods were approached with the aim of preserving the integrity of the internal market after enlargement, while at the same time allowing to constructively address specific problem areas of the Candidate Countries. For instance, where identified State aid measures were deemed to be incompatible with the EU *acquis*, countries were at the first instance required either to abolish these measures or align them. In some rare cases consultations, on fiscal aid, or on restructuring aid to the sensitive industries, have resulted in special limited transitory arrangements (cf. below for details by country). The final review and adjustment of aid schemes is still underway in the framework of the existing aid procedure (see adjacent article).

In the context of the negotiations, two types of aid measures proved particularly demanding. The first group consists of fiscal aid regimes incompatible with Article 87 of the EC Treaty consisting of tax breaks, tax holidays, and tax credits that are used to attract foreign investments, as well as off-shore arrangements. A second important issue concerned aid practices used to bail out ailing industries. These measures, consisting of e.g. tax arrears or loan guarantees, have the potential of jeopardising the proper economic restructuring of some of the key sectors of the Candidate Countries' economies. As such, these aid measures risk seriously delaying the preparation of the Candidate Countries for their full integration to the internal market.

As far as the first group of measures, fiscal aid, is concerned, the Commission helped and worked together with the countries in finding arrangements whereby these aid measures can be brought into line with the *acquis* within a reasonable period

of time. A solution has in most cases been found whereby these incompatible measures will be converted and modified into aid arrangements that are in close conformity with the principles of the *acquis* and particularly the Community Guidelines on regional aid.

As regards the second group of measures, public support for certain problem industries (e.g. the steel sector), the EU agreed in exceptional circumstances to conditionally authorise restructuring aid against, *inter alia*, a guarantee to reduce production capacity of the recipient firms. While the aim has been to give the recipient firms 'a last chance' for viable restructuring, the required cuts in capacity are intended to ensure that they would not be given an undue advantage at the expense of competitors — in the old and new Member States — that operate without such aid.

In conclusion, the above has to be recognised as a very good end result, particularly seen against the formidable challenge by the countries to build up a competition discipline.

Another important result of the process should not be overlooked: players in the market as well as public authorities in the Candidate Countries have become increasingly aware of the competition policy framework, both in the national and the Community context. This can be expected to bear fruit in the coming years helping to overcome challenges relating to the full integration of companies of the acceding countries into the enlarged internal market.

National administrations and businesses are by now familiar with the constraints imposed by the State aid discipline (but also with the benefits it brings about) in attempting to achieve a level-playing field in the internal market. Finally, the accession is also set to coincide with the entry into force of the modernised EU antitrust rules. The experience of applying Community style antitrust rules will help the Candidate Country authorities to meet the challenges that will undoubtedly arise out of the decentralised application of Article 81 of the EC Treaty.

## Summary of special arrangements (transitional periods) country by country

The negotiations on transitional arrangements were conducted on the basis of the principle that they must be strictly limited in scope and duration. *Estonia, Latvia, Lithuania* and *Slovenia* had not requested any transitional arrangements. The

resulting transitional arrangements for the remaining six countries address specific circumstances as follows:

### *Cyprus*

- Phase out of incompatible fiscal aid for off-shore companies by the end of 2005 (so-called International Business Enterprises).

### *The Czech Republic*

- Restructuring of the steel industry to be completed by 31 December 2006.

### *Hungary*

- Phase-out of incompatible fiscal aid for SMEs by the end of 2011.
- Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company started the investment under the scheme before 1 January 2000, and to 50% if the company started the investment after 1 January 2000. In the motor vehicle industry the aid is further limited, and set at a level that corresponds to 40% of the maximum aid ceiling.
- Phase-out of incompatible fiscal aid for off-shore companies by the end of 2005.
- Phase-out of incompatible fiscal aid granted by local authorities by the end of 2007

### *Malta*

- Phase-out of incompatible fiscal aid for SMEs by the end of 2011.
- Phase-out of operating aid under the Business Promotion Act by the end of 2008.
- Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company has obtained the entitlement for the tax exemption before 1 January 2000, and to 50% if the company has obtained the entitlement for the tax exemption after that date up until 30 November 2000.
- Aid for restructuring of the shipbuilding sector during a restructuring period lasting until the end of 2008.

- Adjustment of the market in the importation, stocking and wholesale<sup>2</sup> marketing of petroleum products under Article 31 of the EC Treaty by the end of 2005.

### *Poland*

- Restructuring of the steel industry to be completed by 31 December 2006.

#### *Fiscal aid (special economic zones)*

- Phase-out of incompatible fiscal aid for small enterprises by the end of 2011.
- Phase-out of incompatible fiscal aid for medium-sized enterprises by the end of 2010.
- Modification of incompatible fiscal aid for large companies into regional investment aid; the aid will be limited to a maximum of 75% of the eligible investment costs if the company has obtained its zone permit before 1 January 2000, and to 50% if the company has obtained it between 1 January 2000 and 31 December 2000. In the motor vehicle industry the aid is further limited, and set at a level that corresponds to 30% of the eligible costs.

#### *State aid for environmental protection*

- for investments that relate to standards for which a transitional period has been granted under the negotiations on Environment and for the duration of that transitional period, whereby the aid intensity is limited to the regional aid ceiling (30%-50%) with a 15% supplement for SMEs;
- for existing IPPC installations covered by a transitional period under the negotiations on Environment, aid up to 30% intensity until end 2010;
- for the IPPC-related investment not covered by a transitional period under the negotiations on Environment, aid up to 30% intensity until 31 October 2007;
- for large combustion plants, an aid intensity of 50% was agreed for investments that relate to a transitional period granted under the negotiations on Environment.

### *Slovakia*

- Fiscal aid to a beneficiary in the motor-vehicle manufacturing sector to be discontinued by the end of 2008; the aid will be limited to a maximum of 30% of the eligible investment costs.

- Fiscal aid to one beneficiary in the steel sector to be discontinued at the end of 2009 or when aid reaches a pre-determined amount, whichever comes first. The objective of the aid is to facilitate the ordered rationalisation of excess staffing levels, the resulting total cost being comparable to the aid.

## Some reflections <sup>(1)</sup> on the structure of the state aid rules in the Treaty of Rome

*Ronald FELTKAMP, formerly Directorate-General Competition, unit H-3*

The concept of state aid is defined in article 87 §1 of the Treaty. Four criteria are mentioned. State resources (1) have to be involved, specific undertakings have to be favoured (2), competition has to be distorted (3) and trade between Member States has to be affected (4).

But first let us put the question: why rules on state aid?

1. The Treaty has as underlying philosophy, as approach to the basic problems in society: increase of the welfare of the people concerned. The Treaty is based on the axiom that the best way to achieve this is through competition, mitigated only by considerations of social protection, solidarity and harmonious development. Competition can be distorted, i.e. biased by parties having an interest to avoid or at least mitigate competition: companies, individuals, trade unions and professions on the one hand, the State on the other hand.

Let us limit ourselves to the latter for the moment.

2. Why should States want to limit competition? Internally they may want to protect interests of social welfare **for their citizens** by imposing solidarity or — through regulation — a particular non-voluntary behaviour on market operations (respect of safety rules f.e.). They may also want to grant different forms of financial transfers to market operators (different categories of aid, e.g. in favour of regions, research, etc.) inducing a non-competitive behaviour of these operators in order to make them deliver goods or services of a particular quality or at lower than market price. Such behaviour ‘distorts’ competition. Art. 87 § 1 limits these possibilities of the Member States, but only in so far as the distortion is due to the favouring of specific undertakings by the Member State through state resources, by putting them under the control of an independent body, the Commission, with the task to ensure that they do not affect trade to an extent contrary to the interests of the Community.

3. It follows directly from this that the financial interventions for the State’s **own** consumption by purchases of goods or services from the market do

not come under this definition. Indeed no state resources are involved as state funds are exchanged for goods or services provided to the State; the State receives, in exchange for funds, property or is provided with a service, in other words, the State receives *itself* an **equivalent counterpart**. Of course, in doing so, the State should not favour by its choice certain undertakings from an Internal Market point of view, for which reason the non-discrimination principle plays a central role in the public procurement rules. On top, state aid may be present if the State pays a price to a certain operator which exceeds the market price; only the excess price is however state aid.

4. Regulatory or financial interventions of the state, on the other hand, often involve the forgoing of state resources, i.e. value is transferred to (and not exchanged with) the operators. No state resources are involved, for instance, if the state imposes a non-competitive behaviour on all operators by regulation, f.e. opening hours, emergency requirements to hospitals or pure solidarity systems for sickness funds. In this case the State usually does not pay the operators, as the latter can make the cost be born by the consumer.

But apart from this, regulation usually creates scarcity. The increase in economic value caused by such scarcity could in principle be turned into revenues by and for the State, f.e. licences, exclusive or other special rights can be sold. The economic value inherent to such special rights constitutes state resources and, if such revenue is forgone without equivalent counterpart, state aid, even if granted to a whole sector. Indeed, taking over of cost by the State, of any cost which normally is to be borne by the undertakings of a sector constitutes a favouring of these undertakings over all other undertakings, and investors in such a sector are favoured over those investing in other sectors (see also under 5.)

It follows that any state resource transferred to operators, not exchanged against the same value in a different form flowing back into the property of

<sup>(1)</sup> This article expresses the personal opinion of Mr Feltkamp, former Head of Unit of DG COMP.H.3, and does not prejudice or bind in any way DG Competition or the European Commission.

the State, is state aid if the other conditions in Art. 87 § 1 are fulfilled.

5. The Treaty is of course only interested in state intervention in as far as it has an influence on trade between Member States. As the treaty introduces free competition between operators of its member states, it has to create a protection against aid granted by Member States to support their 'own' undertakings; this protection is found in the Treaty's state aid rules and in the independent surveillance by the Commission.

Therefore whilst internally an aid to a sector might not seem a state aid, from the Community and Treaty point of view it is; income of strong sectors, not as exposed to competition from other Member States, might be used through fiscal tools to support sectors much more exposed to such competition (ex. Maribel)(see also under 4.).

'Favouring' means therefore not only selectivity with regard to individual operators but also selectivity with regard to groups of operators.

6. The Treaty goes even a step further. Even if all operators — without discrimination — receive funds from the state with the obligation to transfer these funds with a social character integrally to consumers, the Treaty presupposes in Art. 87 § 2a that such funds are state aid. If the transfer of funds under these conditions was not considered to involve state aid, Art. 87 § 2a would lose its meaning. Art. 87 § 2a declares such aid to be compatible *ex lege*. However, it follows *a fortiori* from this that if such funds are transferred only through part of all possible operators, aid is involved, which, moreover, is not automatically compatible.

Consequently, all transfers by the State, involving a below market return through a loss or foregoing of value for the State itself, constitute in principle state aid in the sense of the Treaty.

The logic behind this, as it was conceived by the authors of the Treaty, must be that state aid is any behaviour of the state through such transfers aiming at changing the normal market behaviour of the operators. The state may have different objectives: regional development, environmental protection, energy saving, cultural heritage protection, research stimulation, restructuring of undertakings in difficulty or provision of products or services below the normal market price. It all boils down to the state covering costs of operators, which these operators would or could not accept to

bear themselves. The rather inexact term 'market failure' is generally used for this; the market would indeed provide the respective products or services in most cases but not at the socially acceptable or otherwise politically defined conditions at a given point in time in a given country. F.e. it may be justified to subsidise anti-cholera medication in certain countries and not in others at a given point in time.

There is no difference between all these objectives with regard to competition between operators and their corresponding interventions with regard to the question whether there is state aid or not. Such interventions thus constitute state aid, in so far they affect trade between Member States, which is in principle banned (Art. 87 § 1).

The Treaty foresees for certain interventions exemptions from the ban on state aids, as laid down in Art. 87 § 2 and § 3. For public support of services of general economic interest, this exemption is embedded in Art. 86 § 2, in so far as such services are not provided by all operators but the provision thereof is entrusted to a particular operator. Such services constitute clearly an advantage transferred to consumers.

7. Again: It is important to realise that state aid is involved, even **if no discrimination** is present (Art. 87 § 2a). Indeed, as regards all operators channelling through funds to consumers, the Treaty gives to 'favouring' a much larger meaning than simple 'selectivity'.

The presence of state aid can therefore not be ruled out by **any specific procedure**. Tender procedures can only make sure that the aid is reduced to the minimum necessary. It has then to be decided if the aid is compatible; such compatibility is **practically automatically** given <sup>(1)</sup> for aid in favour of public services (services of general economic interest) if entrusted through a tender procedure, in other cases the compatibility qualification falls under the normal discretionary powers of the Commission under Art. 87 § 3 and Art. 86 § 2.

Tender procedures can make aid compatible but cannot change the qualification as aid. The opposite would *a contrario* lead to the conclusion that any aid granted by a non-discriminatory procedure would be no aid in the sense of the Treaty.

Otherwise, any restructuring aid could f.e. be granted to an operator, which through a tender procedure would come out as the operator ready to restructure a company in difficulties for the lowest

(1) Only the fourth criterion of 86§2 would not be covered by such tender procedure. A tender without clear definition and control should be economically and politically unthinkable.



cost to the state, and be considered as involving no state aid under the Treaty rules for the company to be restructured.

The same reasoning can *mutatis mutandis* be made with regard to the theory that an aid which just compensates the cost of an operator for something it would not be ready to bear itself, in other words any aid just eliminating the extra-cost of this operator's action, would not constitute an advantage anymore and therefore not be a state aid in the sense of the Treaty. In general, under such reasoning, public support for investment in disadvantaged regions would not constitute aid as operators are just compensated for the extra-cost of investment in such a region in which they would normally not invest.

The automobile framework was a good example of the inaccuracy of such reasoning, as only the real extra cost of establishment in a particular region was eligible for coverage by state aid; Member States could have justly claimed that no final advantage existed and that therefore no state aid was involved!

8. It can be concluded that the authors of the Treaty developed a more coherent structure of the state aid rules than is usually thought.

They had a meaning of 'favouring' in mind, larger than that of a simple selective (net) advantage,

which is currently often used. This favouring is to be assessed independently of the objectives of the respective State intervention.

9. In conclusion, when Member States intervene in the economy by interacting with certain undertakings, two fundamental situations can be distinguished:

- Either Member States receive in exchange an economically equivalent counterpart flowing back into their property, and thus no state resources in whatever form go to undertakings. In such case, a private market investor's exchange takes place, and there is no state aid.
- Or they do not receive an economically equivalent counterpart, but want to achieve certain public policy objectives (e.g. territorial cohesion in case of regional aid) or want the public funds to be transmitted to a third party either in the form of a service or in the form of social support, through one or more undertakings. In this case, any state resources transferred to undertakings to induce them to such behaviour, which would spontaneously not be generated by the market, and, if applicable, to 'compensate' them for the extra-cost, constitutes state aid in the sense of the Treaty, if the condition 'affectation of trade' is fulfilled.



## Existing aid and enlargement

Georg ROEBLING, Directorate-General Competition, unit A-4

Every new accession to the EU and its internal market necessarily brings about questions of how to integrate the acceding countries into the Community's unique system of state aid control. The forthcoming accession of up to ten countries is no exception. Among the issues to consider, the appropriate treatment of aid measures granted during the pre-accession period and continuing beyond accession require particular attention. This article seeks to give an overview of the main elements of the Commission proposals to the EU Member States for their negotiations on the terms of accession with the 10 acceding countries (i.e. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia). Member States largely endorsed the line advocated by the Commission.

### The Treaty principles on existing aid

When devising its approach to pre-accession aid measures in the acceding countries, the Commission's overriding goal was to devise and set up a system ensuring that competition in the internal market is not distorted<sup>(1)</sup>. In the Community, state aid regulation is based on the centralised monitoring of selective public support by the supranational Commission — a system that ensures that the same substantive standards are being applied with regard to all EU Member States. The position regarding a new Member State is however different. The competence of the Commission to ensure that the aid granted by that State complies with common market principles arises only, *ratione temporis*, as from that State's accession to the Community. In the absence of the Commission's review, there is some risk that the continuation of certain pre-accession aid measures that are incompatible with these common market principles would lead to distortions of competition.

Such a scenario would indeed be the likely outcome if the new Accession Treaty were not to make provision for an effective vetting procedure of pre-accession aid measures: in the absence of special rules for the accession scenario, the general

provisions on existing aid of the EC Treaty would apply. Under these rules, *all* aid measures that pre-date accession and continue to be operated thereafter, including those allowing for particularly distortive operating aid, would automatically qualify as 'existing aid' measures within the meaning of Article 88(1) of the EC Treaty.

In essence, the corollary of qualifying a state aid measure as 'existing aid' — as opposed to 'new aid' — is that the Commission can only alter it as for the future. Under the procedure applicable in such cases, the Commission may propose 'appropriate measures' (i.e. modifications to or the abolition of the aid measure) to the Member State concerned, pursuant to Article 88(1) of the EC Treaty. This implies in particular that aid amounts disbursed in the past under existing aid measures are protected from an order of recovery. The current state aid rules limit the possibility of recovery to 'unlawful aid' which is a different category of aid from 'existing aid':<sup>(2)</sup> unlawful aid are those measures that are put into effect in a Member State in contravention of the notification and standstill obligations arising out Article 88(3) of the EC Treaty.<sup>(3)</sup> These obligations only apply to new aid, but not to existing aid. Hence, in a nutshell, the importance of the distinction<sup>(4)</sup> between new aid and existing aid is that the latter enjoy better legal protection. They benefit from a less intrusive system of state aid control, in particular without a risk of recovery.

At the recent Copenhagen European Council of 12-13 December 2002, EU Member States confirmed their invitation to the 10 acceding countries to join the EU on 1 May 2004. In view of this forthcoming 'big bang', the Commission would probably have to simultaneously propose a large number of appropriate measures after accession, in order to remedy distortions of competition resulting from the continued application of incompatible aid. Such a cumulation of procedures would not only draw heavily on the Commission's resources, but would also present a scenario which would take, realistically speaking, many years to complete. Due to these unavoidable delays, such a

<sup>(1)</sup> See Article 3(g) of the EC Treaty.

<sup>(2)</sup> See Article 1(b)(f) of Council Regulation (EC) No 659/1999 on state aid procedure, OJ L 83 of 27.3.1999, p. 1.

<sup>(3)</sup> Apart from Article 88(3) of the EC Treaty, these obligations are also laid out in more detail in Articles 2(1) and 3 of Regulation (EC) No 659/1999.

<sup>(4)</sup> On recent developments in this respect under the rules of the EC Treaty see *D. Grespan*, in CPN 3/2002, p. 17 at 19-21.

'post accession' approach to pre-accession aid would thus not efficiently remedy distortions of competition.

The key objective of the Commission was therefore to propose a framework that would offer an incentive to the acceding countries to align, where necessary, their aid regimes with common market principles already during the pre-accession period. The Commission could then, after accession, focus its resources on the remaining cases, and deal with them in an expeditious manner.

## Accession of Austria, Finland and Sweden

Looking for suitable models, the approach to existing aid taken for the accession of Austria, Finland and Sweden — all former Member States of the European Economic Area ('EEA') — provided the basic elements of a solution. The Commission then adapted these elements to the particular circumstances of the current accession.

The 1994 Act of Accession provides that all state aid decisions taken by the EFTA Surveillance Authority ('ESA') before the date of accession, and which would fall under Article 87 EC Treaty as a result of accession, shall remain valid. <sup>(1)</sup> Therefore, aid measures approved by the ESA are, for all practical purposes, considered as existing aid without further questions being asked <sup>(2)</sup>. Consequently, the appropriate measures procedure <sup>(3)</sup> would be the only avenue available to the Commission, if it wanted to change such measures for the future.

Why was the EU then prepared to consider ESA state aid decisions as *per se* equivalent to those of the Commission? The explanation to this arguably lies in two cornerstones of EEA state aid control. To begin with, the ESA implemented a state aid policy in the EEA during the pre-accession period which essentially followed the substantive standards of the Community state aid policy. <sup>(4)</sup> Secondly, the state aid monitoring function in the EEA territory is entrusted to a supranational

authority (ESA) modelled closely on the Commission. <sup>(5)</sup> This combination, i.e. the application of Community substantive standards and a Community-style monitoring system, made it possible to recognise ESA state aid decisions as on a par with those of the Commission.

## State aid control during the pre-accession period

In comparison, state aid control in the current group of acceding countries can only pass the first of these two tests. It is true that all candidate countries have over the last years installed national state aid monitoring authorities. These authorities have more recently also by and large aligned their decisional practice with the substantive standards used by the Commission. This unparalleled development resulted from the insistence of EU Member States, as early as December 1994, that candidate countries start introducing an effective state aid policy as part of their preparations for accession to the EU <sup>(6)</sup>. This demand was subsequently included in the EU Common Positions on the accession negotiations in the competition chapter. These documents stipulate uniformly that candidate countries must demonstrate a credible record of national state aid enforcement before negotiations could be concluded. In addition, most candidate countries are already during the pre-accession phase under a legal obligation to implement a domestic state aid policy in accordance with the principles of the *acquis*, pursuant to a provision in their respective Europe Agreements <sup>(7)</sup>.

However, the acceding countries with their national state aid monitoring authorities do not satisfy the second of the two characteristics mentioned above, namely the supranational organisation of state aid control. Therefore, it was deemed necessary to task the Commission as the appropriate supranational body with the mission of screening the decisions taken by the national state aid monitoring authorities. This effectively added a second layer to the filtering process of pre-accession aid.

<sup>(1)</sup> See Article 172(5) Act of Accession, OJ C 241 of 29.8.1994, p. 51.

<sup>(2)</sup> As is confirmed by a reference to Article 172 Act of Accession, contained in Article 1(b)(i) of Regulation 659/1999.

<sup>(3)</sup> See Article 172(5) Act of Accession.

<sup>(4)</sup> See Article 61 EEA Agreement, OJ L 1 of 3.1.1994.

<sup>(5)</sup> See Article 62 EEA Agreement in conjunction with Protocol 26 to the EEA Agreement, OJ L 1 of 3.1.1994, as well as Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, OJ L 344 of 31.12.1994.

<sup>(6)</sup> Conclusions of the Essen European Council of 9 December 1994, Annex IV: '...In the context of future accession, satisfactory implementation of competition policy and state aids control in the associated countries is of special importance. ...'

<sup>(7)</sup> See, for example, Article 63(1)(iii) and (2) of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other, OJ L 348 of 31.12.1994, p. 1.

However, it was recognised that the national bodies are the first instance of review. Therefore the Commission would not need to carry out again a supplementary, fully fledged review of these measures, and the substantive test could be lighter than the one employed within the Community. In practice, therefore, the Commission's task is to weed out incompatible pre-accession aid that escaped the national authorities' first review.

It should be emphasised that the different standard of state aid control used for the purposes of accession should, in all likelihood, prevent parties from within the Community from relying on the fact that the Commission did not object against a pre-accession measure. A failure to object against a pre-accession aid cannot set a precedent for actors in the common market.

### The Commission proposal

Building on the cornerstones of such a two-tier review system, the Commission proposal to the EU Member States thus comprises the following elements:

1. Only those aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date that fulfil the following cumulative condition shall be regarded as existing aid upon accession:
  - i. the aid measures were assessed by the national State aid monitoring authority and found to be compatible with the *acquis*, and
  - ii. the Commission raises no objection against these measures on the ground of serious doubts as to their compatibility with the common market.
2. All measures which constitute state aid and which do not fulfil both conditions shall be considered as new aid upon accession for the purpose of the application of Article 88(3) of the EC Treaty. In practice this implies that if a new Member State wishes to continue an aid measure although it has not passed the two-tier review process, the qualification of the measure as new aid makes it notifiable to the Commission upon accession. More crucially, as 'new' aid, such a measure also falls under the standstill clause. Hence the new Member State would have to immediately discontinue the operation of the measure upon accession, and would only be able to resume it if and when the

Commission authorises the aid. The continuation of such a measure without prior Commission approval makes the aid unlawful, and potentially exposes it to a recovery order.

3. There are only 2 exceptions to this general approach. First of all, this approach is evidently set aside where the Accession Treaty contains a specific transitional arrangement as *lex specialis*. Typically, such a transitional arrangement in the field of state aid will expressly authorise a new Member State to continue a specified aid measure for a certain period of time beyond the date of accession despite its incompatibility with the common market. Secondly, the Commission proposed to include a clause in the draft Accession Treaty pursuant to which aid measures put into effect before 10 December 1994 <sup>(1)</sup> shall be regarded upon accession as 'existing aid' *per se*. These 'grandfather measures' thus do not have to be reviewed under the two-tier review process described above. This last proposal was motivated by the desire to put old and new Member States on an equal footing to the extent possible.
4. Finally, the scope of application of the two-tier review process needs to be highlighted. On the one hand, both aid to the coal sector and aid supporting fisheries products and products derived therefrom fall within the remit of this process. On the other hand, there are two notable exceptions:
  - As with the previous accession <sup>(2)</sup>, state aid to agricultural products is subject to a separate regime. This differentiated approach reflects the fact that the large majority of acceding countries does not currently exercise a meaningful monitoring of public support to the agricultural sector. This lacuna is justified by the exemption of agricultural policy from the scope of the pre-accession association agreements. Without a history of national monitoring of state aid in the agricultural field, already the first tier of the envisaged review mechanism is missing.
  - A similar exception applies to aid to the transport sector in view of the different speeds at which various transport sectors are gradually opening up to competition in the course of liberalisation.

<sup>(1)</sup> I.e. the day following the Essen European Council where the EU had clarified its expectations in the field of state aid.

<sup>(2)</sup> See Articles 138 *et seq.* of the 1994 Act of Accession.

## The procedural framework

Once Member States had tentatively endorsed the cornerstones of the Commission proposal on the treatment of pre-accession aid, the Commission elaborated, in a second step, a proposal for a procedural framework to implement this policy. For reasons of chronology, this proposal envisaged two subsequent procedures:

The Commission proposal foresaw in the first instance that a list be attached to the draft Accession Treaty of those measures that had passed the two-tier review process mentioned above. The measures contained in this list would thus be regarded as existing aid upon accession for the purposes of the application of Article 88 of the EC Treaty. The list would be an integral part of the Accession Treaty, and would as such constitute primary Community law.

The chronology of the ratification process required however that special provision be made also for the considerable period between the finalisation of the draft Accession Treaty, and the actual date of accession. This interim period is expected to stretch over more than 12 months. Just like the current Member States, the acceding countries are entitled to grant new aid measures during this interim period, as long as these new grants respect the relevant *acquis*. Provided that the relevant national state aid monitoring authority finds these measures to be compatible with the *acquis*, and the Commission does not raise an objection on the grounds of serious doubts as to the compatibility of the measure with the common market, these measures have to be qualified as 'existing aid' as well.

However, since the draft Accession Treaty will soon be finalised and then undergo ratification by present and future Member States, such measures cannot anymore be included in the list of measures attached to the Treaty. Therefore, in order to preserve the coherence of the screening system until the very eve of accession, an interim procedure which is self-contained had to be set up.

## Interim procedure

This interim procedure foresees, in its draft form, the following elements:

1. To the extent that a new Member State wishes the Commission to examine an aid measure under this interim procedure, it shall provide the Commission regularly with (i) a list of existing aid measures which have been assessed by the national state aid monitoring authority and which that authority has found to be compatible with the *acquis*, and (ii) any other information which is essential for the assessment of the compatibility of the aid measure. The Commission provides a reporting format to this effect.
2. If the Commission does not object to the existing aid measure on the ground of serious doubts as to the compatibility of the measure with the common market, within 3 months of the receipt of complete information on that measure, the Commission shall be deemed not to have raised an objection. These rules were evidently inspired by similar provisions contained in the state aid procedural regulation for the present Member States <sup>(1)</sup>. It has to be pointed out that as long as the information provided by the acceding country on a given aid measure remains incomplete, the 3 months-period is not triggered.
3. A Commission decision to object to a measure under this interim procedure shall be regarded as a decision to initiate the formal investigation procedure <sup>(2)</sup> within the meaning of the state aid procedural regulation. However, if such a decision is taken before the date of accession, the decision will only come into effect upon the date of accession. The delay in the entry into force of such decisions is necessitated by the fact that possibly by the time the Commission adopts its decision to object to a certain aid measure, the legal base for this decision, namely the Accession Treaty, may not yet have entered into force. It is safe to assume that the Commission will publish its decisions to object to certain measures pursuant to this interim procedure in the Official Journal <sup>(3)</sup>.

## Conclusions

At the time of writing, it is expected, although not yet certain, that the eventual Accession Treaty will contain the rules on existing aid as sketched out above. This continuing legal uncertainty notwithstanding, the Commission and the acceding countries are already actively implementing the

<sup>(1)</sup> See Article 4(5) of Regulation 659/1999.

<sup>(2)</sup> See Articles 4(4), 6, 13(1), 16, 19(2) and 26(2) of Regulation 659/1999.

<sup>(3)</sup> Such a publication would indeed be obligatory if Article 26(2) of Regulation 659/1999 were to be applied, by analogy, to this interim procedure for pre-accession aid. Arguably, such an analogy may be assumed due to the general reference to the 'formal investigation procedure' of Regulation 659/1999 contained in the draft Accession Treaty.

envisaged policy. In particular, at the end of 2002 a list was transmitted to the EU Member States which contained those measures that had successfully passed the two-tier review process discussed above; this list is intended to be included in the Accession Treaty in its final form. With the drafting of the Accession Treaty almost completed, the focus is now shifting to the proper implementation of the interim procedure.

The Commission proposal on existing aid offered acceding countries a carrot and a stick: legitimate grants of aid and those that are properly converted so as to ensure compliance with common market principles, benefit from the protected status as existing aid after accession. On the other hand, promises of aid that do not respect common market

principles have to be swiftly notified as new aid; otherwise, such measures are exposed to the threat of recovery.

The first experiences with this approach demonstrate that indeed considerable efforts have been and are being undertaken by the acceding countries to bring their present aid regimes and individual aid into line with the requirements of the *acquis*. In this sense, the strict policy on incompatible aid after accession as outlined above appears to have provided a sufficiently strong incentive to acceding countries. As a result, potential distortions of competition in the future enlarged common market could be substantially reduced already during the pre-accession phase.





## European Competition Day on 14 February 2003 in Athens

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On 14 February 2003 the Hellenic Competition Commission hosted in Athens the 7<sup>th</sup> European Competition Day. The European Competition Day (ECD) is an event organised by the competition authority of the Member State holding the EU Presidency in collaboration with the Commission. The aim is to enhance public awareness of the positive effects of competition and competition policy for the citizen and notably for the consumer. The issue of 'Promoting competition and consumers' interests: Chances and limits' attracted 500 participants, so far the largest audience at an ECD.

The President of the Hellenic Competition Commission, Dimitris Tsouganatos, and Christos Theodorou, Vice Minister for Development, opened the conference, followed by speeches of Commissioner Mario Monti and of the chairman of the European Parliament's Economic and Monetary Affairs Committee, Christa Randzio-Plath. Commissioner Monti was satisfied that the ECD has become an established EU Presidency event and demonstrated with the help of several examples of current and recent activity of DG Competition how competition policy creates benefits for the citizen. MEP Randzio-Plath focused on the specific aspects of competition in financial services.

The first round table tackled the interrelation of competition policy and consumer protection. The discussion was about the appropriate delimitation between regulation purported to protect the consumer and the necessary room for freedom of

market participants. There was to a certain extent agreement that the need for protective rules would be more limited if consumers would be better informed and aware of their possibilities. Consumer information would therefore be an essential task for government and consumer organisations. A controversial issue was whether rules on allegedly misleading advertising should be strengthened.

The second round table on 'Competition policy in a period of transition' discussed the benefits of regulatory changes in the area of car distribution and maritime cabotage rights; one participant questioned the usefulness of a more prominent involvement of consumer organisations in merger proceedings.

Between the round tables Professor Eleanor Fox of the New York University School of Law examined 'what is harm to competition?'. Her conclusion: Antitrust helps consumers; consumers must help antitrust. The conference was closed by Sven Norberg, Director at DG Competition, who proved on the basis of examples from recent Commission practice that 'Competition is a better deal for consumers'. He notably set out how the consumer interest often has to be defended against the interest of strongly organised industrial lobby groups.

The Athens competition day offered a very interesting and lively conference. It was of a high quality and very well organised, and certainly set a standard against which later such events will have to be measured.



## Competition law analysis of patent licensing arrangements — the particular case of 3G3P

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*On 12 November 2002, the Commission's Competition Directorate-General cleared agreements to set up and operate a world-wide mechanism to evaluate, certify and license essential patents for third generation ('3G') mobile communications systems. The Commission issued a positive administrative letter ('comfort letter') to the 3G Patent Platform Partnership ('3G3P') for the creation of five 3G technology-specific patent platforms that are intended to (1) determine and certify the essentiality of 3G patents; (2) streamline licensing administration; (3) apply a price cap mechanism aimed at moderating the effect of high cumulative royalties.*

### The 3G Patent Platform Partnership

In July 2000 the 3G Patent Platform Partnership ('3G3P') and its 18 partners<sup>(1)</sup> notified agreements which serve to establish a world-wide Patent Platform, which according to the Partners, was designed to provide a voluntary, cost effective mechanism for evaluating, certifying and licensing essential patents for third generation ('3G') mobile communication systems.

The 3G3P claimed that the notified agreements would have pro-competitive effects: 3G3P will be based on open and voluntary membership, it is intended to facilitate market entry and access to 3G technology by preventing the blocking of essential patents. According to the 3G3P, the Patent Platform was envisaged to substantially reduce the costs, uncertainties, and delays associated with the licensing of numerous essential patents for complex technologies. As an arrangement similar to a patent pool, 3G3P had to be reviewed using the criteria for assessing patent pools under the competition rules.

### Competition analysis

Three of the most interesting aspects of the competition law scrutiny of the 3G3P are discussed below, and namely: (1) patent pools and their

effects on competition; (2) 'competing' essential patents in the case of an umbrella standard, and (3) price setting considerations.

#### (1) Patent pools and their effects on competition

A patent pool is an arrangement by multiple owners of intellectual property rights (IPRs) to assign patent rights to each other or to grant licenses to third parties. By pooling patents together, it enhances licensing efficiency and thus access to IPRs. However, given that patent rights bestow a legal monopoly, it has to be ensured that patent holders will not use a patent pool to fix and raise prices, limit output and/or stifle further innovation. Therefore, competition scrutiny of patent pools and similar collective licensing arrangements has to ensure that trade relating to both the IPRs, and to the downstream product/services markets incorporating the IPRs, will remain unrestrained.

The 3G3P have argued that the 3G Patent Platform would merely facilitate transactions between patent holders and licensees. There are a number of features which distinguish it from a pure 'patent pool': (1) the Platform is open to both licensors and licensees, whereas a patent pool consists only of licensors; (2) the licensors retain their freedom to license outside the Platform (non-exclusivity) and they do not assign patent rights to the Platform; (3) the patents are not bundled, i.e. no real pooling of patents occurs: instead licensees have the opportunity to pick and choose between patents and the licensing is carried out on a bilateral basis; (4) there is no single licence between a given licensee and the Platform, whereas in a patent pool a licensee typically has one licence agreement with the patent pool; (5) the Parties to a licence can choose between the Platform's Standard Licence and a negotiable individual licence.

Therefore the legal doctrine on patent pools was not directly applicable. However, most of the rules

<sup>(1)</sup> Consisting of both manufacturers and mobile operators, and namely Alcatel, Cegetel, Electronics and Telecommunications Research Institute Korea ('ETRI'), France Telecom, Fujitsu, Royal KPN N.V., LG Information and Communications, Matsushita, Mitsubishi Electric, NEC, NTT DoCoMo, Robert Bosch GmbH, Samsung Electronics, Siemens AG, SK Telecom, Sonera Corporation, Sony and Telecom Italia Mobile.

governing patent pools under competition law could be used as guidance.

The existing competition regulatory practice, both in the EU and in the US, has established a number of requirements to be met by a patent pool. A patent pool should include essential patents only, those should be licensed under non-discriminatory terms, there should be safeguards that commercially sensitive information will not be exchanged, and innovation should not be discouraged by the patent pool.

## (2) *'Competing' essential patents*

To obtain anti-trust clearance, patent pools must be limited to essential patents only. Essential patents are those patents that are indispensable for complying with a given technology standard. This means that those are patents that are complementary in order to comply with a given standard, and do not compete with each other. Thus, as a consequence, the patent holders are not competitors on the IPR, or the innovation, market, as their IPRs are complementary.

However, in the process of 3G standard-setting, the International Telecommunications Union (ITU) faced pressure from industry groups that favoured alternative 3G air interface technologies on the basis of historical choice of second generation mobile communications (2G) standards. Standards are developed by way of standard specifications and the process is ongoing. The ultimate goal is to achieve interoperability and interworking between the five different air interface technologies in the IMT-2000 and allow for global roaming and other compatible 3G services. Regarding the core fixed network, it is presumed that all players will converge towards all IP-based networks.

ITU could not reach consensus on a single global air interface standard, and adopted a compromise position which created a family of five standards, IMT-2000 (where 'IMT' stands for International Mobile Telecommunications, and 2000 is the year when unanimous approval was given to the main technical specifications for 3G systems). IMT-2000 is therefore the brand name for a 3G umbrella standard that encompasses five separate air interface technologies generally known as W-CDMA, CDMA2000, TD-CDMA, TDMA-EDGE and DECT.

In the process of examining 3G3P, the paramount issue was whether the five air interface technologies within the IMT-2000 umbrella standard were competing or complementary. Market players and industry experts could not give an unequivocal answer to this question, but it could be assumed

that there would be at least a degree of competition between the five technologies. This was irrespective of the fact that in certain regions one of the five was considered the prevailing technology due to either the existing 2G legacy systems or through regulatory choice.

Given that there was deemed to be some potential or actual competition between the five 3G technologies within the IMT-2000 standard, the 3G3P in its original form appeared to amount to an agreement between potential or actual competitors that would pool together competing IPRs, agree on terms and conditions for licensing and royalty rates. This raised serious concerns regarding potential anti-competitive effects of the arrangements. The fact that only essential patents were to be included in the Platform would not in itself suffice to allay competition concerns, given that the 3G3P was to encompass 'competing' essential patents for the five potentially competing air interface technologies covered by the 3G umbrella standard, and not with IPRs for one single technology only.

In the course of 2001 and 2002 the notified agreements were amended several times and the final arrangements were notified to DG Competition in June 2002. The major modification was the creation of five separate air interface technology Platforms (incorporated as 'PlatformCos') instead of one single common Platform for all the five air interface 3G technologies, as was originally conceived. Thus, in order to avoid limiting possible competition between the five available air interface technologies, the parties modified their initial arrangements and established five separate patent platforms, one for each technology, instead of pooling all essential patents for all the five technologies in one single platform. A system of five separate technology-specific 3G patent platforms limited to essential patent was deemed unlikely to restrict competition and innovation with respect to 3G mobile technologies.

## (3) *Price-setting considerations*

The 3G3P argued that the price setting mechanism introduced by means of a Standard Licence, which provides for a Standard Royalty rate, a Maximum Cumulative Royalty rate and a Cumulative Royalty rate will result in a more simplified procedure than the alternative of negotiating prices separately for each of the required patents. The Partners claimed that the result would be a reduction in delays, transaction costs and other uncertainties that are normally associated with the implementation of a new technology where numerous companies hold essential patents.

Patent holders and licensees also have the option to use a Standard Licence agreement as a default contract or they may enter into bilateral negotiations for 'fair and reasonable' consideration and terms. The Partners argued that this possibility should alleviate competition concerns on price fixing.

The 3G3P provides for a 'price-cap', which is not an absolute level, and it is not a single pre-set royalty rate, but a default five percent maximum, not minimum, cumulative royalty rate for potential licensees per product category. The individual royalty rate per patent will differ for each of the licensees, depending on their chosen patent portfolio on each of the product categories.

Thus the Partners argued that royalty 'setting' occurs only when a licensee hits the maximum royalty. It was submitted that the cumulative royalty rates would not be the same for a given Product Category because it was unlikely that licensees would reach the default maximum rate, especially if they themselves own essential patents. Therefore, the 'standard' royalty rates were argued to be in fact varying. Even if royalty rates were identical for two licensees, the royalties payable to each licensor were likely to vary because they would be calculated on the ex-works sales price and volumes of sales per licence per country. Therefore it could be concluded that the 3G3P would rather 'regulate' prices by imposing a maximum overall price to be paid for an acquired patent portfolio, than fix prices (royalty rates) for different individual patents.

With the revised structure of the PlatformCos this price capping is now envisaged to take place per technology and price competition between the IPRs for the five 3G technologies in the five separate PlatformCos will be guaranteed. In addition, there are additional safeguards in the amended agreement that serve to reinforce the independence of each PlatformCo in the setting of royalty rates levels and the reference market value for the calculation of royalties. In any case, because only essential patents are included per PlatformCo, the pricing arrangements governing royalty rates per PlatformCo are not agreements between competitors, thus no price-fixing concerns can arise therefrom.

Even though price competition is unlikely to be restricted both within and between PlatformCos, a

further important issue to consider is the extent to which price competition is the major factor in deciding to choose a given technology of the IMT-2000 family. It has been argued by the Partners that factors other than price would be vital and in particular that the choice of 2G air interface technology would pre-determine the choice of 3G technology to a significant extent. For new entrants, of course, this will not be a valid argument. It has to be taken into account however, that the ultimate choice of technology is made by the mobile operators which will run 3G networks and which would procure certain equipment depending on their choice. In the EU, there are not many true 'new entrants' as most of the operators that have won 3G licences, even new players, are established operators in their national markets. Operators' familiarity with certain technology and installed base would be of serious consideration when choosing the 3G technology.

## Conclusion

3G mobile technologies are expected to bring about a plethora of multimedia and high-speed voice and data services to mobile phone users. In assessing the 3G3P patent licensing arrangements, the Commission's Competition Directorate General had to verify that there is no limitation of competition between different 3G technologies, that the arrangements are limited to essential patents only, that there is no foreclosure of competition in related or downstream markets or anti-competitive tying of patents and that the arrangements do not discourage further R&D and innovation.

The scope of the administrative comfort which has been granted is however limited to the arrangements covered by the notified agreements, and does not extend to any other industry initiatives or arrangements, such as decisions and/or practices of 3G standard setting bodies and industry working groups. Given the novelty of the 3G technologies and the unpredictability in the development of related 3G downstream product markets, the clearance is limited to the arrangements as those have been notified and taking into account the current 3G3P membership.

## From discothèques to websites, a new approach to music copyright licensing: the *Simulcasting* decision

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On 8 October 2002 the Commission adopted a decision in case COMP/C2/38.014 *IFPI Simulcasting* exempting a standard agreement entered into by a number of copyright administration societies from Europe, South America, Asia and New Zealand.

This is the first decision by the Commission concerning the collective management and licensing of copyright for the purposes of commercial exploitation of musical works on the Internet.

Some of the issues at stake in this case have already been subject to a competition assessment at a time when the Internet had no commercial relevance. In the particular context of copyright licensing of physical premises where music is publicly performed, the Court of Justice has addressed the reciprocal relationship between copyright administration societies ('collecting societies') and the relationship between collecting societies and users in the famous 'discothèques cases' *Ministère Public v. Tournier* <sup>(1)</sup> and *Lucazeau v. Sacem* <sup>(2)</sup>.

### 1. Relevance of the case

The relevance of the case is threefold.

First, in spite of a significant flow of complaints and notifications during the past two decades concerning the activity of collecting societies, the last formal (substantive) decision by the Commission in this area was adopted in 1981 <sup>(3)</sup>. Nonetheless, previous Commission decisions as well as numerous judgements of the Court of Justice <sup>(4)</sup> have in this area laid down important principles as regards the relationship between copyright and competition law.

Secondly, the *Simulcasting* decision adapts the existing principles to the online environment and carries out a new assessment under EC competition rules of copyright management activities. The loss of territoriality induced by the Internet and the

digital format of the products protected by copyright result in:

- a) the ability of monitoring copyright usage from a distance by means of appropriate software, thereby rendering meaningless the need for physical monitoring, which was a traditional justification put forward by collecting societies to justify a number of reciprocal arrangements between them containing territorial restrictions;
- b) consequently, territorial restrictions contained in the reciprocal agreements between societies not being objectively indispensable anymore;
- c) and, finally, there being no objective reason for an EEA-based radio or TV broadcaster not being able to choose the most efficient society in the EEA for the grant of a copyright license.

Thirdly, considering the progressive increase in Internet-based media activities, it is highly likely that the Commission is called upon to intervene in the near future in other cases where analogous questions are raised. The investigation carried out in the *Simulcasting* case may therefore provide useful indications for the competition assessment of similar cases involving the administration and licensing of copyright protected musical works on the Internet.

### 2. The notified agreement

This case concerns the notification of a model reciprocal agreement (hereinafter the 'Reciprocal Agreement') between collecting societies acting on behalf of record companies. The purpose of the agreement is to facilitate the grant of international copyright licences to radio and TV broadcasters who wish to engage in simulcasting and thereby make musical works available to the public via the Internet.

'Simulcasting' is the transmission by radio and TV stations of their signal simultaneously and unaltered both via the traditional means (air, cable and satellite) and the Internet.

<sup>(1)</sup> *Ministère Public v. Tournier*, case 395/87, ECJ 13 July 1989, ECR 1989 p. 2521.

<sup>(2)</sup> *Lucazeau v. SACEM*, joined cases 110/88, 241/88 and 242/88, ECJ 13 July 1989, ECR 1989 p. 2811.

<sup>(3)</sup> 82/204/EEC, Commission Decision of 4 December 1981 (IV/29.971-*GEMA statutes*), OJ L 94, 8.4.1982, p. 12.

<sup>(4)</sup> For example, *Basset*, case 402/85, ECJ 09.04.1987; *Tournier*, case 395/87, cit.; *Lucazeau*, case 242/88, cit.

The Reciprocal Agreement is intended to facilitate the grant of a multi-territorial licence for the simulcasting activity such as to allow for an international exploitation of the sound recordings administered by the collecting societies through means including the Internet.

By virtue of the territorially limited way licensing has been carried out so far, each collecting society has pursued its activity on its own territory only. Accordingly, the licenses which societies traditionally grant to users for exploitation of sound recordings are limited to their individual national territories. Therefore, the right to simulcast on the Internet, given that it necessarily involves the transmission of signals into several territories at the same time, is not covered by the existing 'mono-territory' licenses granted by collecting societies to broadcasters where the simulcast includes the repertoires of several collecting societies. The Reciprocal Agreement is intended to facilitate the creation of a new category of licence which is simultaneously multi-repertoire and multi-territorial.

By means of the notified agreement, simulcasters will have a simple alternative to obtaining a licence from the local society in every country in which their Internet transmissions are accessed, although this latter approach will still be available to them.

The Reciprocal Agreement is intended to operate for an experimental period after which its nature, scope and operation will be reviewed. The current version of the agreement will expire on 31 December 2004.

### 3. The parties

The parties to the notified agreement are 29 collecting societies from Europe, Asia, South America and New Zealand the members of which are record and music video producers. The type of rights held by phonogram producers are generally referred to as 'neighbouring rights' to copyright or 'related rights'.

The main function of these collecting societies is the administration of the neighbouring rights of their members for the purposes of broadcasting and public performance. This includes the licensing of rights in the sound recordings of their members to users, determining tariffs for that use, collecting and distributing royalties, monitoring the use of the protected material and enforcing their members' rights.

### 4. The relevant markets

Collective management of copyright and/or neighboring rights covers different activities corresponding to as many different relevant product markets: administration services of rights for right holders, administration services of rights for other collecting societies and licensing services for users. The Reciprocal Agreement affects directly two relevant markets:

- a) multi-territorial simulcasting rights administration services between record producers' collecting societies;
- b) multi-territorial and multi-repertoire licensing of the record producers' simulcasting right.

As regards the first relevant product market, it is characterised on the supply side by record producers' collecting societies capable of administering on a multi-territorial basis for simulcast use the repertoires of other societies located in territories other than the one where the former are established. On the demand side, it is characterised by record producers' collecting societies wishing to have their repertoires administered on a multi-territorial basis for simulcast use by another society located in a different territory.

On its part, the product market for multi-territorial and multi-repertoire simulcast licensing is characterised on the supply side by record producers' collecting societies which have been mandated the necessary rights by their record company members to grant licences to users. On the demand side it is characterised by user TV and radio broadcasters who wish to make the conventional radio/TV signal simultaneously available via the Internet. Since mono-territorial or mono-repertoire simulcasting licences do not represent a viable alternative service for such users, multi-territorial and multi-repertoire licensing of the simulcasting right constitutes the relevant product market.

The relevant geographic market for both products comprises at least all the EEA countries where the local collecting society is a party to the Reciprocal Agreement, i.e. all EEA countries except for France and Spain.

### 5. The competition concerns

Insofar as the Reciprocal Agreement created a new product (multi-territorial and multi-repertoire licensing of the simulcasting right) that could not be realistically created without some co-operation among collecting societies, only certain particular clauses of the Reciprocal Agreement deserved

closer attention, since they could constitute restrictions of competition

The Commission services expressed to the parties a number of concerns related to:

- a) territorial restrictions contained in the cross-licensing arrangements between the parties, which perpetuated the existing national monopolies held by collecting societies;
- b) the amalgamation of copyright royalty and administration fee in the tariffs charged to the users, which maintained an undesirable degree of opacity in the cost structure of collecting societies and which prevented price competition between the parties from emerging as regards the licensing services provided to users.

The competition issues highlighted above had to be balanced against a legitimate concern traditionally expressed by collecting societies and, indeed, national governments as regards the protection of right-holders within the wider framework of national cultural policies.

As a result of the discussions held between the Commission services and the parties, the original agreement was amended so as to ensure that EEA-based simulcasters will be able to choose from which collecting society in the EEA they wish to obtain a single copyright license ('one stop shop' license) for the purposes of simulcasting on the Internet in Europe. This represents a major progress from the previous situation where a simulcaster had to obtain a license from every collecting society in all the territories where its broadcast was made available.

At the same time, the adopted approach ensures that the royalty level to be charged on behalf of right holders is determined at national level by each collecting society, in accordance with national laws, individual commercial needs or cultural policy objectives.

Lastly, the transparency requirement imposed on collecting societies makes sure that a prospective licensee is able to identify the element of the license fee which corresponds to the copyright royalty proper and the element corresponding to the administration fee meant to cover the administration costs of the grantor society. This way, users will be able to identify the most efficient societies in the EEA.

## 6. The principles underlying the Reciprocal Agreement

Two main principles underlie the Reciprocal Agreement.

### 6.1. Remuneration of rights

As regards the remuneration of rights, it is the country-of-destination principle that applies. According to this principle, the act of communication to the public of a copyright protected work takes place not only in the country of origin (emission-state) but also in all the states where the signals can be received (reception-states). It is opposed to the country-of-origin principle according to which the act of communication to the public of a copyright protected work takes place in the emission-state only.

The country-of-destination principle will apply in respect of the amount to be charged by a collecting society to a user for a simulcast license. Given that the envisaged 'one-stop' simulcast license comprises several repertoires and is valid in multiple territories, the tariff for a simulcast license will be an aggregate tariff composed of the relevant individual tariffs charged by each participating collecting society for simulcasting on its own territory. This means that the society granting a multi-repertoire and multi-territory license will have to take into account all the relevant national tariffs, including its own, for the determination of a global licence fee.

### 6.2. Clearance of rights

As regards the clearance of rights, under the originally notified agreement a collecting society was empowered to grant an international simulcasting license only to broadcasting stations whose signals originated in its own territory. This meant that broadcasters were required to approach the producer's collecting society in their own Member State, which constituted the only possible source for a simulcasting license.

However, on 21 June 2001 the IFPI notified to the Commission an amended version of the Reciprocal Agreement allowing broadcasters whose signals originate in the EEA to approach any collecting society established in the EEA which is party to the Reciprocal Agreement in order to seek and obtain a multi-territorial and multi-repertoire simulcasting license. The resulting principle is therefore the freedom of choice by EEA-based broadcasters among EEA-based collecting societies.

## 7. Article 81(1) of the Treaty

The licensing of copyrights and related rights in the online environment is significantly different from the traditional offline licensing, in that no



physical monitoring of licensed premises is required. The monitoring task must necessarily be carried out directly on the Internet and the crucial requirements in order to be able to monitor the use of copyrights and related rights are therefore a computer and an Internet connection. This means that monitoring can take place from a distance.

In this context, the traditional economic justification for collecting societies not to compete in cross-border provision of services does not seem to apply.

It is worthwhile underlining that the Commission acknowledges the need for proper remuneration of right-holders, be it phonogram producers, as in the present case, or performers or authors, in other cases, and endorses the efforts made to protect and to encourage the productive or creative effort underlying the final act of communication to the public of a work protected by copyright or neighbouring rights legislation. The right to remuneration of a right-holder for the public performance of a copyright protected work has been recognised by the Court of Justice as part of the essential function of copyright <sup>(1)</sup>. However, it is also settled case law that although the existence of an intellectual property right under national law is not prejudiced, pursuant to Article 295 (ex-Article 222) of the EC Treaty, by the other Treaty provisions, its exercise may be affected by the prohibitions of the Treaty <sup>(2)</sup> and may accordingly be limited to the extent necessary to give effect to the prohibition under Article 81(1) <sup>(3)</sup>. Given that collective administration of copyright and neighbouring rights clearly corresponds to the exercise of those rights, and not to their existence, the way in which collecting societies put in practice the administration of the rights they are entrusted with may, under certain circumstances, infringe Article 81(1) of the Treaty.

In the present case, the model chosen by the parties for the simulcasting licensing structure results in the society granting a multi-repertoire/multi-territory license being limited in its freedom as to the amount of the global license fee it will charge to a user. In fact, the sum of the individual national tariffs determined by each of the participating collecting societies that contribute to the bundle of repertoires and territories being offered to a user

through a single license will be imposed on the grantor society. This means that the global fee charged by the grantor society for a multi-repertoire/multi-territory license is to a large extent determined *ab initio*, which significantly reduces the competition in terms of price between EEA-based collecting societies.

The original version of the Reciprocal Agreement went beyond the mere recognition that collecting societies must earn enough revenue to honour their financial commitments to each other, because it imposed how to do it, by obliging the societies to respect the tariffs of the country-of-destination. This particular element was, thus, considered by the Commission not to be objectively necessary for the existence of the Reciprocal Agreement.

What rendered this mechanism particularly restrictive was the fact that the lack of price competition as it resulted from the envisaged system occurred not only in respect of the royalty proper due for the use of protected works but also as regards that part of the license fee which is meant to cover the administration costs of the grantor society. In fact, no distinction was made between both elements the sum of which necessarily constitutes the total amount of the license fee.

By not distinguishing the copyright royalty from the administration fee, the notifying parties significantly reduced the prospects of competition between them as regards pricing for the provision of the licensing service. The confusion between both elements of the license fee prevented prospective users from assessing the efficiency of each one of the participating societies and from benefiting from the licensing services by the society capable of providing them at the lower cost. Furthermore, the amalgamation of copyright royalty and administrative fee that resulted in an undifferentiated global license fee to be charged to a user could not be considered as directly related to the notified agreement or objectively necessary for the existence of the Reciprocal Agreement.

In conclusion, the provision of the Reciprocal Agreement which determined that each contracting party should apply to simulcasters the license fees which applied in the other contracting

(1) Case 62/79, *SA Compagnie Générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, 18 March 1980, ECR [1980] 881, para. 14.

(2) Case 15/74, *Centrafarm BV et Adriaan de Peijper v Sterling Drug Inc.*, 31 October 1974, ECR [1974] 1147, para. 7.

(3) Joined cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, 13 July 1966, ECR [1966] 299. See also joined cases 55/80 and 57/80, *Musik-Vertrieb membran GmbH et K-tel International v GEMA — Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte*, 20 January 1981, ECR [1981] 147, para. 12, where the Court says that (in respect of Article 36 of the Treaty) 'there is no reason to make a distinction between copyright and other industrial and commercial property rights'.

party's territory for those simulcasts received in the latter's territory was considered to restrict competition within the meaning of Article 81(1) of the Treaty.

However, it must also be said that the restrictive effects identified by the Commission may prove to have a mere temporary nature if the parties duly implement the changes to the agreement submitted after the original notification. Accordingly, the parties have explicitly acknowledged that *'such implementation is a crucial element to be taken into consideration by the Commission in the assessment of any future arrangement concerning the management and licensing of phonogram producers' rights for the purposes of multi-territorial and multi-repertoire simulcasting.'*

## 8. The exemption

### 8.1. Promotion of technical and economic progress and improvement in the distribution of goods

The simulcasting licenses to users as they result from the Reciprocal Agreement present a new feature and consequently give rise to a new product. As opposed to traditional rights licenses, simulcasting licenses will allow for the use of the licensed rights in more than one territory.

The Commission accordingly acknowledged that the notified arrangement avoids the necessity for a multiplicity of individual lengthy negotiations by users across the EEA with each individual collecting society. As a result, the reciprocal framework can reduce transaction costs significantly and these efficiencies should be passed on both to the rights-holder and to the user.

Moreover, music records and videos broadcast via terrestrial means, satellite and/or cable necessarily have a limited reach due to technical reasons. By making such music records and videos available through the Internet by means of simulcasting, simulcasters will allow virtually anyone from anywhere in the world to access such products.

Lastly, the Reciprocal Agreement also reduces substantially the legal uncertainty surrounding simulcasting licensing, in that the agreement is based on a common understanding of the relevant legal framework by a significant number of the licensing entities in the EEA.

The distribution of music included in records and videos is therefore improved.

### 8.2. Benefits for the consumer

The creation of a legitimate marketplace for simulcasting will benefit consumers both in the short-term and in the long-term.

In the short-term, consumers will get easier and wider access to a range of music by means of the available simulcasts. Furthermore, through the Internet they will be able to access their favourite radio and/or TV music programmes from virtually anywhere in the world.

In the long-term, the fact that simulcasting is now put in place within a legitimate framework which ensures the proper remuneration of right-holders ensures that the effort of music producers is duly rewarded and that therefore a wide range of music will still be available in the future.

### 8.3. Indispensability

The agreement between the societies to amalgamate administration fee and copyright royalty, and thereby to jointly determine a global license fee, was considered to go far beyond what was required to pursue the legitimate concerns of the parties in respect of adequate legal protection and proper remuneration of right-holders.

In order to solve the concern expressed by the Commission, the parties changed the notified agreement on 22 May 2002 such as to separate the copyright royalty from administration fee, and to identify them separately when charging a license fee to a user. Another change introduced in the Reciprocal Agreement is aimed at determining the administration fee with reference to the actual administration costs incurred by the grantor society in respect of the granting of multi-territorial/multi-repertoire licenses.

The parties will present to the Commission by the end of 2003 a set of proposals for the implementation of the separation of the copyright royalty from the administration fee and to implement them as soon as possible after that date. The required mechanisms shall be implemented the latest by 31 December 2004.

The change introduced by the parties into the notified agreement will induce an important degree of transparency in their relationship with users. This will allow users (as well as members of the societies) to better assess the efficiency of each of the societies and to have a better understanding of their management costs. Moreover, it will allow for actual, although limited, price competition between collecting societies in respect of the

licensing service in the market for the licensing of the record producers' simulcasting right.

The Commission accordingly considered that the changes introduced into the Reciprocal Agreement were adequate in order to solve the competition concerns previously expressed in this respect. Lastly, the Commission also considered the time period required for the assessment and implementation of the proposed mechanisms as indispensable in the meaning of Article 81(3)(a) of the Treaty.

As regards the royalty element which results from the aggregation of all the copyright royalties determined at national level, the notifying parties demonstrated that the maintenance of a certain degree of control by the individual collecting societies over the licensing terms of their own repertoire so as to ensure a minimum level of remuneration for their right-holder members was, in these circumstances, indispensable for the conclusion of the Reciprocal Agreement. On the other hand, the option for the pre-determination of national copyright royalty levels appeared to correspond to the least restrictive of the alternatives so as to create and distribute a new product.

In the light of the foregoing, the Commission considered such restriction to be indispensable in the meaning of Article 81(3)(a) of the Treaty.

#### 8.4. *Non-elimination of competition*

Within the traditional framework of copyright and neighbouring rights licensing, actual competition between the monopolistic collecting societies in Europe has been virtually non-existent. In the present case, whilst the establishment of the Reciprocal Agreement will require a degree of co-operation between the collecting societies, it will not be replacing any existing competition, since it is geared to the development of an entirely new service.

The amendment to the Reciprocal Agreement notified by the parties on 21 June 2001 encourages competition between record producers' collecting societies. The collecting societies will be able to actually compete and to differentiate themselves in terms of efficiency, quality of service and commercial terms. Furthermore, the changes introduced by the parties in the Reciprocal Agree-

ment as notified on 22 May 2002 will ensure that, after an initial adaptation period, competition between collecting societies will extend to pricing. Accordingly, the participating EEA societies will have to increase their efficiency as regards their administration costs in such a way as to be able to provide a 'one-stop' simulcasting license at the lowest possible cost to EEA users.

Finally, it is worth underlining the fact that, by creating and encouraging competition between participating collecting societies in the EEA, the Reciprocal Agreement furthers the goal of creating and sustaining a single market, in this case a single market for the provision of inter-society administration services and a single market for the licensing of simulcasting.

In the light of the foregoing, the Commission considered that the Reciprocal Agreement did not eliminate competition in respect of a substantial part of the relevant products in the meaning of Article 81(3) (b) of the Treaty and concluded that the cumulative conditions of Article 81(3) were fulfilled.

### Conclusion

The Commission has previously stated that in certain circumstances co-operation may be justified and can lead to substantial economic efficiencies, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets<sup>(1)</sup>. The Reciprocal Agreement appears to be a product of such a response, given the technological developments which lead to the Internet simulcasting technology.

The *Simulcasting* decision results in the opening up of collective copyright management to competition and in the increase in transparency as regards the relationship between collecting societies and users, whilst maintaining an adequate level of autonomy at national level as regards copyright proper. It demonstrates that the application of competition rules in this area can generate significant consumer benefits and, at the same time, fully respect copyright law and ensure the protection of both right-holders and users.

<sup>(1)</sup> Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements, Commission Notice OJ C 3, 6.1.2001, p. 2, paragraph 3.

## Commission fines Nintendo and seven of its European distributors for colluding to prevent parallel trade in Nintendo products

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### 1. Introduction

The Commission Decision commented here concerns the distribution of Nintendo manufactured game consoles (the NES and SNES static consoles, that were superseded by the N64 console, as well as the portable Game Boy) and game cartridges for these consoles. Apart from being the manufacturer of the products, in certain Member States Nintendo acted as the official exclusive distributor of its products to wholesalers and retailers itself. In other Member States it had appointed independent exclusive distributors.

In March 1995, an ex-officio procedure into the video games industry <sup>(1)</sup> was opened. On the basis of its initial findings, the Commission also opened in September 1995 an ex-officio investigations into the distribution system of Nintendo specifically <sup>(2)</sup>. The final case in the saga <sup>(3)</sup> arose from a formal complaint lodged in November 1996 by Omega Electro b.v., a Dutch 'rack-jobber' <sup>(4)</sup> in video-game products. Following Omega's complaint, the Commission extended and intensified its investigation into Nintendo's distribution practises.

On 30 October 2002, the Commission concluded this long investigation by imposing a total fine of € 167,8 million on Japanese video games maker Nintendo and seven of its exclusive distributors in Europe.

The Decision finds that the addressees participated in a single and continuous infringement of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement with the object of restricting parallel exports in Nintendo's consoles and game cartridges throughout the EEA. The infringement was organised by Nintendo and actively enforced. Companies that resold the products abroad or to companies that would do so were sanctioned and, as a result, intra-EEA parallel trade was significantly reduced. Nintendo's independent distribu-

tors took an active part in, and benefited, from the prevention of parallel trade.

In line with similar cases concerning restrictions of parallel trade, this constitutes a very serious infringement of Article 81(1) EC and 53(1) EEA. This because of the nature of the infringement, its actual impact on the market and the fact that the infringement affected the EEA as a whole. The duration of the infringement was from January 1991 until December 1997. However, the length of participation of each of the addressees varied from slightly more than two months in the cases of Nortec S.A. and CD Contact Data GmbH to 6 years and 11 months in the case of Nintendo.

The following fines were imposed:

- Eur 149,128 million on the Nintendo group of companies;
- Eur 8,64 million on John Menzies plc, Nintendo's exclusive distributor for the United Kingdom and Ireland;
- Eur 0,825 million on Concentra — Produtos para crianças, S.A., the exclusive distributor for Portugal;
- Eur 1,5 million on Linea GIG S.p.A (Italy);
- Eur 1,25 million on Bergsala A.B., (Sweden, Finland, Denmark and Iceland);
- Eur 1 million on CD-Contact Data GmbH, that was responsible for distributing Nintendo's products in Belgium and Luxembourg;
- Eur 4,5 million on Itochu Corporation, responsible for distribution in Greece;
- Eur 1 million on Nortec A.E., that distributed Nintendo's products in Greece after Itochu Corporation had stopped being Nintendo's distributor there.

<sup>(1)</sup> Case No IV/35.587 PO Video Games. The same investigation also gave rise to the Commission opening procedures against Nintendo, Sega and Sony with regard to their licensing practises for third party game producers. See also IP/97/676 and IP/97/757.

<sup>(2)</sup> Case No IV/35.706 PO Nintendo Distribution.

<sup>(3)</sup> Case No IV/36.321 Omega/Nintendo.

<sup>(4)</sup> A 'rack-jobber' is essentially a wholesaler that also provides 'in-store' services (such as providing displays, rack-filling etc.) to retailers.

The total fine and the individual fine for Nintendo are the largest ever imposed in a vertical case. They also rank among the highest when all fining decisions of the Commission, including those in cartel cases, are considered <sup>(1)</sup>.

The remainder of this article will be devoted to a number of questions that in view of their novelty deserve, in our opinion, to be highlighted.

## 2. Unilateral behaviour versus agreements for the purpose of Article 81(1) EC

As the Statement of Objections were issued around the time that the Judgement of the Court of First instance in *Adalat* <sup>(2)</sup> was given, it was probably inevitable that some companies would try to argue that their conduct did not constitute an agreement within the meaning of Article 81(1) EC but merely unilateral behaviour that would fall outside the scope of application of this Article. Indeed, John Menzies argued that, for a part of the alleged duration of its participation to the infringement, its trading policies towards its own customers that hindered parallel trade <sup>(3)</sup> constituted purely unilateral conduct within the meaning of *Adalat*.

It was however established that John Menzies plc's behaviour towards its own customers could not be characterised as purely unilateral. Firstly, it could be shown that John Menzies plc's policy represented the practical implementation of contractual provisions between Nintendo and John Menzies that fell within the scope of Article 81(1) of the Treaty. Indeed, in correspondence with its customers, John Menzies explicitly referred to these contractual provisions to justify its conduct and, thus, a direct causal link could be established between the provisions restricting parallel exports in John Menzies plc's agreement with Nintendo and John Menzies plc's conduct vis-à-vis its customers. In addition, John Menzies plc's assertion was inconsistent with its actual conduct in the market.

## 3. First application of the concept of single and continuous infringement to a vertical case

The infringement was characterised as a single and continuous infringement of Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement.

The application of the concept of a single and continuous infringement has become fairly standard in 'classical' cartel-like infringements. Cartel cases are horizontal in the sense that all participants are direct or potential competitors that market substitutable products in the same relevant market. The present case is however characterised by the fact that Nintendo first and foremost is acting as a supplier to a network of distributors that are, thus, present at a different level of the production or distribution chain. This decision is the first one in which the concept of a 'single and continuous' infringement has been applied to a vertical anti-competitive arrangement.

The application of this concept in the present case can be understood if one looks closer at the kind of relationships that existed between the parties.

For instance, during the earlier part of the infringement formal distribution agreements were in place that restricted parallel exports from territories. These formal distribution agreements were complemented and ultimately even replaced by a closely knit practical collaboration in which all parties actively participated to trace parallel trade and traders. Once traced, supplies to the suspected parallel exporters were limited or cut off completely by the exclusive distributor in the territory where it was established.

In this collaboration, a variety of means were employed to trace the origin of parallel trade and to identify the parallel trader: questionnaires sent off to all distributors about the incidence and origin of parallel trade into their territories, tagging systems, centralised reporting if and when parallel imports into a territory occurred and statistical methods that used product ratios or comparisons of the size of an order to the sales potential of the buyer inside the territory to identify orders for product that were likely to be parallel exported.

The fact that various means were employed over a considerable period of time to pursue the same object favoured the application of the concept of a single and continuous infringement. The same applies to the fact that, over the course of the duration of the infringement, the parties to it varied as a result of several reorganisations of Nintendo's distribution network.

The use of this concept implies that, if the Commission wants to make a party responsible for the illegal conduct of other parties in the context of

<sup>(1)</sup> For more details about the calculation of fines see IP/02/1584 of 30.10.2002.

<sup>(2)</sup> Judgement of the Court of First Instance in case T-41/96 Bayer AG v Commission.

<sup>(3)</sup> *John Menzies plc* had admitted that this policy towards its customers restricted parallel trade. It was only necessary to investigate whether its conduct was purely unilateral or not.

the same infringement, it must show that the undertaking in question was aware of the unlawful conduct of the other participants, or could reasonably foresee such conduct, and was prepared to accept the risk. <sup>(1)</sup>

To show this, the Commission relied on direct evidence from the correspondence between the parties that they were well aware that the object of the arrangements was to restrict parallel trade. In particular, the various questionnaires that Nintendo used to monitor parallel trade are strong evidence that all parties were aware of the larger infringement. It also relied on a large body of indirect evidence that meant that when a party communicated information that parallel imports into its territory occurred it knew that this information would or could be used to restrict these parallel imports by restricting parallel exports from another territory. All parties could therefore be made responsible for the overall infringement, and not just for the part they were directly involved in themselves.

#### 4. Fining distributors

In this case, the Commission decided to use its large discretionary powers <sup>(2)</sup> to fine also the exclusive distributors. Although this is certainly not unique in the decisional practise of the Commission <sup>(3)</sup>, it is the first time that fines are imposed on independent distributors since 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* <sup>(4)</sup> (the Guidelines on fines) entered into force. In the present case there was abundant evidence to show that the distributors — all of them wholesalers familiar with cross-border trading — were neither the victims nor passive spectators of what Nintendo was doing. On the contrary, they actively and willingly co-operated with Nintendo in the prevention of parallel trade.

This must be a warning to distributing companies, in particular those that regularly trade products across borders. The mere fact that they are in a dependent position relative to their suppliers does not mean that they will not be fined. If that was the case then it would mean that distributing companies would be, *de facto*, discharged from complying with EU competition law because, if they would be caught participating in an anti-competitive infringement, no fines would be imposed on them anyway. Evidently, this cannot be allowed.

On the contrary, the current case shows that even companies whose compliance to an infringement was ensured by the use of heavy pressure cannot automatically escape a fine. For instance, John Menzies was fined despite the fact that Nintendo used for some time a supply boycott to ensure its compliance with the infringement. Companies that are subjected to such pressures should not collaborate with the infringement but report it to the Commission instead.

#### 5. Reduction of fines for co-operating with the Commission proceedings outside the scope of the Leniency Notice

The Nintendo decision has been the first very serious infringement where the co-operation by firms in the Commission proceedings outside the cartel field has been substantially rewarded <sup>(5)</sup>. The decision recognises that both John Menzies and Nintendo submitted information that went beyond their obligation to reply to previous requests for information and that the information received allowed the Commission to bring forward the case.

In fact, the vertical nature of the infringement meant that parties could not benefit from the application of the *Commission Notice on the non-imposition or reduction of fines in cartel cases* <sup>(6)</sup> (the 1996

<sup>(1)</sup> Case T-28/99 *Sigma v. Commission* paragraph 40. See also Case C-49/92 *Commission v. Anic*, paragraph 203.

<sup>(2)</sup> The Commission has wide discretionary powers when determining the amount of fines to be imposed, including the power not to impose a fine at all or merely a symbolic fine or, on the contrary, to raise the general level of fines. (see Judgement in Joined Cases 100 and 103/80 *SA Musique Diffusion Française v Commission*, paragraph 109). Evidence that an undertaking, even if negligently, has been responsible for an infringement of Article 81(1) of the Treaty is by itself sufficient to justify imposing a fine.

<sup>(3)</sup> As it was the case in:

*Pioneer Hi-Fi Equipment*. Commission Decision of 14.12.1979. OJ L 60, 5.3.80, p. 21.

*Hasselblad*. Commission Decision of 2.12.1981. OJ L 161, 12.3.82, p. 18.

*Basf Lacke + Farben AG and Accinauto*. Commission Decision of 12.7.1995. OJ L 272, 15.11.1995, p. 16.

<sup>(4)</sup> OJ C 9, 14.1.98.

<sup>(5)</sup> In 2000, the effective co-operation by Nathan with the Commission was also rewarded. However, the infringement in the Nathan-Bricolux case was only of minor gravity. *Nathan — Bricolux*. Commission decision of 5.7.2000 relating to a proceeding pursuant to Article 81 of the EC Treaty. OJ L 54, 23.2.2001, p. 1-18.

<sup>(6)</sup> OJ C 207, 18.7.1996.

Leniency Notice). The first paragraph of the 1996 Leniency Notice limited its application to ‘secret cartels’, that is, to a sub-category of agreements falling under Article 81(1) of the Treaty, namely those that are secret and horizontal. This limitation has been maintained in the *Notice on immunity from fines and reduction of fines in cartel cases* <sup>(1)</sup> (the 2002 Leniency Notice), which concerns only ‘secret cartels between two or more competitors’ and is also the line taken in most if not all other leniency programs in force worldwide.

Instead, the Commission applied the attenuating circumstance foreseen in the Guidelines on fines for this type of situation, namely that of the effective co-operation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases.

In order to decide the actual reductions to be granted, the Commission took into account that, even if the quality of the information provided was less than that of Nintendo, John Menzies was first to provide valuable evidence to the Commission. Thus, John Menzies was granted a quite significant reduction of 40%, while that for Nintendo was

25%. This line is fully consistent with that in the 2002 Leniency Notice <sup>(2)</sup> and shows that the Commission is ready to reward co-operation by firms in areas beyond the classical cartel field.

## 6. Financial compensation of victims of the abuse

The Decision explains that subsequent to the start of its co-operation and with the support of the Commission, Nintendo offered and paid substantial financial compensations to third parties identified in the Statement of Objections as having suffered financial harm from the infringement.

In recognition of that, a reduction of € 300 000 was granted to Nintendo. The reduction was lower than the actual amount paid, but was substantially larger in percentage terms than that granted to ABB in the *Pre-insulated Pipes cartel case* <sup>(3)</sup>, the only precedent so far of this type of reduction. This shows that the Commission is willing to take account of concrete steps taken by firms to correct the damage created by their anticompetitive actions.

<sup>(1)</sup> OJ C 45, 19.2.2002, p. 3–5.

<sup>(2)</sup> See in particular points 21 to 23.

<sup>(3)</sup> *Pre-insulated Pipes*. Commission decision of 21.10.1998 relating to a proceeding pursuant to Article 81 of the EC Treaty. OJ L 24, 30.1.1999.

## Commission clears online travel agency Opodo

*Christine TOMBOY, Directorate-General Competition, unit D-2*

### Introduction

Opodo is an online travel agent created as a joint venture by nine of the largest European airlines. It was notified to the Commission in November 2000. Opodo offers internet travel agency services including airline ticket sales, hotel bookings, car hire and insurance. It has already launched its website in Germany, the UK and in France and intends to offer its services on a pan-European basis.

As notified, the case might have raised some concerns under Article 81 and 82 of the Treaty and the notifying parties proposed a set of undertakings to remedy these concerns. The Commission took these undertakings into account as part of its assessment of the joint venture and eventually issued a 'negative clearance' type comfort letter on 18 December 2002.

In December 2001, a complaint had also been lodged against the notified agreement by TQ3, a German travel agent. As the arguments put forward by the complainant were similar to those raised by other travel agents in response to the Opodo notification, the Commission took the view that these concerns would be dealt with in the final package of undertakings submitted by the parties and rejected the complaint by decision.<sup>(1)</sup>

### Procedure

The Commission published a first notice requesting comments on Opodo on 2 February 2001.<sup>(2)</sup> In November 2001, the Commission issued a 19(3) Notice setting out the undertakings proposed by the parties and noting its intention to clear the agreement on this basis, subject to any comments from third parties.<sup>(3)</sup> In the light of the comments received in response to the 19(3) Notice, a revised set of undertakings was discussed with the parties. Interested third parties having provided comments in response to 19(3) Notice were consulted on these revised undertakings.

### Substance

Given the shareholder airlines' strong positions on the up-stream air transport market, one of the main competition concerns raised by the joint venture was that it might have provided a forum for the airlines to share commercially sensitive information and to collude in price-fixing or market-sharing on the air transport market.

It however results from the facts as set out by the parties that Opodo will operate as an independent travel agency and on an arms-length basis from its shareholders. Notably, marketing agreements and any other agreements between Opodo and the participating airlines — shareholders and non-shareholders — are negotiated individually and confidentially between Opodo and each of the airlines. In addition, the parties have offered certain undertakings to remedy possible concerns under Article 81. They have notably put in place a number of safeguards to ensure that the shareholder airlines do not get access to commercially sensitive information about each other through Opodo.

In the light of these undertakings, the Commission came to the conclusion that the joint venture will not be used as a vehicle for the shareholders to co-ordinate their competitive behaviour. This assessment is reinforced by the fact that (i) the agreements do not place restrictions on shareholder airlines with regard to the distribution of their products through existing or additional distribution channels and that (ii) it would not be in the airlines' commercial interest to bundle their sales through Opodo. The shareholder airlines indeed continue to distribute the vast majority (around 80%) of their tickets indirectly, through travel agents. They are also actively promoting their direct sales which represent the cheapest way for them to distribute their products.

Another possible concern was that the shareholder airlines might have used their strong position on the air transport market to foreclose the travel agency services market. Since they have a financial interest in ensuring Opodo rapidly gains a

<sup>(1)</sup> This decision, to which the undertakings submitted by the parties are attached, is available on DG Competition website ([http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)).

<sup>(2)</sup> OJ C 35, 2.2.2001, p. 6.

<sup>(3)</sup> OJ C 323, 20.11.2001, p. 6-8.



significant share of the travel agency services market, shareholder airlines might indeed be tempted to favour Opodo to the detriment of other travel agents.

In order to relieve this concern, each shareholder of Opodo has undertaken not to discriminate between Opodo and the other travel agents unless the difference in treatment is objectively justified by reference to the commercial basis on which that shareholder normally deals with travel agents. This also means that conferring exclusive rights or a Most Favoured Nation (MFN) status to Opodo cannot be a requirement for shareholders or non-shareholder airlines to sell their inventory through Opodo. This principle is also clearly stated in the undertakings.

The Commission will closely monitor the implementation of these undertakings. Each shareholder airline has indeed undertaken to maintain a memorandum recording the benefits upon which it has assessed the commercial justification for affording exclusive rights or MFN status to Opodo. If a shareholder airline refuses to contract with another travel agent on the same basis as with Opodo with respect to MFN or exclusive rights, the reasons for the difference in treatment between Opodo and that travel agent will also be recorded in the memorandum. These memoranda, as well as the copies of the relevant agreements, will be provided to the Commission six months following the date of the comfort letter issued by the Commission and thereafter, on an annual basis or upon request by the Commission.

## The Revised TACA Decision — The end of the conflict?

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### 1. Introduction

On 14 November 2002, the Commission adopted a long-awaited decision <sup>(1)</sup> granting exemption to those aspects of the revised Trans-Atlantic Conference Agreement that fall within the scope of either Regulation 4056/86 (but outside the scope of the liner conference block exemption contained therein) or Regulation 17. The exemption was granted for a period of six years from 6 May 1999. <sup>(2)</sup>

The background to the decision has been described in a previous article <sup>(3)</sup> and need not be repeated here.

### 2. What does the decision say?

First, it should be noted that as important as what the decision says, is what it does not say. In the light of certain third party comments, which, while purporting to express concern about the Revised TACA, in fact amount to thinly veiled criticism of the EU liner conference block exemption as such, it should be recalled that the latter forms part of existing Community legislation which the Commission is bound to apply. A review of that legislation falls outside the scope of the Commission's examination of the application for exemption of the Revised TACA. The decision accordingly contains no assessment of the extent to which the block exemption may continue to be justified under current market conditions. This is a matter that will be dealt with in the context of the Commission's recently launched review of Regulation 4056/86. <sup>(4)</sup>

It follows that to the extent that the activities of the Revised TACA fall within the scope of Article 3 of Regulation 4056/86 and fulfil the condition and obligations set out in Articles 4 and 5, <sup>(5)</sup> they are automatically exempt. In defining the scope of the block exemption, the Commission has been guided by the findings of the Court of First Instance (CFI) in the *TAA* <sup>(6)</sup> and *FEFC* <sup>(7)</sup> cases. In the *TAA* judgment, the CFI had reason to recall once again the basic precept applicable to any provision derogating from Article 81(1) of the Treaty — namely that it must be interpreted strictly. This precept, the Court found, must apply with even greater force to the liner conference block exemption, inasmuch as the latter has an unlimited duration and authorises what would otherwise be considered very serious restrictions of competition (a horizontal agreement having the object of price-fixing). <sup>(8)</sup> The Court went on to state that the block exemption could not be interpreted 'broadly and progressively so as to cover all the agreements which shipping companies deem it useful, or even necessary, to adopt in order to adapt to current market conditions'. <sup>(9)</sup> In the Revised TACA decision, <sup>(10)</sup> the Commission concludes from these and other findings in the *TAA* judgment <sup>(11)</sup> that the block exemption cannot be interpreted as covering, for instance, joint service contracts. It does not however follow that these agreements are prohibited (see further below).

In the *FEFC* judgment, the CFI provided guidance as to the substantive scope of Regulation 4056/86. Citing the judgment of the European Court of Justice in *Centro Servizi Spediporto*, <sup>(12)</sup> it found that the scope of the Regulation 'is limited to maritime transport services properly so called, that is,

<sup>(1)</sup> Commission decision C(2002) 4349 final in Case COMP/37.396/D2 — *Revised TACA*. The decision is available on the Commission website at: [http://europa.eu.int/comm/competition/antitrust/cases/index/by\\_nr\\_74.html#i37\\_396](http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_74.html#i37_396).

<sup>(2)</sup> The date of publication of the Commission Notice containing a summary of the agreement and inviting third party comments.

<sup>(3)</sup> *Competition in the maritime transport sector: a new era*, Jean-François Pons and Eric Fitzgerald, Competition Policy Newsletter 1/2002.

<sup>(4)</sup> *Idem*.

<sup>(5)</sup> And do not have effects incompatible with Articles 81(3) or 82 of the Treaty (see Articles 7(2) and 8 of the Regulation).

<sup>(6)</sup> Judgment of 28.2.2002 in Case T-395/94 *Atlantic Container Line and others v Commission* [2002] ECR II-875.

<sup>(7)</sup> Judgment of 28.2.2002 in Case T-86/95 *Compagnie Générale Maritime and others v Commission* [2002] ECR II-1011.

<sup>(8)</sup> Paragraph 146 of the judgment.

<sup>(9)</sup> *Ibid*.

<sup>(10)</sup> Recital 90.

<sup>(11)</sup> See paragraph 164.

<sup>(12)</sup> Judgment of 5.10.1995 in Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883.

to transport by sea from port to port'.<sup>(1)</sup> It follows from this finding that services that do not constitute 'transport by sea from port to port' fall outside the scope of Regulation 4056/86 and the block exemption contained therein. This has had consequences for the Commission's assessment of the Revised TACA Tariff charges relating to cargo-handling services in ports (see below).

Secondly, the decision concludes<sup>(2)</sup> that the Revised TACA, following the introduction of amendments designed to circumscribe the exchange of commercially sensitive information, no longer places any restriction on the terms and conditions under which the members of the conference may enter into individual service contracts. That this conclusion is consistent with developments 'on the ground' is evidenced by the dramatic increase in the number of individual service contracts entered into by the TACA lines since the inception of the Revised TACA.

Thirdly, the decision provides guidance as to the limits within which, in the Commission's view, conference members may engage in the collective regulation of vessel capacity.

Article 3(d) of Regulation 4056/86 provides that conferences may engage in 'the regulation of the carrying capacity offered by each member'. In the *TAA* and *EATA* decisions, the Commission concluded that this provision should be interpreted as permitting conferences to withdraw vessel capacity in order to address a short-term fluctuation of demand. It could not be interpreted as permitting a 'freeze' on capacity without any actual vessel withdrawals (that might provide cost savings which could be passed on to transport users). While the point was in issue in the *TAA*'s appeal to the CFI, the fact that the latter concluded that the *TAA* was not a conference meant that there was no need to examine whether the *TAA*'s capacity management programme would have fallen within the scope of the liner conference block exemption had the *TAA* been a conference.<sup>(3)</sup>

The Revised TACA decision describes the amendments that have been made to the text of the conference agreement in order to establish safeguards against abuse. These amendments consist of (a) an undertaking to provide reports to the Commission so that the latter may monitor any Revised TACA capacity regulation programme

and (b), an undertaking not to increase any tariff rates in conjunction with a capacity regulation programme on any trade covered by such programme or to create an artificial peak season.

Subject to the observance of these undertakings, the Commission considers the capacity regulation provisions of the Revised TACA to be covered by the liner conference block exemption.

Fourthly, the decision finds that the provisions of the Revised TACA relating to agreement service contracts (ASCs) and multicarrier service contracts (MSCs), to the extent that they may be restrictive of competition, fall outside the scope of the liner conference block exemption, but qualify for individual exemption. An ASC, also known as a conference service contract, is a joint service contract between all of the members of a conference on the one hand and an individual shipper on the other. An MSC is a service contract between two or more — but not all — members of the conference and an individual shipper.

While acknowledging that joint service contracts constitute only a very small proportion of all the service contracts entered into by the members of the Revised TACA, the Commission nevertheless notes that there appears to be continuing demand from shippers for such contracts in an environment where an alternative form of contract, i.e. an individual service contract, is now freely available. It concludes that joint service contracts provide benefits to shippers and, in the market environment in which the members of Revised TACA currently operate, will not lead to the elimination of competition within the meaning of Article 81(3) of the Treaty.

It should be noted that the ASCs and MSCs entered into by the members of the Revised TACA do not — and may not — cover inland transport services within the European Economic Area.

Finally, the decision deals with the issue of cargo-handling services in ports. Citing the *FEFC* judgment,<sup>(4)</sup> the Commission concludes that the Revised TACA Tariff charges for these operations can fall within the scope of the liner conference block exemption only to the extent that these operations are indivisible from the sea voyage. However, the Commission then goes on to find that to the extent that the Revised TACA Tariff covers cargo-handling services which fall outside

<sup>(1)</sup> *FEFC* judgment, paragraph 241.

<sup>(2)</sup> See recitals 61 to 72.

<sup>(3)</sup> The Court did however find that the capacity management aspects of the *TAA* would lead to the elimination of competition and could for that reason not qualify for *individual* exemption.

<sup>(4)</sup> At paragraphs 239-241.

the scope of Regulation 4056/86, but within that of Regulation 17, it can be considered exemptable. In reaching this conclusion, the Commission recognises that the interposition of carriers between the original service provider (the stevedoring company or terminal operator) and the end-user (the shipper) may have benefits for the latter.

The Commission makes clear however that exemption can be granted only in the very special circumstances that are an essential feature of the Revised TACA case. These circumstances include the fact that only a very small proportion of Revised TACA cargoes are carried under the conference tariff, while by far the greatest part are carried under individual service contracts, and that the members of the Revised TACA have a collective market share of no more than 50%.

### 3. The end of the conflict?

The Revised TACA decision does not deal with all of the issues that at one time or another have given rise to conflicting interpretations of Regulation 4056/86 and other regulations applicable to liner shipping activities. Nor does it necessarily represent the final word on those issues with which it does deal.

The Revised TACA notification was submitted 'without prejudice' to the Parties' view that all elements of the notified agreement fell within the scope of the liner conference block exemption. Following the TAA and FEFC judgments, that position is obviously no longer tenable as regards, *inter alia*, the inland transport aspects of the agreement. A number of other issues of relevance for the Revised TACA agreement have however not yet been the subject of a Court ruling. Chief among these issues is perhaps the question of where to

draw the dividing line between the scope of Regulation 4056/86 and that of Regulation 17. That point may be settled, or at least clarified further, by the CFI when it rules on the *FETTCSA* appeal <sup>(1)</sup>. Another issue is whether joint service contracts are covered by the liner conference block exemption. While the TAA judgment does not deal directly with this point, it does contain a number of findings which, in the Commission's view, indicate that that is not the case. The matter may eventually be settled conclusively by the CFI in its ruling on the *TACA* appeal. <sup>(2)</sup>

Other points yet to be decided by the Court, but not in issue in the Revised TACA decision, include whether conferences may fix freight forwarder commissions and whether, and in what way, a dominant conference may induce independent potential competitors to enter the market as members of the conference. Both matters are pending before the CFI in the context of the *TACA* appeal.

### 4. Conclusion

The above catalogue of unresolved legal issues should not obscure the fact that the adoption of the Revised TACA decision represents a major step towards creating a competitive business environment for liner shipping operators and their customers. And although some of the decision's conclusions are quite specific to the market on which the TACA lines operate, there are many findings that should give food for thought to other conferences operating on EU trades. The TACA parties have made considerable progress in adapting their practices to the requirements of a modern marketplace — it is now up to the other EU conferences to do the same.

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<sup>(1)</sup> Case T-213/00 *CMA CGM and Others v Commission*.

<sup>(2)</sup> Joined Cases T-191/98, etc. *Atlantic Container Line and Others v Commission*.

## New explanatory Brochure on Commission Block Exemption Regulation n° 1400/2002 on the motor vehicle sector: bringing competition rules closer to consumers and market operators

*Manuel MARTINEZ LOPEZ, Directorate-General Competition, unit F-2 <sup>(1)</sup>*

On 30 September 2002, the Directorate General for Competition of the European Commission published an Explanatory Brochure on the new block exemption regulation on the motor vehicle sector <sup>(2)</sup>, as it had been done with the previous regulation <sup>(3)</sup>. As the new rules represent a major change compared to the former regulation, guidance needs to be provided as to the way they should be applied. In effect, during the consultation process which lead to the adoption of the Regulation, the Commission had announced to the Parliament, the Member States, the Economic and Social Committee and interested parties its intention to publish a guide to the new Regulation. The publication of the brochure meets this commitment in advance of the entry into force of the new rules.

Millions of consumers buy a new car or get their car repaired or serviced every year in Europe. Such sales and repair services are provided by hundreds of thousands of small and medium sized undertakings, whether affiliated to a brand manufacturer's network or in the independent sector. The new competition rules on distribution and servicing of motor vehicles are likely to have a bearing on all these activities. The freeing of the sector from the straitjacket effect associated with the previous rules may also lead to a need for more direction. The brochure, therefore, aims at providing different categories of interested parties, in particular consumers, dealers and repairers, with guidance in layman's terms about the provisions of the Regulation and their rights derived therefrom. Such categories of economic operators seldom have access to legal advice and do not often fully exploit the opportunities which EU competition rules offer to them in the single market.

Although the brochure is intended as a legally non-binding guide to the Regulation, experience shows

indeed that this kind of information tools are instrumental in clarifying each party's responsibilities, hence contributing to avoiding or quickly resolving disputes. Since the Regulation is directly applicable in the EU and may be invoked before national jurisdictions, the availability of an explanatory document from the Commission's department which oversees the enforcement of EU competition rules is often of great interest to legal practitioners and economic operators. Moreover, in the future context of decentralised application of Article 81(3) of the EC Treaty <sup>(4)</sup>, the brochure may also prove useful to National Competition Authorities. The initiative should therefore also be seen as an effort to bring EU competition rules even closer to EU citizens and to increase the effectiveness of their application throughout the European Union.

As far as the structure is concerned, the brochure first explains the philosophy and aims behind the Regulation, both as regards the distribution of motor vehicles and repair and maintenance services. Another chapter contains an explanation of the structure of the Regulation and of certain legal aspects of each of its provisions, which may be of particular interest to lawyers and others who wish to better understand the scope and content of the various clauses. A separate chapter is particularly aimed at consumers, including their intermediaries, at dealers in new vehicles and at repairers. It gives answers to questions which are likely to arise for each of these categories of stakeholder, in separate sections for each category. The replies to these questions may also be relevant for vehicle and spare part manufacturers and their wholesalers. More technical aspects such as issues relating to market definition and distribution of spare parts are dealt with in distinct chapters. Finally, a list of reference documents relevant to

<sup>(1)</sup> Members of the Block Exemption Regulation team working under the supervision of the head of unit Eric van Ginderachter: John Clark, Christophe Dussart, Anne-Catherine Gallant, Hubert Gambis, Alberta Laschena, Richard Lewandowski, Manuel Martinez Lopez, Tuija Ristiluoma, Konrad Schumm, and Lazaros Tsoraklidis.

<sup>(2)</sup> Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ L 203, 1.8.2002, pages 30-41.

<sup>(3)</sup> Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ L 145, 29.06.1995, pages 25-34.

<sup>(4)</sup> 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, pages 1-25.

the new regime, an index and the full text of the new Regulation are annexed to the brochure.

Although the brochure cannot possibly reply to each question which the application of the Regulation may raise, its comprehensiveness and user-friendly format should make it easier for the reader to find the relevant information in accordance with his or her needs. Indeed the amount of questions

and requests for clarifications raised by various parties since the adoption of the Regulation has dramatically decreased following the publication of the brochure, which is available in all official EU languages at the following Internet address:

[http://europa.eu.int/comm/competition/  
car\\_sector/distribution/#final\\_reg](http://europa.eu.int/comm/competition/car_sector/distribution/#final_reg)

## Commission rules against the collusive behaviour of Christie's and Sotheby's

*Ewoud C. SAKKERS, Directorate-General Competition, unit E-2*

*In a decision adopted on 30 October 2002, the European Commission found that Christie's and Sotheby's, the world's two leading fine arts auction houses, breached European Union competition rules by colluding to fix commission fees and other trading terms between 1993 and early 2000. Both companies benefited from the application of the Commission's leniency policy: Sotheby's received a reduction of 40% of the fine for having co-operated with the Commission and for having provided additional evidence, leading to a final penalty of €20.4 million. Christie's escaped a fine altogether, because it was the first to provide crucial evidence that helped the Commission to prove the existence of the cartel.*

At the beginning of 2000, Christie's provided evidence to the EU and US competition authorities about an illegal agreement between itself and Sotheby's. Christie's did so with the aim of benefiting from the then applicable leniency rules under the Commission's 1996 Notice on the Non-imposition or Reduction of Fines in Cartel Cases. The information showed that Sotheby's and Christie's had entered into an anti-competitive cartel agreement in the course of 1993 which lasted until early 2000, when the parties recovered their freedom to set prices individually. The purpose of the cartel agreement was to reduce the fierce competition between the two leading auction houses that had developed during the 1980's and early 1990's. The most important aspect of the agreement consisted in an increase in the commission paid by sellers at auction (the so-called vendor's commission). But the collusive agreement also concerned other trading conditions, such as advances paid to sellers, guarantees given for auction results and payment conditions.

According to the Commission's findings, the collusive behaviour found its origins at the most senior level of both companies. In 1993, the then two chairmen of Sotheby's and Christie's entered into secretive discussions during meetings that took place in, amongst others, their respective private residences in London and/or New York. These first high-level meetings were followed by

regular gatherings and contacts between the companies' chief executive officers.

### Co-operation with the US Department of Justice

The Commission collaborated with the US Department of Justice (USDoJ) in this case under the 1991 co-operation agreement. <sup>(1)</sup> The collaboration between the two competition authorities was made easier by the fact that both Christie's and Sotheby's granted waivers as regards the exchange of confidential information. Co-operation with the USDoJ took place not only on substance, i.e. the review of particular evidence, but also on the timing of procedural steps taken by each authority. The Commission reached similar conclusions as the USDoJ in this case. In the US, Christie's (also) received full immunity, whereas Sotheby's was (also) subject to pecuniary sanctions following a plea agreement with the USDoJ. Furthermore, in the US the case led to a conviction in 2002 of the former chairman of Sotheby's. His counterpart at Christie's, a UK citizen, did not stand trial as he chose to remain outside the US.

### Calculation of the fines and the application of the 1996 Leniency Notice

As mentioned, the Commission's investigation started in January 2000, when Christie's approached both the USDoJ and the Commission with proof relating to a cartel between itself and Sotheby's and applied for leniency in both jurisdictions. The evidence consisted mainly of documents that a former CEO of Christie's had gathered concerning contacts between the two auction houses.

Sotheby's subsequently also applied to the Commission for leniency. It admitted to having participated in the cartel and provided further evidence.

The calculation of the fines for both companies took place according to the 1998 method on the calculation of fines for cartel behaviour and abuse of market power. That calculation, based on the

<sup>(1)</sup> Agreement between the European Communities and the Government of the United States of America regarding the applications of their competition laws (OJ L 95, of 27.4.1995, p. 47).

gravity of the offence (a very serious infringement) and its duration, resulted in fines close to (for Christie's) or exceeding (for Sotheby's) the maximum fine that the Commission can legally impose, namely 10% of world-wide turnover as laid down in Regulation 17/62, which sets out the rules and procedures for applying Articles 81 and 82, the latter covering abuses of a dominant position.

Subsequently, in applying the 1996 Leniency Notice (which was the relevant one in this case

because the request for leniency had dated from 2000, before the entry into force in 2002 of the revised Leniency Notice), the Commission considered that Christie's ought to benefit from full immunity because it had provided decisive proof of the cartel at a time when the Commission had no investigation open and because it was the first to provide the Commission with such evidence. The fine for Sotheby's, which includes a 40% reduction based on the 1996 Leniency Notice, was established at € 20.4 million, i.e. 6% of its world-wide turnover.



## La Commission détecte un cartel et inflige de lourdes amendes dans le secteur des plaques en plâtre

*Erwan MARTEIL et Evelyne RIKKERS,  
Direction générale de la concurrence, unité E-1*

*Le 27 novembre 2002, la Commission européenne a adopté une décision infligeant des amendes d'un montant total de 478 millions d'euros à Société Lafarge SA, BPB PLC, Gebrüder Knauf West-deutsche Gipswerke KG et Gyproc Benelux SA/NV. La Commission a qualifié le comportement de ces entreprises d'infraction très grave au droit européen de la concurrence. Le montant élevé des amendes se justifie par la durée de l'infraction et, pour Lafarge et BPB, par le fait que ces entreprises récidivent dans l'infraction à l'article 81, ce qui constitue une circonstance aggravante dans leur chef. Seules BPB et Gyproc ont collaboré avec les services de la Commission et ont bénéficié d'une réduction de l'amende en application de la Communication de la Commission sur la clémence.*

Les plaques en plâtre sont un produit manufacturé se composant d'une couche de plâtre entre deux feuilles de papier ou toute autre matière et utilisés comme matériaux de construction préfabriqués. Ce produit intéresse l'industrie du bâtiment en raison de ses caractéristiques techniques (durabilité, facilité d'installation, coût), mais également le consommateur. Les plaques en plâtre sont en effet largement utilisées dans la construction des habitations modernes et le bricolage et constituent un produit identifiable; le nom des firmes impliquées a valeur de nom commun dans plusieurs Etats membres de la Communauté (acheter du «gyproc» en Belgique, du «placoplâtre» en France, etc.).

Une enquête de la Commission, ouverte *ex-officio* en 1998, a permis d'établir que les principaux producteurs européens de plaques en plâtre avaient participé à un cartel clandestin couvrant les quatre principaux marchés de l'UE (Allemagne, Royaume-Uni, France et Benelux), par lequel ils se sont entendus pour réduire la concurrence sur ces marchés à un niveau conforme à leurs intérêts. Ce faisant, ils ont également échangé des informations sur les volumes de vente et se sont informés des hausses de prix sur les marchés britannique et allemand. BPB, Knauf et Lafarge ont participé à l'entente de 1992 à 1998 et ont été rejoints en 1996 par Gyproc.

La valeur des marchés en question est l'une des plus élevées dans les décisions de la Commission en matière de cartel depuis une dizaine d'années.

En effet, en 1997 et 1998, la valeur totale annuelle de ces marchés était d'environ 1210 millions d'écus pour un volume d'environ 692 millions de m<sup>2</sup> en 1997 et 710 millions de m<sup>2</sup> en 1998. Ensemble, les entreprises participant à l'entente représentaient la quasi-totalité des ventes de plaques en plâtre dans les quatre marchés intéressés.

L'infraction en l'espèce a pris la forme d'un accord complexe et continu visant à restreindre la concurrence, constitué de diverses manifestations par lequel les concurrents ont cherché à mettre fin à la guerre des prix et à stabiliser le marché, ont procédé à des échanges d'informations confidentielles entre concurrents sur une longue durée ainsi que, au Royaume-Uni et plus encore en Allemagne, à des échanges d'information sur certaines initiatives d'augmentation des prix. Un tel accord appartient donc à la catégorie des violations les plus graves de l'article 81, paragraphe 1, du traité.

Les entreprises concernées se sont vues imposer les amendes suivantes; Lafarge: 249,60 millions d'euros, BPB: 138,60 millions d'euros, Knauf: 85,8 millions d'euros et Gyproc: 4,32 millions d'euros.

### Fixation du montant des amendes et application de la communication sur la clémence

Afin de fixer le montant des amendes, la Commission a pris en compte la gravité et la durée de l'infraction. En outre, le rôle joué par chacune des entreprises ayant participé à l'infraction a été apprécié cas par cas. Plus particulièrement, la Commission a tenu compte des éventuelles circonstances aggravantes ou atténuantes et a appliqué sa communication concernant la non-imposition d'amende ou la réduction de leur montant dans les affaires portant sur des ententes («communication sur la clémence»).

La Commission a considéré que toutes les entreprises ont commis une infraction très grave à l'article 81 du traité. Au sein de cette catégorie et afin de prendre en considération la capacité économique effective des entreprises visées à causer un dommage significatif à la concurrence, la

Commission a divisé les destinataires en trois catégories sur la base de leur part de marché sur le total des quatre marchés concernés. La Commission a également, afin d'assurer un caractère suffisamment dissuasif des amendes infligées, appliqué un facteur multiplicateur de 100% au montant de départ de l'amende imposée à Lafarge.

A l'exception de Gyproc qui a commis une infraction de durée moyenne (deux ans et quatre mois), toutes les autres entreprises qui ont participé au cartel ont commis une infraction de longue durée (plus de cinq ans).

S'agissant de BPB et Lafarge, la Commission a considéré comme circonstance aggravante le fait que les deux entreprises ont fait preuve de récidive. Lafarge s'est vue imposer une amende en 1994 dans le cartel du ciment <sup>(1)</sup> et BPB De Eendracht, filiale de BPB, a été un des destinataires de la décision carton, également en 1994 <sup>(2)</sup>. Ceci signifie qu'au moment où ces décisions leur ont été notifiées, les deux entreprises participaient à une autre entente qu'elles ont poursuivie. La circonstance que ces entreprises ont répété le même type de comportement dans un secteur autre que celui pour lequel elles avaient été sanctionnées révèle que la première sanction infligée n'a pas conduit ces entreprises à modifier leur comportement. Cette circonstance aggravante a conduit la Commission à imposer une augmentation de 50% du montant de base de l'amende infligée à ces deux entreprises.

La Commission a accordé à Gyproc une réduction de l'amende de 25% dans la mesure où un certain nombre d'éléments établissent que cette dernière s'est trouvée dans une situation objectivement différente des autres entreprises et constituent une circonstance atténuante. Il en va ainsi du fait que pendant une période substantielle de sa participa-

tion à l'entente, Gyproc paraît avoir eu des difficultés pour éviter que BPB n'obtienne et ne transmette des informations la concernant, en raison de la représentation de BPB dans son conseil d'administration; qu'elle a été un élément déstabilisateur constant qui a contribué à la limitation des effets de l'entente sur le marché allemand et qu'elle était absente du marché britannique, où les manifestations de l'entente ont été plus fréquentes.

Il faut enfin souligner que, contrairement à BPB et à Gyproc, Knauf et Lafarge n'ont pas coopéré à l'enquête de la Commission. Selon la communication sur la clémence, la Commission peut octroyer une réduction d'amende même en cas de comportement récidiviste mais faut-il encore que les entreprises coopèrent à la mise à jour de l'entente. Au titre d'application de la communication précitée, BPB et Gyproc se sont vues respectivement accorder une réduction significative du montant de l'amende à savoir de 30% et 40%.

Cette décision constitue une nouvelle preuve de la détermination de la Commission à découvrir et à punir les infractions au droit de la concurrence, que ce soit sur la base d'enquêtes ouvertes *ex-officio* ou sur base de demande d'application de la politique de la clémence. Dans sa lutte contre les cartels, la Commission accorde la priorité aux secteurs importants de l'économie européenne et notamment aux secteurs où son action est directement susceptible d'améliorer le bien-être des consommateurs. En outre, cette décision confirme la détermination de la Commission à punir de manière appropriée les entreprises récidivant dans des comportements notoirement anticoncurrentiels en aggravant dans ce cas le montant de leur amende.

(1) La décision 94/815/CE de la Commission du 30 novembre 1994 (JO L 343, p. 1), dans les affaires IV/33.126 et 33.322 — Ciment, a infligé à Lafarge SA (alors dénommée Lafarge Coppée SA) une amende de 22 872 000 écus pour avoir participé à une entente illicite dans le secteur du ciment. Le Tribunal de première instance a ramené cette amende à 14 248 000 euros (Jugement du 15 mars 2000, dans l'affaire T-43/95, Recueil 2000, p. II-491).

(2) La décision 94/601/CE de la Commission du 13 juillet 1994 (JO L 243 du 19.9.1994, p. 1), dans l'affaire IV/C/33.833 — Carton, a infligé une amende de 1 750 000 écus à BPB De Eendracht NV, pour sa participation à une entente illicite dans le secteur du carton. Le Tribunal de première instance a ramené cette amende à 750 000 écus (Jugement du 14 mai 1998, dans l'affaire T-311/94, Recueil 1998, p. II-1129).

## Commission adopts cartel decision imposing fines in food flavour enhancers (nucleotide) cartel

*Sam PIETERS, Directorate-General Competition, unit E-1*

*The European Commission fined on 17 December 2002 Ajinomoto Company Inc.(Japan), Cheil Jedang Corporation (South Korea) and Daesang Corporation (South Korea) respectively € 15.54 million, € 2.74 million and € 2.28 million for participating in a price-fixing and customer allocation cartel in nucleotides together with Takeda Chemical Industries Ltd (Japan). Takeda was granted full immunity from fines because it submitted decisive evidence at a time when the Commission had no knowledge of the cartel. The Commission also took into account the small size of the nucleotides market when setting the fine.*

Nucleotide or nucleic acid is made from glucose and is used in the food industry to add flavours to foods. The cartel operated for around 9 years until 1998. During the infringement, the value of the EEA market for nucleotides amounted to around € 8 million.

The investigation started in 1999 when the Commission was approached by representatives of Takeda who revealed the cartel, providing decisive information about its operation. The Commission found that between 1988 and 1998, the four undertakings participated in a cartel in breach of article 81(1) of the EC Treaty and 53(1) of the EEA Agreement by which they aimed to fix 'target' prices, implement concerted price increases, allocate customers, as well as exchange information on sales figures.

### Calculation of fines and application of the Leniency Notice

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The 1996 Leniency Notice was applied.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into two groups according to their relative importance in the market concerned. Further upward adjustments were made in the case of two companies, with regard to their very large size and thus of their overall resources. All participants committed an infringement of long duration (exceeding five years). The Commission took into account the small size of the EEA market value.

### Application of the Leniency Notice

As the investigation into the nucleotides cartel started in 1999, the 1996 Leniency Notice was applied in this case.

Although the Commission considered the cartel agreement to constitute a very serious infringement, it considered that Takeda fulfilled the conditions for total immunity from fines, given that it was the first to come forward, submitting decisive evidence on the existence of the cartel. Daesang, Ajinomoto and Cheil co-operated in one way or another with the Commission and were granted appropriate reductions. The Commission took into account the fact that — although it was not the first — Daesang approached the Commission on its own initiative before receiving any request for information by the Commission.

The difference in the fines reflects the fact that Ajinomoto, the world's biggest producer of nucleotides, was in average nearly twice the size of competitors in terms of 1997 market shares figures. In calculating the fines, the Commission takes into account the effective capacity by market leaders to cause greater damage than smaller players as well as the need to ensure that the penalties have a sufficiently deterrent effect.

## The specialty graphite price-fixing cartels

*Andrés GARCIA BERMUDEZ, Directorate-General Competition, unit E-1*

*On 17 December 2002 the Commission fined SGL Carbon AG, Le Carbone-Lorraine S.A., Ibiden Co., Ltd., Tokai Carbon Co., Ltd., Toyo Tanso Co., Ltd., NSCC Techno Carbon Co., Ltd., Nippon Steel Chemical Co., Ltd., Intech EDM B.V. and Intech EDM AG a total of €51.8 million for participating in a price-fixing cartel in the market of isostatic specialty graphite. In addition, SGL Carbon AG was fined €8.81 million for its involvement in another price-fixing collusion affecting the market of extruded specialty graphite. GrafTech International, Ltd. (formerly UCAR), which was also found liable for both infringements, benefited from a 100% reduction of the fines because, it revealed the cartel's existence to the Commission and provided decisive evidence on its operation.*

In the course of an investigation on the graphite electrodes market, UCAR approached the Commission in order to submit an application under the 'Leniency notice'. The submission concerned alleged anticompetitive practices in the neighbour market of specialty graphite products. On the basis of the information provided by UCAR, the Commission opened a new investigation in March 2000, as a result of which it has found that SGL Carbon AG, Le Carbone-Lorraine S.A., Ibiden Co., Ltd., Tokai Carbon Co., Ltd., Toyo Tanso Co., Ltd., GrafTech International, Ltd. (former UCAR), NSCC Techno Carbon Co., Ltd., Nippon Steel Chemical Co., Ltd., Intech EDM B.V. and Intech EDM AG participated in a world cartel between 1993 and 1998, through which they fixed the price, exchange sensitive commercial information and occasionally shared out the market for isostatic specialty graphite products. SGL and GrafTech were also found responsible of participating in a parallel price-fixing cartel in the market of extruded products.

'Specialty graphites' is the general term widely used in the industry to describe a group of graphite products for diverse applications. Specialty graphite products are often categorised by the way the graphite is produced: isostatic graphite (produced through isostatic moulding), used in EDM electrodes, continuous casting dies, hot press moulds, semiconductor applications; and extruded graphite (produced through extrusion), used in electrolytic anodes and cathodes, boats, sintering trays, crucibles.

During the infringement period, the annual market of isostatic products in the European Economic Area was worth around €35-50 million. Extruded products amounted to about €30 million. The companies concerned accounted for most of the EEA-wide market for both products.

The isostatic cartel began with a 'Top Level meeting' in Gotenba (Japan) on 23 July 1993, where the major producers of isostatic graphite -SGL, LCL, Ibiden, Tokai, Toyo Tanso, and NSC/ NSCC- agreed the basic principles by which they would cartellise the world market. They agreed on the target of establishing an appropriate product-grouping standard, the principle for sustained price increases and the creation of committees at management level in order to fine-tune and implement the general agreement. This plan was subscribed by all the participants and subsequently adhered to by Intech (February 1994), and UCAR (February 1996). A monitoring and enforcement scheme was set up, that entailed the holding of regular multilateral meetings, at 4 levels: 'Top Level meetings' (attended by the top executives, that defined the main principles of collaboration); 'International meetings' (senior management, that discussed the classification of products and established minimum prices for each group); 'Regional' (European) meetings and 'Local' (national) meetings (both meant to implement the principles agreed at the International meetings, and attended by local managers). The Top Level meetings were hosted in Japan. The International meetings were hosted at different locations, in turn. None of the 4 categories of meetings took place within any specific framework, organisation or forum. The parties subsequently implemented their plan over a period of more than four and a half years.

A meeting in Paris on 24-25 February 1993 marked the starting date of a regular collusion between UCAR and SGL in the market of unmachined extruded specialty. Throughout the duration of the cartel, the parties regularly discussed prices and classification of products in order to compete on quality and service, while avoiding competition on price levels. They closely monitored the implementation of their agreements through the organisation of regular meetings. They further agreed who would announce what price on what date and the order of announcement. In order to carry out the price agreements, the representatives at the meeting usually passed internal notes to

local managers at country level, who ‘fine tuned’ the price lists before sending them to the customers. This arrangements went on for more than three and a half years.

In each case the companies’ conduct was a very serious infringement of the competition rules, as set out in Article 81 of the European Union Treaty and Article 53 of the EEA-Agreement.

### Individual amount of the fines

The following is a list of the individual fines (in million Euro):

- SGL: 27.75 (18.94 for the infringement affecting the isostatic specialty market, 8.81 for the infringement affecting the extruded specialty market)
- Toyo Tanso: 10.79
- Carbone-Lorraine: 6.97
- Tokai Carbon: 6.97
- Ibiden: 3.58
- Nippon Steel Chemical: 3.58
- Intech: 0.98

In setting the amount of the fines, the Commission took account of the gravity of the infringements, their duration, and the existence of aggravating and mitigating circumstances. The role played by each undertaking was assessed on an individual basis. The Notice on the non-imposition or reduction of fines in cartel cases (‘the Leniency notice’) was applied.

All the undertakings concerned in each cartel were found to have committed a very serious infringement. Within this category, the undertakings involved in the isostatic cartel were divided into five groups, according to their relative importance in the market. The cartels were of medium duration (between one and five years). The Commission identified SGL as ringleader of the isostatic cartel, since it took the initiative to launch the cartel and steered its development, and on that ground it increased the fine to this company by 50%. The Commission also found that the

involvement of Intech in the isostatic cartel was particular in that it was to a considerable extent under instructions from Ibiden; this circumstance led to a reduction of 40% of Intech’s fine. As the infringements took place before the Commission had the occasion to find UCAR, SGL or Tokai responsible for their participation in the cartel of *Graphite Electrodes*, there was no ground to establish an aggravating circumstance of recidivism.

### Application of the Leniency notice

Part of the evidence on the cartel was provided to the Commission by the companies involved, in the context of the leniency policy.

UCAR disclosed the cartels to the Commission, and was granted a 100% reduction of the fine. The Commission also granted a reduction of 35% in the fine imposed on SGL, LCL, Ibiden, Tokai, Toyo Tanso and NSC/ NSCC, because they provided additional information on the cartel before the statement of objections was sent. Intech did not cooperate in the Commission’s investigation and only received a 10% reduction for not contesting the facts.

Although the new leniency notice was adopted in February 2002, it is the old notice (18 July 1996) that was applicable in this proceedings, since the cooperation took place before February 2002.

### Section 5.b of the Guidelines on fines

According to section 5.b of the 1998 Guidelines on fines, the Commission should, depending on the circumstances of a given case, take into account certain objective factors, when fixing fines. In this respect the Commission considered that SGL was *both* in a delicate financial position and had recently been imposed an important Commission fine (Euro 80.2 in the *Graphite Electrodes* cartel <sup>(1)</sup>), which should have had already a deterrent effect on its own. The Commission considered that, in these particular circumstances, imposing the full amount of the fine did not appear necessary in order to ensure effective deterrence, and reduced SGL’s fine in this case by 33%.

<sup>(1)</sup> Commission Decision of 18 July 2001, OJ L 100, 16.8.2002, p. 1.

## Commission fines participants in concrete reinforcing bars cartel

*Flavio LAINA, Directorate-General Competition, unit E-2*

On 17 December 2002 the Commission imposed fines totalling more than € 85 million on eight Italian firms for having organised, between 1989 and 2000, a cartel on the market in concrete reinforcing bars, a product used in the construction industry

The undertakings concerned were Alfa Acciai SpA, Feralpi Siderurgica SpA, Ferriere Nord SpA, IRO Industrie Riunite Odolesi SpA, Riva Acciaio SpA and Siderpotenza SpA, the latter being controlled by Lucchini SpA. Two other firms, Leali SpA and Acciaierie e Ferriere Leali Luigi SpA, were considered together since they formed a single entity until they were split up in 1998 and the latter of the two is in liquidation. Valsabbia Investimenti SpA and Ferriera Valsabbia SpA were also treated as one company since they are the result of a split in early 2000.

Reinforcing bars are a long hot-rolled steel product in coils or bars of 5 mm and over, with a smooth, crenelated or ribbed surface, for reinforcement of concrete. Italy is the first producer of reinforcing bars of the Community, and the turnover of the undertakings addressees of the present decision, which represented almost 80% of the market (in 2000), was to be estimated in 2000-2001 around 900 million euros.

### The infringements

Following a detailed investigation during which it carried out on-the-spot inspections in 2000, the Commission found that these eight firms took part, with the aid of the Italian trade association Federacciai, in an agreement aimed at fixing the prices of reinforcing bar in bars or coils in Italy.

National cartels are not normally investigated by the Commission, but the relevant product was covered by the Treaty establishing the European Coal and Steel Community (ECSC) and therefore the Commission had sole jurisdiction to pursue the infringement, as established by article 65, section 4, of that Treaty.

The Commission's investigation demonstrated that, for a period of ten and a half years between

1989 and 2000, the cartel members fixed the size extras to be added to the base price for each product. Reinforcing bars are sold in some twenty diameters ranging from 5 to 40 mm.

From April/May 1992 until 2000, the cartel members also fixed the base price and, until September 1995, agreed on standard terms of payment.

Lastly, between 1995 and 2000, they limited and/or monitored production and/or sales.

Some of the firms did not take part in all the above infringements or did so for only part of the time. Ferriere Nord, for example, took part from 1993 onwards.

All these activities were an infringement of article 65, section 1 of the ECSC Treaty and constituted a single, complex and continuing infringement: complex because some contested behaviours can be regarded as constituting agreements while others can be regarded as concerted practices, continuing because it was brought about through the repetition of the same behaviours during the period under examination, and single because the purpose of all the measures was to increase the price of reinforcing bars in Italy. As regards the possibility that activities having the same anticompetitive purpose and each of which taken in isolation can be included under the concept of 'agreement', 'agreed practice' or 'decision by an association of companies' can be regarded as constituting a single infringement, this has been expressly confirmed by the Court of Justice in particular in the Anic <sup>(1)</sup> case.

### Expiration of the ECSC Treaty

One of the main legal issues of the case was the expiration of the ECSC Treaty in the course of the procedure.

In view of the termination of the ECSC Treaty, the Commission issued on 26 June 2002 a Communication concerning certain aspects of the treatment of competition cases resulting from the expiry of

<sup>(1)</sup> Ruling by the C.J.E.C. in case C — 49/92 C.E.C./Anic Partecipazioni S.p.A. of the 8 July 1999, in ECR. 1999, page I- 4208-4209.

the ECSC Treaty <sup>(1)</sup>, in which the Commission explained in which way, on the basis of the general principles of law, the transition between the two treaties would take place.

In fact, the Commission believes that both the EC Treaty and the ECSC Treaty belong to the same legal order, *l'ordre juridique communautaire*, and that in the framework of this new order the ECSC Treaty was to be considered *lex specialis* until the 23 July 2002. Consequently, the procedural applicable law is the one in force at the moment of the adoption of the measure in question, while the substantive law applicable is the one in force at the time of the infringement.

### The position of an association of undertakings under the ECSC Treaty

The practices in which the concerned firms and Federacciai constituted very serious infringements of Article 65(1) of the ECSC Treaty.

However, Article 65(5) of the ECSC Treaty does not provide for trade associations to be fined. In accordance with the Eurofer <sup>(2)</sup> case-law, if it is true that the Commission cannot inflict a fine on an association of undertakings, the same association can nevertheless be the addressee of a decision whenever it is certain that it has been involved in the infringement. Therefore, the Commission did not fine Federacciai, which is nevertheless one of the addressees of the decision.

### FINES

The Commission imposed the following fines (in € million):

- Riva Acciaio SpA: 26,90
- Lucchini SpA and Siderpotenza SpA, jointly: 16,14
- Feralpi Siderurgica SpA: 10,25
- Valsabbia Investimenti SpA and Ferriera Valsabbia SpA, jointly: 10,25
- Alfa Acciai SpA: 7,175
- Leali SpA and Acciaierie e Ferriere Leali Luigi SpA in liquidazione: 7,175

- IRO Industrie Riunite Odolesi SpA: 3,58
- Ferriere Nord SpA: 3,57

### Calculation of the fines

In calculating fines, the Commission took into account the seriousness of the infringement, its duration and any aggravating or mitigating circumstances.

Although the infringement was extremely serious, the Commission took account of the specific circumstances of the case, involving a domestic market which was during the period in question subject to the special rules of the ECSC Treaty and on which the firms concerned enjoyed, during the early part of the infringement, a limited market share.

The fines imposed on Riva and Lucchini reflect their overall size, which is much larger than the other firms concerned.

The fine imposed on Ferriere Nord also take account of the fact that its participation in the infringement was of a shorter duration and that the firm had already been fined, in August 1989, for taking part in an agreement on the market in welded steel mesh, which was considered as an aggravating circumstance.

### Leniency

Although the Commission published a new Leniency Notice on 19 February 2002, the preceding Notice, published in 1996, was applied in this case. In fact, the first firm sought leniency in the current proceeding when the 1996 Notice was still in force. Ferriere Nord was the only undertaking who submitted to the Commission information which lead to a better understanding of the agreement. The Commission considered that the criteria laid down in section D 'Significant reduction in a fine', first indent, were met, and therefore granted a reduction of the fine. Therefore, Ferriere was granted a reduction of 20% of amount of the fine.

<sup>(1)</sup> Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, published in Official Journal C 152 of 26 June 2002. In point 31 of the communication the Commission stated that: 'If the Commission, when applying the competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law'.

<sup>(2)</sup> Judgment of the Court of First Instance of 11 March 1999. Eurofer ASBL v Commission of the European Communities. Case T-136/94, European Court reports 1999, page II-0026.

## Aviation sector

### 1. Commission closes investigation into Lufthansa/SAS/United Airlines and KLM/NorthWest alliances

*Monique NEGENMAN, Directorate-General Competition, unit D-2*

#### I. Introduction

On 28 October 2002 the European Commission decided to close its investigations under Article 85 (ex 89) of the Treaty into two transatlantic aviation alliances, that is the alliance between Lufthansa, SAS and United Airlines (STAR Alliance) on the one hand and the alliance between KLM and NorthWest (Wings) on the other hand <sup>(1)</sup>. In the first case, the Commission's decision was based on certain remedies, addressing the Commission's concerns about reduced competition on a number of routes between Frankfurt airport and certain US destinations. In the case of KLM/NorthWest no remedies were held necessary.

The cases are of importance in particular for two reasons. First, they are the first cases in which the Commission took a formal position under the EC competition rules on a *transatlantic* aviation alliance agreement <sup>(2)</sup>. In the two cases the Commission further developed its approach to transatlantic air alliances under the EC competition rules, notably in terms of market definition and the identification of affected markets. Second, the two cases are of interest from a *procedural* point of view. In the absence of a competition enforcement regulation for air transport between the Community and third countries <sup>(3)</sup>, both proceedings were initiated on the basis of Article 85 of the Treaty. Competition cases formally initiated on the basis of this provision are rare <sup>(4)</sup>, and raise a number of particularities. Both aspects will be explained in further detail in this Article.

#### II. The Commission's assessment

##### *Background*

For a good understanding of the Commission's competition analysis of the two cases it is necessary to briefly recall the background of the two cases. Neither of the two alliances was notified to the Commission but the latter decided in 1996, on its own initiative, to start proceedings under Article 85 of the Treaty in order to examine the compatibility of the alliance agreements under EC competition law. The focus of these proceedings was on passenger air transport services between the Community and the United States.

The Commission's investigation initially focussed in particular on the alliance between Lufthansa, SAS and United Airlines ('the LH/SAS/UA alliance'), which raised the most imminent competition issues. This resulted in 1998 in a so-called 'draft-proposal' within the meaning of Article 85 of the Treaty, a sort of statement of objections, in which the Commission identified a large number of point of origin-point of destination pairs (O&D routes) where the LH/SAS/UA alliance was found to restrict competition and where appropriate measures to avoid the elimination of competition were held necessary.

In view of the arguments put forward by the parties the Commission launched an intensive market investigation, which led to a somewhat revised approach to the competition assessment of international aviation alliances, notably as regards market

(1) See the notice published in the OJ C 264, 30.10.2002, p. 5. This (unpublished) decision was taken after the Commission invited interested third parties to comment on the intention to take a favourable position on the two alliances and close the respective proceedings.

(2) Anti-trust decisions which the Commission adopted with regard to aviation alliances cases so far all related to intra-Community transport.

(3) Regulation (EEC) No 3975/87, laying down the procedure for the application of the EC competition rules in the air transport sector, is limited to air transport between Community airports.

(4) For all other economic sectors, with a few minor exceptions, procedural implementing regulations have been adopted and therefore there is no need to apply Article 85 of the Treaty.



definition and the assessment of potential competition. In particular, the Commission concluded that on long haul routes a certain degree of substitutability between indirect services (e.g. a flight from Frankfurt, via Amsterdam to Washington) and non-stop services could be accepted, depending on a number of factors, such as overall additional flight duration, airline preference, price, schedule and the availability of indirect flights. Moreover, the Commission applied a more economic approach when identifying affected markets, by considering alliance partner A only as potential competitor of alliance partner B (already operating services on the route concerned) where carrier A had a real commercial possibility of entry. This was in particular held to be the case if the route concerned was directly linked to one of the potential competitors' hubs or sufficiently thick enough in terms of passengers transported to allow market entry on a point-by point basis.

This revised approach allowed the Commission to take a more positive view on the LH/SAS/UA alliance and its initial concerns from a competition point of view could be reduced to five hub-to-hub O&D routes. The Commission's revised approach had also consequences for its examination of the transatlantic alliance between KLM and North-West (KLM/NW), where its initial competition concerns were reduced to two hub-to-hub O&D routes, where both parties were actual competitors prior to the alliance.

### *The competition concerns*

By entering into their alliance agreements, both the alliance partners in LH/SAS/UA and KLM/NW had respectively, while retaining their corporate identities, integrated their services and de facto acted as single entities. In particular, the alliance partners in both cases are engaged e.g. in code sharing, joint pricing, co-ordination of capacity, co-ordination of marketing and sales activities and they share revenues and cost. In short, they co-ordinate all key parameters on which airlines normally compete. By entering into the alliance agreements the parties therefore ended all competition between themselves and this raises in particular competition concerns under Article 81 of the Treaty on those city-pairs where the parties hold high combined market shares and were they were prior to the alliance either actual (the overlap markets) or potential competitors (the non-overlap markets).

In the LH/SAS/UA case the Commission identified five such routes: the O&D routes Frankfurt-Chicago, Frankfurt-Washington, Frankfurt-Los Angeles, Frankfurt-San Francisco and Copen-

hagen-Chicago. On these markets, all hub-to-hub routes, the parties were, prior to the alliance, either actual competitors (Frankfurt-Chicago, Frankfurt-Washington) or could be considered to be potential competitors with a real commercial possibility to enter (Frankfurt-LA, Frankfurt-San Francisco, Copenhagen-Chicago), holding combined market shares varying from 56 to 95%.

As concerns KLM/NW, the Commission came to the conclusion that the alliance restricted competition within the meaning of Article 81(1) of the Treaty on two routes, that is Amsterdam-Detroit and Amsterdam-Minneapolis/St Paul. Both routes are hub-to-hub routes on which the parties were actual competitors prior to the alliance under a so-called blocked-space agreement and on which they hold combined market shares of about 80%.

### *Market entry barriers and need for remedies*

In the LH/SAS/UA case the Commission concluded that there was, without appropriate remedies, a risk of elimination of competition on four of the affected routes (the routes from Frankfurt to the US), given the existence of substantial market entry barriers. These entry barriers were both of a structural nature (slot shortage at Frankfurt airport) and of a regulatory nature (a possibility of price control by the German Government with regard to the fares of indirect services).

In order to meet the identified competition concerns the parties offered to surrender slots at Frankfurt airport to allow (either direct or indirect) new air services on the four routes concerned. The parties offered to surrender sufficient slots to allow two additional daily competing air services on the Frankfurt-Washington route and one additional daily competing air service on each of the other three routes. In addition, new entrants using the slots, if they operate a non-stop service, will be admitted to the parties' frequent flyer programme and offered interlining facilities. Moreover, the parties will not participate in that part of the IATA tariff conference concerning services on the routes in question.

In addition to the commitments proposed by the parties, the German Government formally declared that they would not apply any price control on indirect services on the routes concerned. This ensures that indirect services may provide real competitive constraints on the direct services provided by the parties.

The Commission considered that, on the basis of this package of commitments and the declaration

by the German Government, the arguments of the parties that the alliance fulfils the cumulative conditions of Article 81(3) of the Treaty could be accepted <sup>(1)</sup> and that there were therefore no longer reasons to adopt an infringement decision under Article 85 of the Treaty. As a result the Article 85 proceeding was closed.

As concerns the KLM/NW case, the Commission did not identify significant market entry barriers, in terms of slot constraints at Amsterdam Schiphol or the two US airports concerned, nor substantial regulatory barriers such as government price control on indirect services. Therefore, it concluded that existing or new (indirect) competition could sufficiently constrain the competitive behaviour of the parties and that the Article 85 proceeding could be closed, without the need of imposing remedies.

### III. Proceedings under Article 85 of the Treaty

#### *Background*

Regulation (EEC) No 3975/87, laying down the essential rules for applying the EU competition rules in the transport sector, is limited to air transport between Community airports. The recently adopted Regulation (EC) No 1/2003, which will replace the procedural provisions of Regulation (EEC) No 3975/87 as from 1 May 2004, does not change this <sup>(2)</sup>. There is thus no procedural implementing regulation laying down the rules to be applied in case of possible infringements of Articles 81 and 82 of the Treaty on routes between the Community and third countries. This means that the Commission will have to continue to rely on the provision of Article 85 of the Treaty when applying the EU competition rules to international air transport.

Article 85 of the Treaty empowers the Commission, if it finds that there has been an infringement of the EC competition rules, to propose appropriate measures to bring it to an end and, if this is not done, record such infringement in a reasoned decision and authorize Member States to take the

measures, the conditions and details of which it shall determine, needed to remedy the situation.

The Commission's experience in dealing with the LH/SAS/UA and KL/NW cases under Article 85 of the Treaty has shown that, although eventually in the cases at stake a satisfactory solution for the identified competition issues was found, the lack of appropriate enforcement powers is unsatisfactory from the point of view of enforcement as well as time-consuming and cumbersome. In particular, the Commission lacks the appropriate tools, which are necessary for the fact-finding process. Although the Commission applies as much as possible *mutatis mutandis* the procedures of Regulation (EEC) No 3975/87 <sup>(3)</sup>, in practice it has to rely on the willingness of the parties to provide the Commission with the necessary facts. Furthermore, Article 85 of the Treaty does not empower the Commission to adopt a decision requiring the undertakings concerned to bring an infringement to an end and impose the remedies that are necessary to address the competition concerns. Such measures will have to be taken by the competent authorities in the Member States concerned. Although the Commission, in particular in the LH/SAS/UA, closely co-operated with the competent authorities of the Member States concerned, it is clear that this practice does not ensure fully an effective and coherent application of EC competition law.

#### *Proposals for competition enforcement rules for air transport between the Community and third countries*

In the past the Commission has submitted several proposals, most recently in 1997, to the Council for extending the scope of Regulation No (EEC) No 3975/87 to transport between the Community and third countries. So far, the Council has not decided upon these proposals.

The recent Court ruling in the 'open skies' cases <sup>(4)</sup> is expected to accelerate the pace of change in the aviation sector. Following the Court's judgment the Commission has requested the Council to grant the Commission the appropriate mandate for

<sup>(1)</sup> Even though the Commission under Article 85 EC is not authorised to grant an exemption, the principles of Article 81 EC can be applied in its entirety to assess whether there is an infringement and to determine the appropriate measures to bring such an infringement to an end.

<sup>(2)</sup> Article 32 under c of Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1) excludes from its scope air transport between Community airports and third countries.

<sup>(3)</sup> For example, in the LH/SAS/UA case the Commission after sending the parties a draft-proposal, gave them the opportunity to react to this document in writing and it organised a hearing in which the parties and interested third parties were given the opportunity to express their views orally.

<sup>(4)</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany.

negotiations with the United States in order to establish a coherent policy for international air transport. <sup>(1)</sup> Clearly, an effective enforcement of Community competition laws is an essential part of such a co-ordinated air transport policy. The current competition regime does not provide sufficient level playing field either to the industry or to Member States since internal EU air traffic and international traffic to and from the Community are subject to different enforcement regimes, even though companies and alliances treat them as a single business. Accordingly, the need for an effective enforcement of the EC competition rules to international air transport has become yet more important in the light of the Court's judgment. In this light the Commission is currently preparing new proposals to establish competition enforcement rules for air transport between the Community and third countries. These proposals are

expected to be submitted to the Council in the first half of 2003.

#### IV. Conclusion

In the LH/SAS/UA and KLM/NW cases the Commission has further developed its competition assessment approach to transatlantic aviation cases, allowing a more positive overall approach, while at the same time ensuring that competition is not eliminated in certain markets. The experience with the proceedings in both cases have however also demonstrated that there is a clear need for effective competition enforcement rules for air transport between the Community and third countries. In light also of the recent Court's judgment in the open skies cases, the Commission is expected to submit proposals to that end in the near future <sup>(2)</sup>.

<sup>(1)</sup> Declaration of the European Commission on the implications of the judgements of the Court of Justice in the 'open skies' cases of 14 November 2002 (COM(2202) 649).

<sup>(2)</sup> Declaration of the European Commission on the implications of the judgements of the Court of Justice in the 'open skies' cases of 19 November 2002 (COM(2202) 649 (final), para 26 and 53).

## **2. Investigation into air alliance between bmi british midland and United Airliness closed**

*Michael GREMMINGER, Directorate-General Competition, unit D-2*

### **Introduction**

In November 2002, DG Competition decided to close its investigation under the EC competition rules in relation to the alliance between bmi british midland and its US partner United Airlines, both members of the global STAR alliance. In this case the Commission did not launch formal proceedings but co-operated actively with the Office of Fair Trading (OFT) of the United Kingdom. Both authorities have come to the conclusion that the alliance agreement between bmi and United Airlines fulfils the necessary requirements to merit such an exemption.

### **Background**

British Midland Airways Limited and United Airlines, Inc. entered into an Alliance Expansion Agreement on 5 September 2001. On 13 December 2001, the parties notified the Agreement to the Office of Fair Trading under the Enforcement Regulations. The parties did not formally make a parallel notification of the Agreement to the European Commission. However, the parties supplied the Commission with a copy of the Agreement and with all subsequent information supplied to the OFT. The Commission has conducted a parallel informal investigation. <sup>(1)</sup>

In its decision of November 11, 2002 the OFT concluded that the Alliance Agreement, if implemented, would infringe Article 81(1) of the EC Treaty as it would have the effect of appreciably preventing, restricting or distorting competition in relation to the scheduled air transport of passengers, but that the requirements for individual exemption under Article 81(3) are also met. The OFT has therefore decided to grant the Agreement an exemption from the prohibition in Article 81 of the EC Treaty.

### **Procedures — Close co-operation between the Commission and the OFT**

For procedural reasons the OFT took the lead in this case, using its powers under the EC Competition Law Enforcement Regulations 2001. It should be recalled that Council Regulation 3975/87, which lays down detailed rules for the application of Articles 81 and 82, only relates to air transport between EEA/Community airports. However, the OFT has powers under the Enforcement Regulations to make a decision on the application of Articles 81 and Article 82 in relation to (inter alia) air transport between Member States and third countries. In the absence of such powers, the Commission would have had to investigate the alliance using its powers under Article 85, under which it would only have been able to propose measures to be taken to bring infringements to an end.

The formal exemption decision adopted by the OFT on November 1, 2002 was developed jointly with the Commission through all stages of the enforcement procedure and the assessment is consistent with the approach taken by the Commission in other airline alliance cases. The early and effective co-operation between the two competent competition authorities enabled any enforcement or policy problems to be avoided. It was therefore not necessary for the Commission to open a formal investigation in parallel with the OFT. Consequently the Commission closed its own ex-officio investigation in this case.

This case is a good example of effective and fruitful co-operation between the Commission and a National Competition Authority, in advance of modernisation of the EC Competition rules.

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<sup>(1)</sup> See notice published in the Official Journal (OJ C 367, 21.12.2001, p. 30).

### 3. The Commission's approach towards global airline alliances — some evolving assessment principles

*Michael GREMMINGER, Directorate-General Competition, unit D-2*

#### I. Introduction

The number of international airline alliances and similar forms of co-operation agreements has increased in recent years and significantly impacts on the play of competition within today's airline industry. This process of economic repositioning in the air transport sector is likely to accelerate as a consequence of the recent Court's ruling in the 'open skies' cases. <sup>(1)</sup> The expected changes in the regulatory framework, in particular the elimination of the nationality clauses, will increase the possibilities for European airlines to restructure their business by engaging in further alliance, merger and acquisition activity, while the Commission will have to make sure that these developments take place in accordance with competition law. <sup>(2)</sup>

Today the Commission takes a broadly positive approach to international airline alliances. Alliances can bring benefits to the economy as a whole from efficiency-triggered cost savings, as well as to consumers as a result of service improvements such as new seamless services, improved schedules or reduced fares. Nevertheless, there is a risk that these benefits will be achieved at the expense of restricting or eliminating competition in certain markets. The Commission therefore usually tries to ensure continued competition on all routes affected by alliances by imposing a set of remedies that have the effect of making new entry possible as a condition for exemption. However, where the network overlap is substantial, and economic benefits in relation to the harm to competition are rather low, prohibition of the transaction may be the only answer, in the absence of effective remedies. Although very much a case-by-case assessment, the following assessment principles — established on the basis of the most recent trans-

atlantic alliance cases <sup>(3)</sup> — illustrate the Commission's current approach to structural airline transactions.

#### II. Market definition issues

##### *The 'point of origin/point of destination' (O&D) pair approach*

To establish the relevant market in air transport cases, the Commission applies the so-called 'point of origin/point of destination' (O&D) pair approach. According to this approach, every combination of a point of origin and a point of destination should be considered to be a separate market from the customer's viewpoint. <sup>(4)</sup> To establish whether there is competition on an O&D market, the Commission looks at the different transport possibilities in that market, that is, not only at the direct flights between the two airports concerned, but also other alternatives to the extent that they are substitutable to these direct flights. These alternatives may be direct flights between the airports whose respective catchment areas significantly overlap with the catchment areas of the airports concerned at each end (airport substitution), indirect flights between the airports concerned, or other means of transport such as road, train or sea (inter-modal substitution). Whether one of those alternatives is substitutable to the direct route depends on a multiplicity of factors, such as the overall travel time, frequency of services and the price of the different alternatives and can only be decided on a route-by-route basis.

The Commission also investigates whether passengers travelling on unrestricted tickets (who can travel on any flight offered by a carrier on a

<sup>(1)</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 against the United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany.

<sup>(2)</sup> Communication from the Commission on the consequences of the Court judgement of 5 November 2002 for European air transport policy (COM (2002)649).

<sup>(3)</sup> See in particular the contributions 'Commission closes investigation into KLM/NW and LH/SAS/UA alliances' and 'Investigation into air alliance between bmi british midland and United Airlines closed' in this Competition Policy Newsletter as well as 'The proposed British Airways-American Airlines alliance' in Competition Policy Newsletter 2002, No. 2, p. 28. In a detailed review of the Commission's emerging policy regarding airline alliances and mergers see J. Stragier speech, European Air Law Association, Zurich, 9 November 2001.

<sup>(4)</sup> See in particular Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803 and Commission decision of 11.08.1999 in Case COMP M. 2041 *KLM/Alitalia*.

given city-pair) are in a different market to passengers with restricted tickets (who are restricted to travelling on the flights specified on their ticket). In the past, these two groups of passengers have been rather labelled 'time-sensitive' and 'non-time-sensitive'. In practice, what enables airlines to separate these two groups is less the extent of their preference for short journey times than the extent of their preference for schedule flexibility. Time-sensitive passengers are prepared to pay more to ensure they will always be able to travel on the most convenient flight. Whereas in cases concerning *intra-European* routes this distinction has led to the definition of separate markets, in *transatlantic* cases it has never been necessary to argue on the basis of this distinction, since the alliance partners usually had similar shares of both the unrestricted and the overall markets.

### *Network competition and network markets*

Network carriers, operating a so-called hub-and-spoke system, usually argue that the market definition used in air transport should take into account that the airline industry is characterised by network competition among airlines alliances. This reference to network competition represents a supply side perspective and highlights the key drivers of those carriers' business model rather than the customer needs to be served. Imagine a consumer wishes to fly from a concrete point of origin to a certain point of destination. If no choice between airlines on this particular O&D pair exists, the consumer may find little comfort in the fact that airlines compete world-wide in the development of their respective networks. Thus, while the emphasis on network competition reflects the supply side considerations, from a demand side driven market definition perspective it is justified to analyse the effects of the co-operation primarily under the O&D pairs approach. Network competition issues as such are still not sufficient to require changes to the established market definition approach followed by the Commission. However certain network phenomena such as the competition effects resulting from frequent flyer programs, corporate customer deals or the possibly limited interlining access of third carriers to feeder traffic may have to be considered as 'market entry barriers' in the context of assessing the alliance part-

ners' market power on the routes concerned. Nevertheless, it should also be noted that the Commission's approach at least implicitly recognises notions of network competition by accepting that certain indirect routings via competing hub-airports may be substitutable with direct long-haul flights.

### *The evolution of the Commission's market definition*

Initially the Commission was of the opinion that for time-sensitive passengers indirect flights were generally not substitutable for non-stop flights on long-haul routes, since — other things being equal — indirect flights are considered as less attractive. Intensive market investigations in the alliances cases *Lufthansa/United Airlines/SAS*, *KLM/NorthWest* as well as in the merger case *United Airlines/US Airways* however have indicated that indirect flights — depending on a number of factors such as airline preference, price, schedule, availability of direct flights — have to be seen as (at least as potential) suitable alternatives to non-stop services on long haul routes. <sup>(1)</sup> In *United Airlines/US Airways* it was concluded that indirect routings may constitute a competitive alternative to non-stop-services if they are marketed as connecting flights on the city-pair concerned on the CRS; are operated on a daily basis and cause only a limited extension of the trip duration. <sup>(2)</sup> In the recently closed transatlantic airline cases, where the routes concerned showed a corresponding pattern, the Commission followed a similar approach and concluded that indirect flights, under certain conditions, appear to exert a sufficient competitive constraint on non-stop long-haul services. Conversely the Commission needs to assure that the competitive conditions on markets, where one party offers a direct service and the other a competitive indirect service, will not be substantially affected by the alliance.

As regards *intra-European* routes the Commission maintained in its recent *Lufthansa/AuA* decision its established practice that indirect flights are not able to put sufficient competitive constraints on short-haul direct flights. <sup>(3)</sup> The situation may however be different — depending on the market conditions — on certain medium-haul routes, where the Commission concluded in the *Spanair/*

<sup>(1)</sup> The situation and market conditions however may be totally different when indirect flights involve 'back tracking'. In *BA/AA* and *bmi/United* it was concluded that on many UK-US routes only a small number of passengers choose to fly indirect and that these flights were therefore at a competitive disadvantage and as such unlikely to constrain the market behavior of the alliance on the problematic direct overlap-routes.

<sup>(2)</sup> Case COMP/M.2041 — *United Airlines / US Airways* of 12.1.2001.

<sup>(3)</sup> Commission decision of 5 July 2002 in the case COMP/37.730 — *AuA/LH*, OJ. L 242, 10.9.2002.

SAS case that indirect flights are less at a disadvantage to direct flights than on short-haul services. <sup>(1)</sup>

### III. Identification of competitively affected markets

The competitive assessment of alliances in the airline industry is complicated not only by the high number of potentially affected O&D markets but also by the network nature of the industry. In practice this may mean that competition could take place *between routes* as well as on *specific routes*. When trying to identify the markets competitively affected by an alliance, the Commission usually categorises two broad types of affected markets: *overlap* and *non-overlap* markets. The first category addresses mainly actual, the second mainly potential competition issues.

#### *Competition assessment on overlap markets*

Whereas for *intra-European* alliance cases in principle only direct-overlap markets may raise competition concerns for *long-haul traffic* the situation is insofar different as both direct and certain indirect routes may belong to the same relevant market. This makes it necessary to differentiate for the latter services into three further market overlap sub-categories: direct-direct overlap routes, direct-indirect overlap routes and indirect-indirect overlap routes. For these categories some rough assessment thresholds have been established, indicating possible competition concern on a preliminary basis. In the recently cleared airline alliance cases the Commission has only raised serious competition concerns on O&D markets where the combined market shares of the parties were higher than 50%, and in the case of direct-indirect overlaps, where in addition to the 50% threshold the increment was higher than 3%. As regards indirect-indirect overlaps, such routes are only under rather exceptional circumstances likely to raise serious competition concern, since the usually

available competing direct or other indirect services via competing hubs should sufficiently constrain the alliance' market behaviour.

The competitively affected markets will be identified on the basis of these thresholds and subsequently a more detailed market analysis will be undertaken, unless market information indicates that there are already competition problems at a low market share. This 'filter' process allows the Commission to concentrate on the markets with the largest competition concerns and where it is likely that competition will be eliminated as a consequence of the transaction.

#### *Competition assessment on non-overlap markets*

Whereas the Commission initially considered alliance partners as potential competitors on all routes connecting destinations of the respective networks and where before the alliance at least one operating party was already present <sup>(2)</sup> the Commission today applies an economically realistic approach towards potential competition in the airline industry, relying on the notion of a real commercial possibility of entry. <sup>(3)</sup> An airline will in principle only be considered as a potential competitor on a specific route if that route is either directly linked to one of its hubs <sup>(4)</sup> or sufficiently frequented by local traffic to allow market entry on a point-to-point basis <sup>(5)</sup>, while taking into account the operational requirements of the respective business models. This perspective is in principle applicable to short-haul <sup>(6)</sup> and long-haul routes alike, however different evaluation thresholds in terms of minimum O&D traffic, extent of necessary connecting/transfer passengers and/or relative size of hub/operational presence (e.g. international, domestic, regional hub) might be relevant. <sup>(7)</sup> On *long-haul* routes it might be furthermore necessary to analyse to what extent alliance partners have to be considered as potential competitors on indirect routings. However, the Commission has so far never challenged an alliance on the basis of a restriction of potential

<sup>(1)</sup> Case COMP/M. 2672 — SAS/Spanair of 5.3.2002.

<sup>(2)</sup> Commission notices published in the cases *British Airways/American Airlines* and *Lufthansa/SAS/United Airlines*, OJ C 239, 30.7.1998.

<sup>(3)</sup> Joint cases T-374/94 etc. *European Night Services and Others v. Commission* [1998] ECR II-3141.

<sup>(4)</sup> In principle airlines operating a hub-and-spoke system will not enter a route where they do not have a hub at one end, since their whole business model is based on increasing traffic through their hubs.

<sup>(5)</sup> For example in *BA/AA* various of the routes where competition concern arose were regarded as thick routes and therefore considered as attractive enough for a point-to-point entry.

<sup>(6)</sup> In the *SAS / Spanair* case the Commission concluded that neither *Lufthansa* nor *bmi* or *AuA* would be potential entrants on the concerned overlap route of SAS and Spanair, given the presence of other carriers, the limited number of passengers per year and the absence of hubs in Copenhagen or Madrid.

<sup>(7)</sup> Neither definitive minimum O&D traffic thresholds, nor decisive criteria for hub-categorization have been established so far.

indirect competition, since the effect on competition there is probably only appreciable in very exceptional cases and moreover unlikely to lead to an elimination of competition. This revised approach towards potential competition assessment has not only significantly reduced the number of potentially affected overlap markets but has also inversely increased the importance of competitive indirect services as necessary competitive constraints as far as long-haul routes are concerned.

#### **IV. Market power, entry barriers, elimination of competition and remedies**

Airline alliances usually involve such a high degree of business integration (e.g. route coordination, joint-pricing, revenue-sharing, joint-marketing, ...) that it ends any actual and potential competition between the parties on the affected markets. Taking further into account that alliances normally have, at least on some routes (in particular on the the hub-to-hub routes) rather high market shares, such alliance agreements are therefore usually caught by Article 81 with respect to all routes where the operation leads to an appreciable restriction of competition on the relevant markets.

##### *Economic benefits and fair share for consumers*

The Commission in principle accepts that alliances can contribute to improving the production and distribution of transport services and promote technical and economic progress. The Commission further accepts that connecting passengers can enjoy the various types of alliance benefits, such as wider choice of destinations and connections, seamless service and lower fares. It is however vital that the benefits of an alliance are passed on to the passengers. Such a conclusion is the more likely the more complementary the respective networks are and consequently the less overlap markets exist. However, more difficult is to establish the benefits to be expected for point-to-point passengers, on the routes where the parties were actual or potential competitors before. In the context of its on-going airline alliance investigations the Commission therefore puts a higher emphasis on receiving clear evidence on the expected passenger benefits (e.g. consumer pass-on in case of efficiency gains) on these routes.

##### *Elimination of competition*

Whether competition is likely to be eliminated depends — among other factors — on the market position of the alliance on the relevant markets (e.g. market share/ concentration ratio) and on the existence of significant entry barriers, hence whether the parties will enjoy market power, which allows them to act to a considerable extent independently of their competitors and customers. Although airline alliances often lead, in particular on the overlap routes to high market shares, these are as such not sufficient to conclude that significant market power exists and that competition is likely to be eliminated. This appears in the airline industry to be much more evident where high market shares come together with high entry barriers.

In airline alliance cases the Commission usually faces various types of entry barriers. The most important are

- Regulatory barriers, such as government pricing restrictions for indirect flights or the unavailability of necessary traffic rights,
- Slot shortages at congested airports,
- Increased frequencies resulting from the co-operation,
- Network effects resulting from joint frequent flyer, travel agency or corporate customer incentive schemes or reduced third carrier access to transfer passengers,
- ‘Behavioural’ barriers arising from possible predatory pricing or predatory capacity tactics

Whether market power resulting from entry barriers is likely to eliminate competition needs to be primarily established on a route-by-route analysis. Of particular competition concern are usually barriers resulting from slot shortages at congested airports, because these have the direct effect of marginalising the threat of market entry. In addition it might be also necessary to assess certain network effects across all affected routes in order to identify market power arising from the overall economic strength of an alliance at their respective hubs or vis-à-vis certain customer groups. Absent significant entry barriers the Commission analyses to what extent actual and potential competition provides sufficient constraints on the parties. If existing direct or indirect competitors have or easily can introduce or adapt sufficient capacity to accommodate even a significant additional proportion of customers currently carried by the parties, this should in principle act as a significant



constraint on the alliance's competitive behaviour on those routes.

### *Entry barriers and remedies in the recent transatlantic alliance cases*

In the *KLM/NorthWest* transatlantic case the Commission followed the above outlined economic reasoning and consequently accepted high market shares on the direct overlap routes in the absence of any further direct competition and without imposing any remedies. This was possible because the Commission did not identify any significant market entry barrier on the affected routes and therefore could conclude that the existing indirect competition should sufficiently constrain the competitive behaviour of the alliance partners. Moreover, it was accepted that there exists an important level of potential indirect competition resulting both from the possibility for competitors to commence new services and to adjust existing services by schedule adjustment.

A different market situation was present in the *Lufthansa/SAS/United Airlines* case. There the Commission identified significant regulatory and structural entry barriers which prevented new direct and indirect market entry and therefore direct and indirect flights from competing effectively on the problematic routes. The Commission came to the conclusion that absent sufficient remedies competition was likely to be eliminated on these routes. After the parties had submitted corre-

sponding undertakings, basically slot surrender at congested airports and furthermore the German aviation authorities agreed no longer to apply certain restrictive price control measures vis-à-vis competitive indirect services, the case was cleared.

The Commission remedy approach in the recent transatlantic airline cases clearly mirrors the identified entry barriers. The more problematic the identified entry barriers are, the more significant remedies are needed to ensure that competition is not eliminated on any routes. The exact scope and content of necessary remedies on long-haul routes might be different from those usually applied on short-haul routes due to significantly different market conditions. Whereas for intra-European alliances the likely remedy approach is focused on allowing direct entry <sup>(1)</sup>, on long-haul routes with rather limited point-to-point traffic, remedies will be designed to remove entry barriers to allow effective competition from indirect services.

### **Conclusion**

The strong focus on market entry barriers and the existence of market power in the Commission's current airline alliances competition assessment practice is well rooted in modern competition policy and concentrates on the real market effects of alliance agreements. It has helped the Commission to apply a realistic competition assessment approach towards global alliances.

<sup>(1)</sup> See most recent in Commission decision of July 5, 2002 in Case COMP/37.730 — *AuA/LH*.



## EC Merger Control Conference — highlights of proceedings

Mary LOUGHRAN — Directorate General Competition, Directorate B

### Introduction

In November the Commission and the IBA jointly hosted a two-day conference on the subject of reform of the merger control system. The Conference focussed on reform both in terms of review of the merger control regulation and merger practice generally. More than 40 speakers from the Commission, the US anti-trust agencies, academia and the legal profession presented papers to the Conference which provided the basis for some stimulating debates and discussions.

### Keynote Address from Commissioner Monti and Mrs Randzio-Plath of the European Parliament

The Conference began with a key-note speech from Commissioner Monti who announced that he would be proposing a series of reform measures to the Commission. The details of these reforms, subsequently adopted by the Commission on 11 December, are described in *'Reform of the EU Merger Control System — a comprehensive package of proposals'* <sup>(1)</sup>.

The Conference then moved on to an address from Mrs Randzio-Plath, Chairperson of the Economic and Monetary Committee of the European Parliament who raised a number of important issues which arise in the context of a merger investigation including the protection of workers and other social aspects as well as consumer welfare which is naturally central to the Commission's analysis of mergers. Anticipating this point Commissioner Monti had already announced at the Conference his plans to create a new Consumer Liaison function through which the views of consumers could be better channelled and presented.

In response to this address Mr. Philip Lowe, Director General, Directorate-General for Competition, said that the substantive competition test, regardless of which one was eventually selected, could not be designed to address the issue of the social impact of mergers. In the Commission's view, these matters were best dealt with by specific tailor-made legislation for this purpose,

such as the European Works Council Directive. He announced however that the Commission had decided to ensure that firms are specifically reminded of their obligations to respect these employee-related legislative questions in the notification provisions in Form CO. In addition, in discharging its merger control function, the Commission would continue to respect the rights of employee representatives to be heard. One particular example was their right to receive information regarding proposed divestiture commitments and to provide comments on them.

### Jurisdictional issues

During the first morning session the conference addressed the topic of case allocation within the EU and more particularly the question of multiple filings within the EU and more widely. Mr. Götz Drauz, Director, Merger Task Force, Directorate-General for Competition, provided the conference with an overall view of the issues involved and presented the aims of the current review process which were essentially to optimise the system of case allocation between the Commission and national competition authorities, in line with the twin pillars of EU merger control: the one-stop-shop and the principle of subsidiarity. He outlined the main options open to the Commission and explained why it had been decided to discard some of the earlier ideas floated in the Green Paper.

There was strong support from all speakers for a clear system, based on the one-stop shop principle, while recognising also the need to address the issue of multiple filings.

Mr. Drauz explained that the proposed reforms announced by Commissioner Monti aimed to offer an early opportunity to make requests for referrals at pre-notification stage. The objective was to respond to the multiple filings issue by offering a 'facility' to notifying parties so that they can request cases which would normally fall under the Commission's jurisdiction to be dealt with by national authorities and vice versa. It had been decided after some reflection not to pursue the mooted '3-plus' rule i.e. that where the transaction was notifiable in more than 3 Member States it

<sup>(1)</sup> See article by Stephen A. RYAN — Competition Directorate General, Directorate B Merger Task Force in the beginning of this Newsletter.

should ‘automatically’ qualify for treatment at Community level. It was thought that a ‘voluntary 3-plus rule’ could have led to forum shopping while a ‘mandatory 3-plus rule’ would have brought under Community jurisdiction too many cases which were purely national in scope and which had in reality no Community dimension. He underlined that these proposals were not intended to base competence on geographical market definition. Rather the reforms on case allocation were directed by the principles of clarity, subsidiarity and proportionality.

## The role of the Commission and the Community Courts

President Vesterdorf provided the conference with a view from inside the Court of First Instance on the workings of the judicial system and how it might be improved. President Vesterdorf called attention to the respective roles of the Commission and the Court: the Commission’s job was to ensure that the correct legal framework is in place to maintain competitive markets, and to develop matters of competition policy accordingly. The Court, on the other hand, was entrusted with the task of ensuring that the decisions taken by the Commission, are lawful, both in terms of substance and procedure. He recalled however that in each case the matter is decided on the facts, not on issues of institutional balance.

President Vesterdorf outlined in particular the Court’s view of the nature of the Commission’s discretion in the competition assessment of a merger. As far as the existing facts are concerned he stated that discretion did not exist. The Court would rigourously review the precision with which the Commission had assessed the existing market structure etc. However, as to the future behaviour of firms, President Vesterdorf indicated that there was some scope for discretion, related precisely to the issue of predicting future events based on economic theories.

A common concern expressed by all speakers was that judicial review should be timely. President Vesterdorf made it clear that this could be done only with more resources for the Court. On interim measures as applied in merger cases, President Vesterdorf also recognised that such relief might be available in certain circumstances, but he expressed some reservations about its feasibility in practice, especially for prohibition decisions.

The conference also addressed a quite topical issue relating to the legal consequences of a Court judgement annulling the Commission’s assessment of a merger. Opinions were divided on the inter-

pretation of Article 10 (5). On the one hand the Commission’s decision in *Kali und Salz* suggested that the new assessment should start from the beginning of Phase I. On the other hand, some expressed the view that Article 10(5) should be reviewed to provide a more flexible means for giving effect to the Court’s judgements. The panel did not address what approach should be taken where the Court’s judgement partially vindicates a decision and partially annuls it. Philip Lowe concluded generally that the Commission needed to look at Article 10(5) again.

## Judicial Review: A comparison of the EU and the US systems

During the first afternoon session the conference looked at and compared the respective merits of the EU’s administrative system and the US prosecutorial system of merger control. The conference heard that in the US, the parties’ rights of due process are mainly protected within the context of the judicial proceedings. By contrast, the administrative process in the EU is characterised by extensive checks and balances throughout the investigative procedure as well as during the judicial review if an appeal is launched. Also in the EU, the control of concentrations with a Community dimension is entrusted to a supra-national institution. This is not so in the US. Both in legal and political terms, this entails the transfer of national sovereignty to the Commission.

Mr. Lowe summed up the discussion by pointing out that a move over to a US-style system would remove the rationale for our current checks and balances, since the Commission would only be taking a preparatory step. However far from removing power from the Commission, such a development could in fact concentrate even greater power in the hands of the ‘prosecutor’ without providing any obvious countervailing benefits in terms of due process or timeliness. The rights of all interested parties would have to be respected during the judicial proceedings in any event. The *quid pro quo* for the EU system has so far been a relatively transparent and predictable system of merger control in consultation with Member States.

## Procedure and Due Process

On procedural issues Commissioner Monti recognised in his key-note speech that the Review exercise had revealed a need for greater respect for the rights of all parties, be they notifying parties or third parties, in the conduct of our investigations — and for alleviating the time squeeze put on all

concerned at given key moments. He went on to outline the amendments that the Commission would seek in order to introduce greater flexibility through ‘stop-the clock’ provisions to allow for more time to be spent on the conduct of investigations or the negotiation of remedies in addition to the extension of parties’ rights with regard to access to information during the procedure.

Mr. Lowe summed up the debate by pointing out that in the last few years the Commission had faced increased pressure, not only due to the growth in the number of merger notifications, but also to the greater economic complexity of the cases being reviewed. Higher levels of industrial concentration have also brought a need for greater sophistication in the economic analysis contained in our recent decisions. In addition, an increasingly expert private bar operating at a European level had developed a dialogue with the Commission on the interpretation of the merger regulation which had led to a much more incisive application of its provisions. He expressed the hope that this dialogue would continue to enlighten and enrich the work of the MTF and would continue to contribute to the efficiency and the objectivity of our decision-making system.

## Substantive test

The session on the substantive test focussed on the question of whether the current dominance test was sufficiently wide to cover all mergers which involved competitive harm. Some argued that the current test was sufficiently wide. Others argued that there was a category of cases which fell outside its scope. Those who advocated a change to a significant lessening of competition (SLC) test nevertheless recognised the risk of the loss to the EU legal system of a body of case law which had been built up over decades. Some felt that the cost of switching to a significant lessening of competition test might outway the perceived benefits of this test in terms of greater clarity.

Mr. Lowe summed up the discussion by pointing to the common wish for a predictable and trans-

parent application of the Merger Regulation. He acknowledged that before we amended the current test we would have to carry out to a certain extent a cost-benefit analysis of any change. The planned changes in regard to Article 2, the introduction of new recitals and the draft guidelines would allow us to interpret dominance to cover the kinds of behaviour in non-collusive oligopolistic situations envisaged. That change would be limited to the Merger Regulation and would not affect Art. 82.

## Efficiencies

The session on efficiencies revealed the reasons why there was no explicit role for efficiencies from the outset of the application of the Merger Control Regulation. In particular it emerged that the history surrounding the adoption of the Merger Regulation, and the subsequent commitment by the Commission was to make it clear that merger policy was about maintaining competitive markets and not an instrument of industrial policy. Speakers from DG Competition explained that our policy and practice in this area would be set out in the new horizontal merger guidelines.

## Conclusion

Mr. Lowe concluded the two-day debate by highlighting some of the fundamental issues at the centre of our deliberations. These were at the heart of the values that underpinned our system of merger control in Europe. The system was founded on one of the most fundamental tenets of the European Union — that is the principle of an open market economy with free and fair competition. As the guardian of the Treaty, the Commission obviously bore primary responsibility for ensuring that the Community's policies respect those principles. In the area of mergers this meant the public interest as expressed in a competition test aimed at protecting consumer welfare from anti-competitive harm had to be balanced against the necessary private interest of investors in getting their deals done.

## Merger Control: Main developments between 1<sup>st</sup> September 2002 and 31<sup>st</sup> December 2002

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### Recent cases — Introductory remarks

Between 1 September and 31 December 2002, 102 new cases were notified to the Commission. This is more than in the previous four-month period (92) and represents a slight increase compared to the same period in 2001 (90). In this quarter the Commission took 105 final decisions. In total during this period the Commission cleared 96 cases in Phase 1. There were no outright prohibition decisions during this period (pursuant to Art. 8 (3)). Two conditional clearances were granted — one at the end of an initial Phase I investigation and the second following an in-depth investigation. There were 41 decisions adopted in accordance with the simplified procedure. In addition, during this period the Commission took five referral decisions pursuant to Article 9 of the Merger Regulation. Four new in-depth investigations were opened (Art. 6(1)(c) decision) during September to December 2002.

### Jugement du TPI: Schneider vs. Commission

Le 22 octobre 2002, le Tribunal de première instance, statuant pour la première fois selon la procédure accélérée en matière de concentrations, a annulé la décision de la Commission du 10 octobre 2001 déclarant incompatible avec le marché commun la concentration entre les fabricants de matériels électriques français Schneider et Legrand. Dans un arrêt distinct rendu le même jour, le Tribunal, statuant également selon la procédure accélérée, a annulé la décision de la Commission du 30 janvier 2002 ordonnant à Schneider de se séparer de Legrand. Le Tribunal a estimé que la décision d'incompatibilité ayant été annulée, la décision de séparation était privée de base légale.

L'arrêt portant sur le recours en annulation contre la décision d'incompatibilité comporte des considérations relatives à la fois à l'appréciation au fond de l'opération et au déroulement de la procédure administrative.

### *Appréciation au fond des effets de la concentration*

#### *Décision*

Dans sa décision d'incompatibilité, la Commission avait considéré que l'opération conduirait à la création ou au renforcement d'une position dominante sur 18 marchés de produits distincts, tous de dimension nationale, dont neuf situés en France les neuf autres étant situés dans 6 autres Etats Membres. Cette appréciation était notamment fondée sur les caractéristiques de ces marchés (fidélité à la marque, barrières à l'entrée, faible degré d'élasticité de la demande), le caractère incontournable de l'entité fusionnée (parts de marchés significatives, disparition de la rivalité concurrentielle entre les deux entreprises, émergence d'un leader européen, panoplie inégalée de produits, détention de marques importantes, et large couverture géographique), et l'absence de contraintes significatives du point de vue de la demande (position de force à l'égard des grossistes) et de la concurrence. L'arrêt remet en cause la force probante de certains de ces facteurs sur certains des marchés affectés.

#### *Appréciation du Tribunal*

Tout en admettant la présence de certains de ces éléments, tels que le faible degré d'élasticité de la demande générale en matériel électrique basse tension, l'existence d'une fidélité significative à la marque des tableautiers et installateurs, ou la difficulté pour de nouveaux concurrents d'entrer sur le marché (points 134-143), le Tribunal a néanmoins estimé que la Commission avait commis des erreurs d'appréciation de nature à priver de valeur probante l'appréciation économique de l'impact de l'opération de concentration (point 411).

En premier lieu, le Tribunal a considéré que les indices de puissance économique tirés de la gamme de produits inégalée, de la panoplie incomparable de marques ou de la couverture géographique dont l'entité issue de la concentration aurait disposé sur l'ensemble de l'EEE, conduisait en l'espèce à surestimer l'impact de l'opération sur chacun des différents marchés nationaux affectés

par l'opération. Tout en soulignant qu'il est en principe loisible à la Commission de prendre en compte l'existence d'effets transnationaux dans l'analyse de l'impact d'une opération de concentration dans des marchés de dimension nationale, le Tribunal a jugé que la Commission n'avait pas démontré l'existence de tel effets dans chacun des marchés nationaux affectés (points 171-178).

En deuxième lieu, le Tribunal a jugé que la Commission s'était bornée à un examen trop général des rapports de force entre fabricants et grossistes au niveau transnational et que, dès lors, ni le caractère incontournable de la nouvelle entité vis-à-vis des grossistes, ni l'incapacité de ceux-ci à exercer une contrainte concurrentielle sur cette entité n'avaient été valablement démontrés sur chacun des marchés en cause (points 193-231).

En troisième lieu, le Tribunal a jugé que c'était à tort que la Commission avait refusé de prendre en compte sur les marchés de tableaux électriques les ventes internes de deux concurrents verticalement intégrés, ce qui l'avait amenée à sous-estimer leur puissance économique. Selon le Tribunal, les prix des fabricants non intégrés, tels que Schneider et Legrand, aurait subi directement la concurrence de ces fabricants intégrés lorsque la vente de matériels électriques est effectuée dans le cadre de la réalisation, par voie d'appels d'offres, de grands projets de construction (point 281-297). Le Tribunal rejette l'estimation faite par la Commission des ventes intégrées de ces deux concurrents et retient par la suite les parts de marché présentées par Schneider et comprenant ses estimations des activités intégrées de ces deux concurrents.

Enfin, le Tribunal a estimé que l'analyse de la Commission concernant les effets de l'opération de concentration sur les marchés danois et italiens étaient entachées d'erreurs spécifiques affectant plus particulièrement la légalité de la décision au regard de ces deux marchés nationaux (points 298-403).

L'arrêt souligne néanmoins que les erreurs ainsi constatées ne pouvaient en elles-mêmes suffire à remettre en cause les griefs retenus à l'égard de chacun des marchés sectoriels français affectés par l'opération (point 413). A cet égard, le Tribunal pose en effet le principe important selon lequel, *«quelle que soit l'ampleur des erreurs que peut présenter une décision de la Commission constatant l'incompatibilité avec le marché commun d'une concentration, elles ne peuvent pas entraîner l'annulation si, et dans la mesure où, l'ensemble des autres éléments contenus dans cette décision permet au Tribunal de considérer comme établi que la réalisation de l'opération aboutira à la création ou au renforcement d'une*

*position dominante ayant pour effet une entrave significative à une concurrence effective au sens de l'article 2, paragraphe 3, du règlement»* (point 412). Alors qu'il a explicitement rejeté les arguments de la Commission pour les marchés danois et italiens, l'arrêt confirme l'analyse de la Commission s'agissant des marchés français. Il relève, en particulier, que les parts de marché détenues sur chacun d'entre eux étaient indicatives de dominance et que la disparition de la rivalité entre les deux parties notifiantes aurait supprimé un facteur essentiel de concurrence, de sorte que l'analyse économique de la Commission ne pouvait être tenue pour insuffisante (points 416-419).

### *Considérations procédurales*

Sur le plan de la procédure, l'arrêt confirme la légalité de l'enquête conduite par la Commission, tout en annulant la décision pour violation des droits de la défense en raison du caractère insuffisamment clair et précis de la communication des griefs.

### *Impératif de célérité et demandes de renseignements*

Durant le cours de la seconde phase, la Commission avait suspendu le délai de quatre mois en raison du défaut de réponse à certaines questions posées dans le cadre d'une décision de demande de renseignements. Tenant compte de l'impératif de célérité qui caractérise l'économie générale du Règlement n° 4064/89, le Tribunal a jugé que le délai de 12 jours fixé par Commission aux parties pour répondre à sa demande de renseignements au titre de l'article 11, paragraphe 5, de ce Règlement était raisonnable, nonobstant le grand nombre de questions posées (322) notamment pour une entreprise de la taille de Schneider. Le Tribunal a également souligné qu'une décision de demandes de renseignements a automatiquement pour effet de suspendre le délai de quatre mois à partir de la date à laquelle le défaut de fournir les informations nécessaires a été constaté jusqu'à la date à laquelle il est mis fin à cette défaillance (points 94-113).

### *Droits de la défense*

En revanche, en ce qui concerne les marchés sectoriels français, le Tribunal a jugé que la Commission avait méconnu les droits de la défense de Schneider au motif que la communication des griefs n'avait pas permis à celle-ci de mesurer dans toute leur ampleur les problèmes de concurrence identifiés par la Commission. Selon le Tribunal, il ne ressortait pas avec suffisamment de clarté et de

précision de la communication des griefs que le renforcement de la position de Schneider face aux distributeurs découlait non seulement du chevauchement pur et simple des parts de marché mais aussi de l'adossement de Schneider à la position prépondérante de Legrand sur d'autres marchés, lui permettant ainsi d'avoir un accès privilégié à la distribution.

Le Tribunal a estimé que, du fait de cette violation, la Décision aurait pu être différente à deux égards. En premier lieu, la Commission aurait pu revenir sur sa position si Schneider avait pu présenter utilement ses observations sur ce grief aussi bien dans sa réponse à la communication des griefs qu'au cours de l'audition (point 457). En second lieu, Schneider a pu être indirectement dépossédée de la possibilité d'obtenir un agrément que la Commission aurait pu donner si Schneider avait eu l'opportunité de présenter en temps opportun des propositions de cessions d'actifs d'une ampleur suffisante pour permettre de résoudre les problèmes de concurrence identifiés par la Commission sur les marchés français (point 460).

Au regard de l'ensemble de ces éléments, le Tribunal a annulé la décision d'incompatibilité en précisant que, dans l'hypothèse d'une reprise de l'examen de la compatibilité de l'opération, les motifs de son arrêt impliquaient notamment que Schneider puisse faire utilement valoir sa défense pour les marchés sectoriels français et, le cas échéant, proposer des mesures correctives adéquates.

A la lumière de l'arrêt, la Commission a procédé au réexamen de l'opération et, après avoir précisé les griefs reprochés à Schneider et examiné les propositions d'engagements qui lui étaient soumises, a décidé d'ouvrir la seconde phase en raison des doutes sérieux qui subsistaient quant à la compatibilité de l'opération avec le marché commun. Toutefois, aucune décision finale n'a été adoptée en raison de la décision de Schneider de vendre Legrand au consortium KKR Wendel et du retrait consécutif de la notification.

### **CFI Judgment: Tetra Laval vs. Commission**

On 25 October 2002, the Court of First Instance (CFI) delivered its ruling in case T-5/02, Tetra Laval v Commission, and annulled the Commission's Decision of 30 October 2001 declaring as incompatible with the common market the merger between Tetra Laval, a Swiss-based packaging company mainly active in carton packaging, with Sidel, a French packaging company mainly active in plastic PET packaging equipment.

### ***The Commission's prohibition decision of 30 October 2001***

The Commission's decision focused mainly on the likely anti-competitive effects of the merger. The Commission concluded that the two companies were active in distinct product markets, carton packaging and PET packaging equipment respectively which were, however, closely neighbouring markets PET being a technical substitute for the so-called sensitive products that traditionally have been packaged in carton (liquid dairy products, juices, fruit-flavoured still drinks, and tea/coffee drinks) and PET being expected to grow significantly in those segments in the near future in rivalry to carton. The merger would create a market structure allowing the merged entity to leverage its dominant position in carton in order to turn its leading position in PET packaging equipment into a dominant one. The merger would also strengthen Tetra's existing dominance in carton by eliminating the actual and potential competition represented by Sidel as the leading company in a neighbouring, rival market. The Commission rejected remedies offered by Tetra consisting mainly of promises not to engage in abusive practices, to hold Sidel as a separate company and to offer a licence for Sidel's SBM machinery to an independent third party. The Commission found that the remedies were unviable, impossible to monitor and insufficient to address the serious anti-competitive effects of the merger.

### ***The CFI judgment of 25 October 2002***

The CFI was asked to annul the Commission's Decision on the basis of procedural and substantive arguments. Regarding procedure, the applicant claimed that it had been unlawfully denied access to the file in respect of an expert report and the responses to a market survey on its offer of commitments. On substance, Tetra claimed that the Commission had not shown that the merged would lead to the creation or strengthening of a dominant position as leveraging was not possible, foreclosure could not take place and elimination of potential competition would not change Tetra's incentives to innovate and lower prices in the carton market.

The Court dismissed the applicant's procedural arguments. It found that the applicant had sufficient access to the expert report and had been able to understand and to comment on this report. As regards the market test of the commitments, the Court found that the Commission was entitled to provide access in the form of summaries in order to protect the identity of certain respondents, who



feared retaliation. The Court also dismissed claims made by Tetra that the questionnaires were inaccurate or misleading and concluded that it was not apparent that respondents were misled or confused and that the rights of defence were therefore not infringed by the use of summaries.

As regards substance, the Court confirmed that the Commission was entitled to assess the possible anti-competitive conglomerate effects of the merger, even though, in the Court's view, mergers between undertakings active on distinct markets do not usually give rise to competition concerns (point 150). The Court observed that, in certain circumstances, the means and capacities brought together by a conglomerate merger may immediately create conditions allowing the merged entity to leverage its way so as to acquire, in the relatively near future, a dominant position on a neighbouring market (point 151). Indeed, the Court acknowledged that, in this case, the Commission showed, on the basis of well established and objective evidence that the two markets in question were closely related and that the merged entity would have the ability to engage in leveraging practices (point 199).

### *Leveraging*

However, noting that, while the Commission enjoys a certain margin of discretion, the lapse of time before the emergence of the anticipated dominant position requires the Commission's analysis of the future position to be 'particularly plausible' (point 162), the Court held that, in the circumstances of the case, the merged entity would not be likely to engage in leveraging practices with significant, anti-competitive, foreclosure, effects.

The Court based its reasoning on mainly three elements:

(i) First, the Commission should have considered the extent to which the incentives of the merged entity to leverage would be reduced, or even eliminated, owing to the illegality of the conduct in question, the likelihood of its detection, action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue. (point 159) Furthermore, the Commission should have taken into account the behavioural commitments offered by the applicant in assessing the likelihood of the merged entity engaging in unlawful leveraging activity (point 161). In the absence of such an assessment, the Court based its analysis of leveraging exclusively on conduct "which would, at least probably, not be illegal" (point 162).

(ii) Second, the Court disagreed with the Commission on the growth prospects of PET claimed in the Decision in respect of milk and fruit juice were not based on 'convincing' evidence (points 203 to 214);

(iii) Third, the CFI held that, price discrimination by end use shown by the Commission to exist in the SBM machine market, could not be relied upon given that such a practice would be illegal in the future for a dominant merged entity; in addition, the CFI thought that the Decision did not provide sufficient evidence on technical differences between SBM machines split by end use in order to justify the definition of sub-markets among SBM machines with reference to their end-use (point 269) and that there was no distinct market for SBM machines for sensitive products.

In addition, the CFI thought that the Commission underestimated the importance of the merged entity's competitors on the carton and the PET side and the interaction of PET and carton with other packaging materials such as glass, cans and HDPE where the merged entity would not be present or would have a modest position.

On this basis, the Court thus found that the Commission committed a manifest error of assessment in concluding that a dominant position would be created on PET equipment markets, and particularly on those for low- and high-capacity SBMs (point 308).

### *Reduction of potential competition in the carton market*

Again, the Court acknowledged that the Commission was entitled to examine anti-competitive effects, based on the significance for the carton markets of a reduction of potential competition from the neighbouring PET equipment markets (point 323). However, the Court held, inter alia, that Tetra's behaviour as regards pricing and innovation in the carton market would not be altered after the merger as there was a sufficient level of competition ensuring that Tetra would have to continue to fight and innovate. Therefore, the Court concluded that it had not been shown that the merged entity's position would be strengthened vis-à-vis its competitors on the carton markets.

### *Comment*

The case was dealt with under the CFI's expedited procedure and the CFI's ruling led, for the first time in EU merger proceedings, to the companies being allowed to proceed with the implementation of their merger following their successful court

action against the Commission. The Commission had to re-assess the case following the CFI's judgment and cleared the merger, under conditions, on 13 January 2003. The Commission has, however, almost simultaneously, appealed against the CFI's judgment.

In deciding to lodge the appeal, the Commission considered that the CFI judgment in Case T-5/02 raises problems of legal principle concerning several aspects of the work of the Commission in the field of merger control. In particular, the CFI's judgment raises issues relating to the interaction between the Merger Regulation and Article 82, the role of behavioural commitments in merger control and the appropriate standard of proof and requisite evidence that the Commission has to produce in merger prohibition cases. Given the importance of these issues, the Commission considered that a review of the judgment by the ECJ was necessary and desirable.

### **CFI Judgement: Lagardère SCA, Canal+ SA vs. Commission**

The main interest of this judgment lies in its impact on the interpretation of the Merger Regulation with regard to ancillary restraints. The Court held that contractual clauses which constitute restrictions directly related and necessary to the realisation of an operation of concentration (ancillary restrictions) and which have been approved by the Commission, fall outside the application of Regulation 17 and the other sectorial regulations listed in Article 22(1) ECMR. In consequence the assessment of these clauses must by necessity be undertaken in the framework of the procedure foreseen by the ECMR and the Commission is obliged to carry out such an assessment where the merging companies so request.

In June 2002 the Commission had cleared under Article 6(1)b a concentration including the notified ancillary restrictions. Subsequently in July 2002 the Commission had informed the parties that 'following an error of manipulation the text of the June decision which had been notified was incorrect. Consequently the Commission has decided to make textual modifications on it.' Further in a meeting with the parties the Commission had then explained that a correction of the errors was necessary in the interest of coherence with a Commission decision of 3.3.1999 under Article 81 EC (case COMP/36.237 TPS).

By its decision of 10.7.2000, the Commission had thus modified its assessment of the restrictions notified by the parties to the concentration as ancillary, contained in its decision of 22.6.2000. This

modified assessment was less favourable to the interests of the parties. Some restrictions which had been approved by the June decision for the entire notified duration or parts of it, were no longer approved by the July decision or only for a shorter period. Insofar as these restrictions were not covered by the Commission's clearance decision in the merger case, they could fall under the application of Regulation 17 and could be disputed in national court proceedings in view of an examination of a possible infringement of Community and national competition law. The Court therefore held that the July decision produced obligatory legal effects of a nature such as to affect the interests of the applicants by modifying in a serious way their legal situation.

The Court further held that Article 6(1)b 2<sup>nd</sup> indent of the ECMR not only excluded the application of Regulation 17 to the assessment of ancillary restrictions, but also conferred exclusive competence to take a binding act in this respect on the Commission. It resulted clearly from Article 21(1) ECMR that the Commission's exclusive competence regarding the control of concentrations is not limited to compatibility decisions only, as defined in Article 3 ECMR, but extends to all acts with binding effect which the Commission is called upon to take in application of the ECMR. By inserting Article 6(1)b into the ECMR the Community legislator had created a specific legal basis for the examination of ancillary restrictions which are notified as such in the context of a concentration.

In consequence the Court annulled the Commission decision of 10 July 2000 which attempted to retroactively modify the original assessment on the ancillary restrictions.

Following this judgment the Commission has decided to propose a clarification of the ECMR within the framework of its comprehensive reforms adopted on 11 December 2002. The new draft would stipulate clearly that the Commission is not required to pronounce on ancillary restrictions when it evaluates a concentration. In its reasoning (see paragraph 108 of the judgment) the Court itself seems to invite the Community legislator to make such a clarification.

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

*Summaries of cases declared compatible with the common market under Article 8(2) of the ECMR with commitments*

### **Energie Baden-Württemberg / ENI / GVS**

On 17 December 2002 the European Commission authorised, subject to conditions, the joint acquisition of German regional gas wholesaler Gas Versorgung Süddeutschland (GVS) by German electricity firm Energie Baden-Württemberg AG (EnBW) and Italian gas and petroleum firm ENI S.p.A. The operation, as initially notified to the Commission, would have strengthened GVS's dominant position on the wholesale gas market in Baden-Württemberg, in South-West Germany, namely by securing GVS's hold on EnBW's local distributors. In order to address these competition concerns, the parties undertook to grant early termination rights to all local gas distributors which had entered into long term supply contracts with either GVS or EnBW's existing subsidiaries Neckarwerke Stuttgart AG (NWS) and EnBW Gas GmbH.

EnBW and GVS are both based in Baden-Württemberg in South-West Germany. EnBW is active in the fields of electricity generation, transmission, distribution, supply and trading as well as of gas and district heating supply. GVS operates a gas transport system in the region whereby it supplies gas to local distribution companies and to a few industrial customers.

ENI is active in the exploration and production of oil and natural gas world-wide and holds shares in transportation companies operating trans-national pipelines for transmission of natural gas, *inter alia* in Germany.

The Commission received a notification on 14 August 2002 according to which EnBW and ENI would both acquire 50% of GVS, consequently taking joint control of the company from the State of Baden Württemberg and several local distribution companies. On 16 September 2002, the Commission started an in-depth investigation to assess the impact of the proposed operation.

The investigation showed that GVS controls approximately 90% of the market for regional

wholesale gas supply in Baden-Württemberg. Ruhrgas and Wingas supply the remaining 10%. This strong position is expected to be challenged in the near future as Wingas, which operates its own gas pipeline system in Germany, will complete construction of a new pipeline before the end of 2004 which will cross Baden-Württemberg from East to West giving it access to the high consumption Stuttgart area.

The Commission's decision focussed on relaxing GVS's strong grip on customers in the region with which it has concluded long-term wholesale supply contracts.

The proposed concentration would have strengthened GVS's dominant position in Baden-Württemberg due to EnBW's activities on the downstream market. EnBW holds shares in numerous local gas distributors, which in turn are supplied by GVS and represent a substantial part of GVS' customers. Without the present operation EnBW would have had a strong incentive to profit from developments in the coming years, such as the completion of the Wingas long-distance gas pipeline. As a shareholder of GVS, however, EnBW will be more interested in GVS's economic success and, therefore, is likely to use its influence to secure demand for GVS.

In order to address the competition concerns identified by the Commission, EnBW and ENI submitted, at an early stage of the in-depth investigation, to grant early termination rights for all long-term supply contracts concluded between, on the one hand, local gas distributors and, on the other hand, GVS or EnBW's subsidiaries NWS and EnBW Gas. This right can be exercised once, on two possible dates, on giving six-months notice.

The proposed commitments will potentially free up substantial demand. In the event that NWS and EnBW Gas were not to switch supplier, since they are controlled by EnBW, the commitments would still allow its customers, i.e. local distribution companies, to switch to other gas wholesale suppliers. The timing of the commitments is intended to match the arrival of increased competition in Baden-Württemberg through completion of the Wingas pipeline.

## *B — Summaries of decisions taken under Article 6*

*Summaries of decisions taken under Article 6(1)(b) and 6(2) where undertakings have been given by the firms involved*

### **RAG/Degussa**

In November the Commission granted conditional approval to the acquisition of the German specialty chemicals company Degussa AG by the German mining and technology group RAG. The transaction had initially raised competition concerns in the construction materials sector, more specifically regarding certain products used in the production of concrete to improve its performance. But RAG offered to divest its production capacity for Naphtalene Sulfonate in the EU, an important concrete admixture input product. This divestment would remove the Commission's concerns.

RAG Aktiengesellschaft is an international mining and technology group based in Germany. Its business activities comprise coal mining, power generation, environmental technology, chemicals and plastics. Degussa AG is a German-based international company which makes specialty chemicals. Its activities range from food additives to construction chemicals, coatings and specialty polymers. Degussa is currently 64 % owned by the German utility group E.ON.

The Commission's investigation showed that the combination of RAG's and Degussa's activities could have led to the creation of a dominant position in the field of input products for concrete admixtures. These products are designed to influence the viscosity and water content of concrete to make it more workable. In order to remove these competition concerns, RAG offered to divest its Naphtalene Sulfonate (NSF) business in the EU, an important concrete admixture input product, including production plants in Italy, Spain and Germany.

The Commission's market investigation showed that these commitments will eliminate the overlap of RAG's and Degussa's activities and will enable a viable new competitor to be created in order to compensate for the removal of Degussa as an independent supplier.

## *C — Summaries of referral decisions taken under Article 9 of the ECMR*

Article 9 of the Merger Regulation is intended to fine-tune the effects of the turnover- based system of thresholds for establishing jurisdiction. This instrument allows the Commission, if certain conditions are fulfilled, to refer the transaction to the competent competition authority of the Member State in question. If for instance the transaction threatens to create a dominant position restricting competition in distinct markets within a specific Member State the Merger Regulation allows the Commission to refer cases to national authorities in such circumstances if they request a referral. This arrangement allows the best placed authority to deal with the case in line with the subsidiarity principle.

### **Koninklijke BAM NBM/Hollandsche Beton Groep**

The Commission referred the proposed acquisition of the Dutch construction company Hollandsche Beton Groep N.V. (HBG) by rival Koninklijke BAM NBM N.V. (BAM) to the Dutch Competition Authority, giving the latter the possibility to take a closer look at the impact of the transaction on competition in the Dutch construction and asphalt markets.

The deal would combine two of the six largest construction companies in the Netherlands. BAM is one of the largest construction companies in the Benelux, active in developing, building and maintenance of housing and industrial buildings and transport infrastructure and after the deal it would be one of the 10 largest construction companies in Europe.

HBG has activities in all aspects of building, dredging and consultancy & engineering in many countries within and outside Europe, including the United States of America. HBG is currently a subsidiary of the Spanish Grupo Dragados S.A. (Dragados), which intends to sell all of its shareholding in HBG to BAM. BAM notified this transaction to the Commission under the European Merger Regulation 4064/89.

On 12 August 2002 the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit, or NMa*) requested the Commission to refer the examination of those aspects of the deal relating to the Netherlands in application of Article 9 of the Merger Regulation. According to the NMa the proposed concentration threatened to create or

strengthen a dominant position on a number of markets in the building sector and on a number of markets for the production of asphalt in the Netherlands.

The Commission's findings in its first-phase investigation revealed that such a threat could indeed exist as regards a possible market for large building projects, in which BAM and HBG were particularly strong, as well as on several regional asphalt markets.

The Commission considered that the NMa was best placed to assess the competitive impact of the case on the Dutch building and asphalt markets. The Dutch Competition Authority had recently investigated these sectors which meant that it had considerable and up-to-date knowledge of the sector. The Commission's investigation revealed that, apart from the aspects of the transaction referred to the Dutch Competition Authority, the notified operation did not give rise to any competition concerns. This was in particular true for the Belgian construction market, where both companies were also active.

### Leroy Merlin/Brico

On 13 December 2002 the Commission decided to refer certain aspects of Leroy Merlin's acquisition of Brico DIY stores to the competition authorities in France, Spain and Portugal. The Commission found that the deal did not raise competition concerns in the rest of the European Union and therefore cleared the transaction as regards these aspects. At the same time it decided to acquiesce in the request of the three national authorities concerned to examine the case on the grounds that these authorities were best placed to assess its impact on the distribution of DIY items in their own countries. This referral decision was the first occasion on which the Commission made a referral pursuant to Art. 9 of the ECMR to as many as three Member States. The referral decision was based on the local nature of the competition problems raised by the transaction.

On 30 October 2002 the Commission had received a notification of Leroy Merlin's plan to acquire control of Brico France, Brico Spain and Brico Portugal. Leroy Merlin, a French-based company controlled by the Mulliez family, which likewise controls Auchan, is also present in France and Spain, and is soon to be present in Portugal. Both companies basically operate in the retail sale of DIY, decoration and home improvement items.

The Commission's investigation showed that the acquisition of Brico by Leroy Merlin would have an competitive impact on the French, Spanish and

Portuguese markets only. Brico is known in France under the name 'Obi' and in Spain and Portugal, 'Aki'. In *France* the new group would be the market leader in the sale of DIY products by large specialised stores, ahead of Castorama. In *Spain* Brico and Leroy Merlin together account for almost all sales of DIY products by large specialised stores. Leroy Merlin does not yet operate in Portugal but it has received authorisation to open stores from the relevant public authorities. Brico is the leading distributor of DIY, decoration and gardening products in the country.

The information obtained by the Commission during the investigation pointed to the strong positions held by Leroy Merlin and Brico on certain local markets in these three countries. In accordance with its usual practice in such cases, it therefore agreed to refer the examination of the case as regards these markets to the French, Spanish and Portuguese authorities in accordance with the request of these authorities.

The Commission had also looked at the impact of the deal on the upstream procurement markets, but found that the new group's position on these markets would not lead to the creation or strengthening of a dominant position.

### Electrabel/ IEH

On 23 December 2002 the Commission decided to accede to the request of the Belgian Economic Minister to refer, pursuant to Art. 9 of the ECMR, a transaction involving an agreement between l'Intercommunale d'Electricité du Hainaut (IEH) and Electrabel for the supply of electricity to eligible customers.

The regulations on liberalisation of the Belgian electricity market inter alia prohibit commune associations, such as IEH, from acting as supplier of electricity to eligible customers (in cases where they are also a distributor of electricity). These regulations also require the commune associations to designate a default supplier i.e. a supplier who will provide electricity to those eligible customers who have not specifically chosen a particular supplier. The commune associations subsequently entered into an agreement with Electrabel which provides that they would desist from the activity of supplying electricity and would be replaced by Electrabel. In return the commune associations would receive a financial interest in Electrabel.

Several of these transactions fell within the jurisdiction of the Belgian competition authorities who had, at the time of the referral, already concluded in relation to three of them that they would result in a strengthening of the dominant position of Elec-

trabel on the market for the supply of electricity to eligible customers. They have in consequence prohibited these transactions.

The transaction between Electrabel and IEH fell within the jurisdiction of the Commission because of the size of IEH. In order to ensure the coherence of the decisions with regard to these similar transactions the Belgian authorities requested the referral of the IEH transaction to them as provided for in the ECMR. The Commission, having found that the transaction threatened to re-enforce the

dominant position of Electrabel for the supply of electricity to eligible customers and that this market was national in scope, it decided to accede to the request of the Belgian authorities. The Belgian authorities will now proceed to deal with the case.

Electrabel is a subsidiary of Tractebel which belongs to the Suez group. Electrabel is principally active on the markets for electricity, gas and associated services. In 2001 more than 80% of its non-trading turnover derived from Belgium.

## Le système fiscal des Açores (Portugal)

*Carlos TENREIRO, Direction générale de la concurrence, unité G-1*

Au vu de la Constitution de la République portugaise, les régions des Açores et de Madère sont des régions autonomes disposant notamment d'une autonomie administrative et financière. Par loi n° 13/98 du 24.2.1998 relative aux finances des régions autonomes, l'Etat portugais a défini de façon précise les conditions d'une telle autonomie, en établissant, en particulier, que l'impôt sur les revenus des personnes singulières (IRS) et des personnes collectives (IRC) constitue une ressource des régions dans lesquelles ils sont dus.

En application de ses compétences en la matière, et par décret législatif régional n° 2/99/A du 20.1.1999, la région des Açores a arrêté les modalités d'adaptation du système fiscal national aux spécificités régionales. Ce décret législatif produit ses effets depuis le 1.1.1999, et comporte un volet relatif à des réductions des taux d'impôt sur les revenus qui s'appliquent automatiquement à tous les opérateurs économiques (personnes physiques et morales), et viseraient notamment, selon les autorités portugaises, à permettre aux entreprises installées dans la région de surmonter les handicaps structurels qui découlent de leur localisation dans une région insulaire et ultrapériphérique. A ce titre, tous les assujettis à l'impôt sur les revenus redevables dans la région des Açores bénéficient de réductions des taux à hauteur de 20% pour le IRS (15% pendant l'année 1999) et de 30% pour le IRC.

En avril 2002, la Commission a décidé d'ouvrir la procédure d'examen prévue à l'article 88§2 du Traité à l'encontre des dites réductions des taux d'impôt, en estimant, à titre provisoire, qu'elles devraient être considérées comme des aides au fonctionnement (non notifiées). Or, les lignes directrices concernant les aides d'Etat à finalité régionale consacrent le principe général de l'interdiction des aides au fonctionnement, tout en précisant que, dans les régions ultrapériphériques bénéficiant des dérogations des articles 87§3.a) et c) «peuvent être autorisées des aides qui ne sont pas à la fois dégressives et limitées dans le temps, dans la mesure où elles contribuent à compenser les coûts additionnels de l'exercice de l'activité économique inhérents aux facteurs identifiés à l'article 299, paragraphe 2, du traité, dont la permanence et la combinaison nuisent gravement au développement de ces régions (éloignement, insularité, faible superficie, relief et climat diffi-

ciles, dépendance économique vis-à-vis d'un petit nombre de produits)». Compte tenu des termes de ces lignes directrices (selon lesquelles «il incombe à l'Etat membre de mesurer l'importance des coûts additionnels et de démontrer le lien qui existe avec les facteurs de l'article 299, paragraphe 2», «les aides envisagées devront être justifiées en fonction de leur contribution au développement régional et de leur nature» et «leur niveau devra être proportionnel aux coûts additionnels qu'elles visent à compenser»), la Commission a alors considéré qu'il ne lui était pas possible de vérifier si les aides se justifiaient en fonction de leur contribution au développement régional et de leur nature, et si leur niveau était proportionnel aux coûts additionnels qu'elles viseraient à compenser, en particulier en ce qui concerne des activités mobiles pour lesquelles l'existence de handicaps régionaux réels n'entre que très peu en ligne de compte lorsqu'il s'agit de décider de leur localisation.

Tant les autorités portugaises comme le seul l'intervenant dans cette procédure d'examen (le gouvernement régional des îles Åland, en Finlande) ont considéré que la mesure en question ne serait pas sélective, c'est-à-dire qu'elle ne favoriserait pas «certaines entreprises ou certaines productions». A cet égard, ils ont soutenu en particulier que l'on doit distinguer entre les cas où des avantages fiscaux dont la portée est limitée à une partie du territoire national sont octroyés par l'Etat, et ceux où les mêmes avantages sont conférés par une autorité territoriale infraétatique pour la portion de territoire relevant de sa compétence. Les premiers seraient sélectifs car limités dans leur portée à une partie des entreprises soumises à la juridiction de l'Etat, tandis que les deuxièmes seraient des mesures générales car applicables à toutes les entreprises soumises à la juridiction de l'autorité régionale.

Après avoir examiné les observations susmentionnées, la Commission a souligné en particulier que l'élément de sélectivité dans la notion d'aide se fonde sur une comparaison entre le traitement avantageux accordé à certaines entreprises et celui réservé à d'autres entreprises qui se trouvent dans le même cadre de référence. Or, en principe, il résulte à la fois de l'économie du Traité, qui vise les aides octroyées par les Etats ou au moyen de ressources de l'Etat, et du rôle fondamental que jouent, dans la définition de l'environnement politique et économique où les entreprises opèrent, les

autorités centrales des Etats membres (par les mesures qu'elles prennent, par les services qu'elles rendent et, le cas échéant, par les transferts financiers qu'elles opèrent), que le contexte dans lequel cette comparaison doit être effectuée est l'espace économique de l'Etat membre.

Ceci étant, la thèse selon laquelle des avantages ayant une portée territoriale limitée deviendraient des mesures générales dans la région concernée du seul fait qu'elles n'ont pas été instituées par l'autorité centrale, mais par l'autorité régionale et qu'elles s'appliquent dans tout le territoire soumis à sa juridiction semble inconciliable avec la notion d'aide. En effet, une distinction basée uniquement sur le pouvoir qui décide de la mesure enlèverait tout effet utile à l'article 87 du Traité, qui vise à appréhender les mesures en question exclusivement en fonction de leurs effets sur la concurrence et sur les échanges communautaires. C'est ainsi que, selon les conclusions de l'Avocat Général Saggio dans les affaires jointes C-400/97, C-401/97 et C-402/97, «le fait que les mesures en cause sont prises par des collectivités territoriales dotées d'une compétence exclusive en vertu du droit national est en réalité (...) une circonstance purement formelle, qui ne suffit pas à justifier le traitement préférentiel réservé aux entreprises qui relèvent du champ d'application des 'normes forales'. Si tel n'était pas le cas, l'Etat pourrait aisément éviter l'application, dans une partie de son territoire, des dispositions communautaires en matière d'aides d'Etat, tout simplement en apportant des modifications à la répartition interne des compétences dans certains domaines, de manière à invoquer ainsi, pour ce territoire déterminé, la nature 'générale' de la mesure en question».

Dans ce contexte, la Commission a considéré que l'utilisation d'un critère purement institutionnel pour différencier les «aides» des «mesures générales» mènerait inévitablement à des différences de traitement dans l'application de la discipline des aides aux Etats membres selon que ceux-ci ont adopté un modèle centralisé ou décentralisé de distribution des compétences fiscales (ou autres, par exemple en matière de sécurité sociale), tout en rappelant que l'autonomie fiscale de l'autorité régionale octroyant les avantages n'a jamais été considérée comme un élément de nature à exclure la qualification d'aides. Au contraire, dans la décision n° 93/337 concernant les aides fiscales à l'investissement au Pays basque la reconnaissance du fait que «les institutions compétentes des trois provinces basques peuvent, sous certaines conditions, maintenir, établir et réglementer le régime fiscal à l'intérieur de leur territoire», n'a pas empêché la Commission de conclure que les bénéfices fiscaux

institués par les trois provinces basques relevaient des dispositions de l'article 87§1. Or, les réductions des taux d'impôt en vigueur aux Açores ne peuvent pas être considérées comme un cas d'application d'un mécanisme permettant à l'ensemble des collectivités locales d'un certain niveau (régions, communes ou autres) d'instituer et de percevoir des impôts locaux, n'ayant aucun rapport avec la fiscalité nationale, mais configurant plutôt une réduction applicable uniquement aux Açores du taux d'impôt fixé par la législation nationale et applicable dans la partie continentale du Portugal. Dans ces conditions, la qualification d'aide de ces mesures ne remet pas en cause l'autonomie fiscale des régions telle qu'établie par la Constitution portugaise, et vise seulement à assurer que, lorsque ces régions exercent leur autonomie en réduisant le niveau d'un impôt perçu sur une base nationale, les bénéfices fiscaux ainsi octroyés respectent la discipline communautaire des aides régionales et des autres encadrements applicables sur un pied d'égalité dans tout le territoire communautaire, sans préjuger de la compatibilité de ces avantages avec le marché commun.

La Commission a ainsi considéré que les dites réductions des taux d'impôt sur les revenus concernent des aides d'Etat qui auraient un caractère continu et viseraient à surmonter les handicaps structurels permanents qui découlent du caractère insulaire de la région des Açores et de son éloignement des centres économiques continentaux en réduisant les dépenses courantes des entreprises. Dans la mesure où elles constituent des aides au fonctionnement octroyées dans une région ultrapériphérique qui est, jusqu'à fin 2006, entièrement éligible au sens de l'article 87§3.a) du Traité, mais dont la durée n'est pas limitée dans le temps et dont la dégressivité n'est pas assurée, de telles aides ne peuvent être autorisées que si elles sont destinées à réduire les coûts additionnels de l'exercice de l'activité économique inhérents aux handicaps identifiés à l'article 299§2 du Traité, dans le respect des conditions établies par les lignes directrices concernant les aides d'Etat à finalité régionale.

Dès lors, la Commission a décidé, en décembre 2002, de clôturer la procédure d'examen par une décision finale conditionnelle qui exclut les entreprises exerçant des activités financières ou du type «services intra-groupe» (centres de coordination, de trésorerie ou de distribution). Compte tenu en particulier du niveau de développement socio-économique de la région (le PIB par habitant y étant, en 1998-2000, 52,6% de la moyenne communautaire), et pour ce qui est des entreprises



actives en dehors du secteur financier, la Commission estime en effet que:

- en raison de la difficulté d'estimer de façon objective l'incidence de chacun des facteurs mentionnés à l'article 299§2 du Traité sur les coûts additionnels de l'activité économique, et dans la mesure où les réductions des taux d'impôt susvisées ne s'appliquent pas en faveur d'un ou plusieurs secteurs particuliers mais s'adressent plutôt à l'ensemble de l'économie régionale, il semblerait, en principe, acceptable de procéder, tel que l'ont fait les autorités portugaises, à leur évaluation en termes abstraits;
- une réduction de 30% du taux de IRC permettrait simultanément de réduire le handicap des entreprises localisées aux Açores, tel que mesuré par leur niveau de profits, en 9,3 points de pourcentage (de 33,6% à 24,3%). Dans la mesure où la compensation des surcoûts liés à la nature ultrapériphérique de la région serait donc limitée à environ 27,7% de leur valeur absolue, les aides envisagées seraient, ainsi, justifiées en fonction de leur contribution au développement régional;
- compte tenu de la valeur moyenne du montant de IRC acquitté par les entreprises redevables dans la région au long des cinq dernières années (23500 euros, selon les autorités portugaises), le niveau des avantages associés à une telle réduction des taux d'impôt pourrait être considéré comme proportionnel aux coûts additionnels qu'ils visent à compenser.

En revanche, et dans la mesure où les réductions des taux d'impôt sur les revenus s'appliquent à des entreprises actives dans le secteur financier (intermédiation financière, assurance, et auxiliaires financiers et d'assurance) ou en faveur d'activités du type «services intra-groupe» (activités dont le fondement économique est de rendre des services à des entreprises appartenant à un même groupe, tels des centres de coordination, de trésorerie ou de distribution), la Commission constate qu'elles ne sont pas justifiées en fonction de leur contribution au développement régional, et que leur niveau n'est pas proportionnel aux handicaps qu'elles viseraient à pallier. En particulier, et dans la mesure où des éléments quantifiés permettant de mesurer objectivement le niveau des coûts additionnels auxquels seraient confrontées les sociétés financières redevables dans la région des Açores ne lui ont pas été fournis, la Commission n'a pas pu considérer que de telles activités participent de manière suffisante au développement régional ni, partant, que l'application de dites réductions des taux d'impôt est compatible avec les dispositions pertinentes des lignes directrices relatives aux aides d'Etat à finalité régionale. Etant donné que ces aides ont été illégalement mises en vigueur et qu'aucun principe de droit communautaire ne s'y oppose, les avantages fiscaux dont auraient déjà bénéficié des entreprises actives dans le secteur financier, ainsi que celles exerçant des activités du type «services intra-groupe» (et relatifs aux années 1999, 2000 et 2001), sont à récupérer par les autorités portugaises.

## Le nouveau régime d'aides de la Zone franche de Madère (Portugal)

*Carlos TENREIRO, Direction générale de la concurrence, unité G-1*

La Commission a autorisé en 1987, au titre de la dérogation de l'ex-article 92§3.a) du Traité CE et pour une période initiale de trois ans, un régime d'aides financières et fiscales dans la Zone franche de Madère, composée par une zone franche industrielle, un centre de services financiers, un centre de services internationaux et un registre maritime international. La prolongation de ce régime a ensuite été autorisée à deux reprises, pour des périodes additionnelles de, respectivement, trois et six ans.

Suite à la venue à échéance du régime précédemment autorisé par la Commission, et compte tenu de sa suspension, par les autorités portugaises, pendant les années 2001 et 2002, la Commission a autorisé, en décembre 2002, un nouveau régime d'aides fiscales en faveur de la zone franche industrielle et du centre de services internationaux de la Zone franche de Madère pendant la période 2003-2006. Dans les termes de ce régime, les nouvelles sociétés qui seront licenciées pour y exercer leurs activités entre le 1.1.2003 et le 31.12.2006 pourront bénéficier notamment d'un taux réduit d'impôt sur les revenus de 1% en 2003-2004, 2% en 2005-2006 et 3% en 2007-2011.

L'accès au nouveau régime de la Zone franche est limité aux sociétés qui développent une activité réellement nouvelle, entraînant la création de nouveaux emplois à titre permanent. Les bénéfices fiscaux dont ces entreprises pourront bénéficier seront cependant limités en fonction du nombre d'emplois créés, moyennant un plafonnement de la base d'imposition y relative à 1,5, 2, 12, 20, 30 ou 125 millions d'euros (selon que cette création sera, respectivement, inférieure à 3, entre 3 et 5, entre 6 et 30, entre 31 et 50, entre 51 et 100, ou de plus de 100 nouveaux emplois). En outre, l'accès au centre de services internationaux de la Zone franche est limité aux activités énumérées dans une liste qui comprend les services fournis à l'agriculture, sylviculture et pêche, le commerce automobile et de gros, les transports et communications, l'immobilier, location et services aux entreprises, l'enseignement supérieur et formation permanente, et les activités récréatives, culturelles et sportives et les services personnels, tout en excluant explicitement toutes les activités d'intermédiation financière, d'assurance, et d'auxiliaires financiers et d'assurance, ainsi que toutes les activités du type

«services intra-groupe» (centres de coordination, de trésorerie et de distribution).

Compte tenu du fait qu'il s'agit d'aides qui auront un caractère continu et visent à surmonter les handicaps structurels permanents qui découlent du caractère insulaire de la région de Madère et de son éloignement des centres économiques continentaux, la Commission a considéré que les aides en question constituent des aides au fonctionnement qui, même si elles sont octroyées dans une région ultrapériphérique qui est, jusqu'à fin 2006, entièrement éligible à la dérogation prévue à l'article 87§3.a) du Traité, ne peuvent être autorisées que dans le respect des conditions établies à cet égard par les lignes directrices concernant les aides d'Etat à finalité régionale.

Or, bien que consacrant le principe général de l'interdiction des aides au fonctionnement, les lignes directrices admettent des exceptions dans les régions bénéficiant de la dérogation de l'article 87§3.a), «à condition qu'elles soient justifiées en fonction de leur contribution au développement régional, de leur nature et que leur niveau soit proportionnel aux handicaps qu'elles visent à pallier». En outre, elles précisent que, dans les régions ultrapériphériques bénéficiant des dérogations des articles 87§3.a) et c) «peuvent être autorisées des aides qui ne sont pas à la fois dégressives et limitées dans le temps, dans la mesure où elles contribuent à compenser les coûts additionnels de l'exercice de l'activité économique inhérents aux facteurs identifiés à l'article 299, paragraphe 2, du traité, dont la permanence et la combinaison nuisent gravement au développement de ces régions (éloignement, insularité, faible superficie, relief et climat difficiles, dépendance économique vis-à-vis d'un petit nombre de produits)». Dans les termes de ces mêmes lignes directrices «il incombe à l'Etat membre de mesurer l'importance des coûts additionnels et de démontrer le lien qui existe avec les facteurs de l'article 299, paragraphe 2». Finalement, «les aides envisagées devront être justifiées en fonction de leur contribution au développement régional et de leur nature» et «leur niveau devra être proportionnel aux coûts additionnels qu'elles visent à compenser».

A cette fin, les autorités portugaises ont remis à la Commission 5 études parmi lesquels figure notamment une monographie du CEPS (*Centre for*

*European Policy Studies*) qui vise à procéder à une recension des handicaps de la région de Madère en vue de démontrer la conformité du régime aux règles applicables en matière d'aides d'État. Dans ce contexte, elles ont fait valoir en particulier que la Zone franche génère annuellement des recettes publiques qui auraient atteint quelques 7 millions d'euros en 1999 (grâce à l'obligation, pour les entreprises qu'y sont agréées de s'acquitter d'une redevance d'installation, ainsi que d'une redevance annuelle de fonctionnement), et aurait déjà contribué significativement à la diversification du tissu productif de Madère (traditionnellement dépendante des activités agricoles et artisanales, tout comme du tourisme, des travaux publics et des transferts financiers), notamment dans la mesure où elle aurait abouti par le passé sur la création de plus de 1000 postes de travail directs et représenterait déjà environ 10% du PIB et 1,4% de l'emploi de la région. Compte tenu des limitations physiques à l'expansion des activités économiques dont dépend actuellement la région, telles que relevées notamment par les conclusions de la dite étude (selon laquelle «*the relevant handicap is to be found in the overall economy, i.e. the fragile growth prospects of the successful sectors and the virtual absence of any alternative economic activity*»), la Zone franche de Madère constituerait, ainsi, le seul gage de développement soutenable de la région.

De même, et selon les autorités portugaises, la proportionnalité des aides aux handicaps qu'elles visent à pallier pourrait être appréciée soit d'un point de vue qualitatif soit d'un point de vue quantitatif:

- la dimension qualitative de la proportionnalité serait assurée par la nature *onshore* du régime, ainsi que par les modifications qui lui sont apportés par rapport aux modalités d'octroi d'aides qui ont été en vigueur par le passé. A cet égard, elles ont souligné en particulier que le centre de services financiers est désormais exclu de son champ d'application, et que les aides seront à la fois dégressives et limitées dans le temps, même si ceci n'est pas automatiquement requis pour les régions ultrapériphériques;
- la dimension quantitative de la proportionnalité serait assurée au vu de l'évolution récente de la fiscalité des entreprises au Portugal (le taux normal de l'impôt est passé de 36% en 1996 à 30% en 2002, et des nouvelles réductions seraient encore envisagées), ainsi que par la mise en relation des pertes de recettes fiscales (estimées, sur base des taux effectifs d'imposition, à quelques 19 millions d'euros par an) et de la contribution directe de la Zone franche au

budget de la région (quelques 7 millions d'euros en 1999), tout comme par sa contribution au PIB et à l'emploi régional.

Dans sa décision, la Commission observe en premier lieu que la région de Madère est une région ultrapériphérique éloignée d'environ 1000 km de la capitale du Portugal, et dont la superficie totale n'atteint pas les 800 km<sup>2</sup>, ce qui, en raison de l'étroitesse des marchés régionaux, limiterait considérablement les possibilités d'obtention d'économies d'échelle qui permettraient aux entreprises régionales d'atteindre les niveaux de compétitivité nécessaires, tout en entraînant des surcoûts importants, notamment en matière d'écoulement de certaines marchandises. De plus, et compte tenu en particulier du faible niveau de développement atteint par la région (le PIB par habitant y était, en 1998-2000, 71,5% de la moyenne communautaire), celle-ci figure effectivement parmi les moins développées à l'intérieur de l'Union européenne.

De même, la Commission observe que, exception faite des entreprises industrielles qui rempliraient des conditions particulières en matière de contribution à la modernisation du tissu économique régionale (pour lesquelles un abattement à la base d'imposition est également prévu), les mêmes avantages fiscaux s'appliqueraient indifféremment à toutes les sociétés admises à la Zone franche de Madère, pour autant que les conditions d'éligibilité au régime soient respectées. En outre, la Commission constate que cette Zone franche est conçue comme une zone spéciale destinée à attirer des activités économiques réelles et à favoriser la création matérielle d'un tissu productif diversifié (d'où les conditions minimales de création d'emplois et d'investissement), et que les aides seront modulées en vue d'établir une certaine proportionnalité entre le montant de l'aide et sa contribution au développement régional.

Ceci étant, et en ce qui concerne le rapport entre la nature des aides fiscales susvisées et leur contribution au développement régional, la Commission observe en particulier que les aides en cause seraient destinées à inciter la localisation dans la Zone franche de Madère de certaines activités qui ne sont à présent que très peu ou pas du tout représentées dans l'économie régionale. En particulier, et dans la mesure où les secteurs de la construction et du tourisme, qui constituent à présent l'axe sur lequel pivote toute l'économie de la région, sont exclus du bénéfice de ce régime, la Commission estime ainsi que les aides en cause sont susceptibles de contribuer à la diversification de l'économie régionale et donc à pallier sa dépendance vis-à-vis d'un petit nombre de produits.

De même, la Commission observe que les services financiers et les activités du type «services intra-groupe» sont exclus du champ d'application du régime, ce qui permet d'atténuer, voire écarter, le risque de montants élevés d'aides comportant des impacts modestes sur le développement régional. Il en va de même en ce qui concerne la modulation des aides et la limitation de leur montant maximal (moyennant le plafonnement de la base d'imposi-

tion) selon le nombre de nouveaux emplois créés. La Commission estime ainsi que les dites aides, dont l'application fera l'objet d'un rapport annuel détaillé qui permettra aux autorités portugaises de prouver et à la Commission de constater leur efficacité réelle, seront octroyées en conformité avec les conditions établies par les lignes directrices concernant les aides d'Etat à finalité régionale en matière d'aides au fonctionnement.

## A scheme of the Land of Saxony in favour of small and medium enterprises: a clarification on the application of the block exemption regulation

*Constanze STROPP, Directorate-General Competition, unit G-1*

On 24 September 2002 the Commission took a final negative decision concerning a scheme of the Land of Saxony as far as the provisions exceed the scope of the Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises <sup>(1)</sup>, which has replaced the Community guidelines on State aid for SMEs (hereinafter referred to ‘SME Exemption Regulation’) <sup>(2)</sup>.

### Factual description

The scheme provided aid ceilings of up to 65% — 80% for external consultancy measures such as ‘coaching of firms’, ‘co-operation’ and ‘design-promotion’ for small enterprises active in the Land of Saxony, which is an assisted area under Article 87(3)(a) EC Treaty. The Commission considered the measures predominantly to fall into the scope of Article 5 of the SME Exemption Regulation, but the maximum aid amount was not limited to the 50% aid ceiling laid down by it.

### Main arguments brought forward by Germany

In its comments Germany referred to recital (4) of the SME Exemption Regulation <sup>(3)</sup> and took the view that even though Article 5 of the SME Exemption Regulation foresees no higher aid ceilings for aid to small enterprises this does not mean that a more favourable treatment of small firms or assisted regions pursuant to Article 87(3)(a) EC Treaty cannot be approved by the Commission — only that higher aid ceilings have to be notified before.

With reference to the wording of recitals (11) and (14) of the SME Exemption Regulation, Germany argued that in assisted areas higher aid ceilings should be set out for small enterprises than for medium-sized firms. <sup>(4)</sup> These ceilings should thus

exceed the maximum foreseen in the SME Exemption Regulation.

### Assessment

The Commission assessed on the basis of Article 87(3)(c) EC Treaty whether or not the additional aid amount exceeding the provisions of the SME Exemption Regulation should be approved with regard to recital (4) of the SME Exemption Regulation. The Commission concluded that for external consultancy measures such as ‘coaching’, ‘co-operation’ and ‘design-promotion’ an aid intensity in excess of 50% would exceed the amount necessary to incentivise undertakings to incur this type of expenditure. In particular the Commission took the view that the fact that the undertaking would be obliged to contribute at least half of the cost for this type of aid should effectively contribute to the efficiency and necessity of the measure envisaged. Consequently the Commission concluded that a higher percentage would adversely affect trading conditions to an extent contrary to the common interest.

The Commission did not follow Germany’s line of reasoning based on recital (11) of the SME Exemption Regulation that a higher aid intensity for external consultancy measures should be available for small undertakings. Recital (11) refers to the specific situation of investment aid outside assisted areas — it does not refer to external consultancy measures. The Commission considered that a single rate of 50% of external consultancy aid is appropriate for all SMEs, whether small or medium sized. Such aid would generally represent a relatively modest amount compared to new investment, and would be in the nature of an one-off cost, bearing in mind that operating aid is according to Article 5 of the SME Exemption Regulation excluded. As such, the Commission would not normally expect SMEs to finance such

<sup>(1)</sup> OJ L 10 of 13.1.2001.

<sup>(2)</sup> The SME Exemption Regulation exempts any aid that, in accordance with Article 87 of the EC Treaty, under certain conditions is compatible with the common market and not subject to the notification requirement of Article 88(3) of the EC Treaty.

<sup>(3)</sup> Recital (4) of the SME Exemption Regulation reads as follows: ‘This Regulation is without prejudice to the possibility for Member States of notifying aid to small and medium-sized enterprises. Such notifications will be assessed by the Commission in particular in the light of the criteria set out in this Regulation’.

<sup>(4)</sup> Recital (11) of the SME Exemption Regulation reads as follows: ‘Having regard to the differences between small enterprises and medium-sized enterprises, different ceilings of aid intensity should be set for small enterprises and for medium-sized enterprises.’

costs from medium term borrowing. It is mainly in the area of medium term borrowing for the purposes of investment that SMEs experience a disadvantage as a function of their relative size. In this respect, small undertakings experience a greater disadvantage than medium sized undertakings. That is why the Commission considered that a difference in aid intensity is justified in the case of investment aid. But not in the case of external consultancy aid, where that relative disadvantage is less acutely experienced.

The Commission did not agree with Germany that — based on recital (14) of the SME Exemption

Regulation <sup>(1)</sup> — higher aid intensities for external consultancy aid should be available for small firms in assisted regions under Article 87(3)(a) and (c) EC Treaty. Recital (14) refers to the specific situation of investment aid. It does not refer to external consultancy aid. The Commission considered that a single rate of 50% of external consultancy aid is appropriate for all SMEs, whether or not in assisted regions. Such aid does not generally have an immediate nor long lasting impact on regional development nor on job creation, in the way that investment regional aid does. The Commission consequently observed no necessity for higher aid intensities to be available in the Land of Saxony.

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<sup>(1)</sup> Recital (14) of the SME Exemption Regulation states: ‘This Regulation should exempt aid to small and medium-sized enterprises regardless of location. Investment and job creation can contribute to the economic development of less favoured regions in the Community. Small and medium-sized enterprises in those (less favoured) regions suffer from both the structural disadvantage of the location and the difficulties deriving from their size. It is therefore appropriate that small and medium-sized enterprises in assisted regions should benefit from higher ceilings.’

## Quand le soutien à l'emploi des jeunes en entreprises n'est pas une aide d'État

*Andrée JALLON, Direction générale de la concurrence, unité G-2*

La Commission a adopté le 2 octobre 2002 une décision qualifiant de mesure générale le dispositif français mis en place par la loi du 1er août en faveur de l'emploi. Le public visé est celui des jeunes âgés de 16 à 22 ans et non titulaires d'un diplôme de second cycle de l'enseignement général, technologique ou professionnel.

L'appréciation positive de la Commission découle du caractère non sélectif et non discrétionnaire du dispositif, étant établi par ailleurs que les autres critères cumulatifs permettant de définir une aide sont réunis en l'espèce. Le dispositif est en effet financé par le budget de l'Etat, il octroie un avantage économique aux entreprises concernées, certaines parmi elles exerçant de surcroît des activités de nature à affecter les échanges entre Etats membres.

Le contenu du projet notifié à la Commission ayant évolué au cours des débats parlementaires, le texte législatif définitivement adopté ne pose aucune condition restrictive à l'applicabilité de la loi à l'ensemble des entreprises. Quelle que soit leur localisation, leur taille et le secteur économique dans lequel elles exercent leur activité, l'administration ne dispose d'aucun pouvoir d'apprécier l'opportunité ou le montant des subventions allouées aux entreprises. Le seul contrôle préalable mis en place vise à s'assurer que ces dernières n'ont procédé à aucun licenciement économique dans les 6 mois précédant l'embauche des jeunes et qu'elles ne sont par ailleurs redevables d'aucune cotisation ou contribution sociale.

La réduction du coût de l'emploi de jeunes en situation d'échec scolaire constitue, selon les Pouvoirs Publics français, un incitant déterminant de leur embauche compte tenu des besoins en personnel qualifié exprimés par les entreprises.

La seule condition, objective, fixée par la loi du 1<sup>er</sup> août 2002 à l'éligibilité au dispositif est relative à la durée, celle du contrat de travail conclu, égale ou supérieure à 3 ans, ainsi que celle du travail presté, au moins à mi-temps. En contrepartie, l'employeur se voit accorder pendant une durée de 3 ans par emploi créée une subvention dont le

montant sera calculé par référence aux cotisations et contributions patronales obligatoires versées aux organismes sociaux en raison des salaires versés aux jeunes concernés. Comprise mensuellement pour un emploi à temps plein entre 225 et 292 € les deux premières années puis diminuée de moitié la troisième, la subvention attachée à chaque contrat est réduite proportionnellement à la durée du travail effectuée par un salarié employé à temps partiel.

La validité du dispositif n'est pas limitée dans le temps en ce sens que la signature d'un nouveau contrat-jeune constitue pour une entreprise la source d'une nouvelle subvention. L'entreprise est créditée trimestriellement à terme échu; la sanction prévue en cas de non respect de la durée de son engagement est dissuasive puisque l'employeur est tenu de rembourser à l'Etat l'intégralité des financements reçus en relation avec un contrat qui serait rompu à son initiative.

Le coût budgétaire du dispositif, appelé à monter en puissance, est évalué par le Gouvernement français à 200 millions € en 2003 et pourrait atteindre 650 millions € en 2006.

La Commission s'est référée à sa Communication consacrée au contrôle des aides en relation avec la réduction du coût du travail <sup>(1)</sup> pour apprécier le dispositif. Selon ce texte: «une réduction générale, automatique et non discrétionnaire des coûts de main d'oeuvre non salariaux n'entre évidemment pas dans le champ d'application des règles de concurrence en matière d'aides d'Etat» (point 11). Tel est bien le cas du dispositif adopté

La Communication précise: «le ciblage sur certaines catégories de travailleurs» ne contredit pas l'analyse «pour autant que les mesures s'appliquent de manière automatique sans discrimination entre entreprises» (point 14). Ainsi, bien que seules les entreprises employant des jeunes non qualifiées soient éligibles au dispositif, celui-ci ne saurait pour autant être qualifié de mesure spécifique, constitutive d'une aide d'Etat.

<sup>(1)</sup> JO C 1 du 3.1.1997, p. 10.

La décision de la Commission relève par ailleurs que le dispositif de soutien à l'emploi des jeunes remplit, de surcroît, les conditions posées par les lignes directrices concernant les aides à l'emploi <sup>(1)</sup>. Ainsi, dans l'hypothèse où la mesure aurait été spécifique et non pas générale, la Commission l'aurait appréciée comme compatible avec le Traité. Le texte des lignes directrices se réfère en effet dans sa partie introductive aux jeunes et aux travailleurs peu qualifiés comme catégories sociales en direction desquelles les Etats membres sont invités à diriger leurs actions. La «réduction des coûts indirects du travail», notamment sous la forme «d'exonérations ciblées des charges sociales permettant de réduire le coût du travail dans le bas de l'échelle» constitue l'une de ces actions citée à titre d'exemple.

On constate que le dispositif de soutien à l'emploi des jeunes remplit l'ensemble des critères posés au point 21 de ces mêmes lignes directrices:

La limitation à 3 ans de la durée du financement public soutenant la création de chaque contrat-jeune est de nature à garantir sa proportionnalité à l'objectif poursuivi ainsi que sa nécessité.

Les subventions allouées sont dépourvues de tout lien de causalité avec la réalisation d'un investissement; leur montant est exclusivement fonction du nombre de postes de travail créés et du montant des salaires y afférant. Elles constituent des aides à la création d'emploi.

Les subventions visent en effet à favoriser le recrutement de jeunes travailleurs éprouvant des difficultés particulières à s'insérer sur le marché du travail; elles contribuent à assurer la stabilité de l'emploi créé et à améliorer l'employabilité de nouveaux salariés conformément aux conclusions adoptées lors de sommets européens et notamment à Lisbonne.

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<sup>(1)</sup> JO C 334 du 12.12.1995, p. 4.

Postérieurement à la décision ici commentée, la Commission a adopté le 12 décembre 2002 le Règlement n° 2204/2002 (JO L du 13.12.2002, p. 3). aux termes duquel elle se prononcerait dorénavant dans un cas semblable. Cette novation ne modifie pas l'analyse qui suit.



## Eco-tax reliefs for companies in Denmark, Finland and Sweden after the Court ruling in Adria-Wien Pipeline GmbH case

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

Several Member States have introduced eco-taxes on energy products in order to reduce the consumption of energy, and thereby also the emissions of greenhouse gases into the atmosphere. Although there is an environmental objective behind these taxes, most Member States consider a tax relief to be necessary for those consumers that consume the most energy — mainly the manufacturing industry — and for which the tax burden would otherwise be too important. A balance is struck between achieving an environmental benefit through the tax and protecting the international competitiveness of energy intensive industrial companies.

The eco-tax systems in Denmark, Finland and Sweden are two-tier systems, with a general tax reduction for a relatively large number of companies, and targeted, higher, reductions for companies whose energy intensity exceeds certain thresholds. In the case of Finland and Sweden, the Commission has so far only scrutinised these latter tax reliefs, which clearly ‘favour certain undertakings’.

However, on 8 November 2001, the Court of Justice decided on case C-143/99 Adria-Wien Pipeline GmbH <sup>(1)</sup>, which concerned the energy tax reliefs in Austria. In Austria, only undertakings whose activity is shown to consist primarily in the production of goods are eligible for the energy tax reliefs. The Austrian Constitutional Court referred to the Court of Justice the question whether such a delimitation of the beneficiaries rendered the measure selective within the meaning of Article 87(1) EC. In the affirmative, the Court was asked whether such a legislative measure would be regarded as State aid even if it applied to all undertakings, regardless of their activity.

The Court decided, in particular, that national measures providing for energy tax reliefs which only apply to undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid. The Court

also stated that a measure, which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil the condition of selectivity.

Following this Court ruling, the Commission reviewed the corresponding measures in force in Denmark <sup>(2)</sup>, Finland <sup>(3)</sup> and Sweden <sup>(4)</sup>.

### Denmark

The Danish 10% CO<sub>2</sub> tax relief has been notified to the Commission before, and approved as a general measure. It has been considered not to favour certain undertakings, since available to all VAT-registered companies. The Commission reassessed the tax relief in the light of the Court’s ruling and decided that it could still be considered to constitute a general measure. The VAT-criterion as a basis for determining eligible companies is wide and does not per se exclude companies in e.g. the service sectors. The objective of the Danish authorities when applying the VAT-criterion is also to make a distinction between consumers who mainly use energy for heating and hot water (i.e. who have a ‘household type’ of consumption) and consumers who also use energy for other purposes. In order to come closer to the objective, an adjustment is made so that certain types of VAT-registered companies are not eligible for the relief for the reason that they are considered only to have a household type of energy consumption. Some service activities are to be found among those excluded from the tax relief, but since they meet the criterion, their exclusion is in the ‘nature or general scheme of the system’, and not such as to render the measure selective.

### Finland

In Finland, there are two different energy tax rates on the consumption of electricity. Industrial

<sup>(1)</sup> European Court Reports [2001] page I-08365.

<sup>(2)</sup> State aid N 841/A/2000, OJ C 238, 3.10.2002, p. 13.

<sup>(3)</sup> State aid NN 75/2002, OJ C 309, 12.12.2002, p. 17.

<sup>(4)</sup> State aid NN 3/A/2001 and NN 4/A/2001. Not yet published in the OJ.

companies and professionally managed greenhouse companies pay a lower rate than other electricity consumers. This differentiation was introduced in 1997, but was not notified to the Commission. Following the Court ruling, the Commission investigated the measure on its own initiative. On 2 August 2002, it decided that the measure was indeed selective, since strictly limited to industrial companies and greenhouse companies, and that it constituted State aid.

According to the current Community guidelines on State aid for environmental protection, environmental aid should be assessed under the guidelines in force when the aid was granted. In this case, therefore, the aid had to be assessed under the 1994 Community guidelines on State aid for environmental protection <sup>(1)</sup> for the period 1 April 1997 — 2 February 2001. The aid was found to be compatible with the common market, because the circumstances of the granting of the aid were in line with those accepted under the Commission's practice at that time. With respect to the aid granted to industrial companies as from 3 February 2001, the Commission applied the rules applicable to operating aid in the form of tax reductions or exemptions in the current environmental guidelines <sup>(2)</sup>. The tax relief was found to be clearly compatible with these rules, since it was introduced at the same time as the tax on electricity consumption itself, and since companies still pay a significant part of the tax. The aid was therefore approved for a 10-year period as regards industrial companies, and, in order to avoid discrimination between sectors, also with regard to professionally managed greenhouse companies.

## Sweden

The general reduction of the CO<sub>2</sub> tax paid on fuels used for heating in the production processes of the manufacturing industry was introduced in 1993. The Commission concluded that the measure was specific, since companies in the service sectors are not eligible. However, the tax relief was introduced in 1993, i.e. before Sweden joined the European Economic Area and later the European Union, and was not increased until 1 January 2001. Before that date, it therefore constituted existing aid.

Formally, the aid had to be assessed under the 1994 environmental guidelines for the period 1 January — 2 February 2001, and for the same reasons as in the Finnish case, it was found to be compatible with the common market. The main assessment, for a 10-year period starting 3 February 2001, was made under the current environmental guidelines. Point 52 provides that where an existing tax is increased significantly, and where the Member State concerned takes the view that derogations are needed for certain firms, the conditions set out in point 51.1 as regards new taxes are applicable by analogy. In this case, the general tax relief for the manufacturing industry was increased significantly on 1 January 2001 and on 1 January 2002. The Commission therefore considered that the condition on which it can accept that a relief from a tax is needed for certain firms was fulfilled. Companies have always had to pay at least 25% of the tax (disregarding any other tax relief they may benefit from). Therefore, an approval was given for a 10-year period, as the general reduction of the CO<sub>2</sub> tax will not exceed 75% in the future either.

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<sup>(1)</sup> OJ C 72, 10.3.1994, p. 3.

<sup>(2)</sup> OJ C 37, 3.2.2001, p. 3.

## Aid in favour of Kahla Porzellan GmbH and Kahla/Thüringen Porzellan GmbH

*Eva VALLE, Directorate-General Competition, unit H-2*

On 30 October 2002 the European Commission finalised three years of investigation ordering recovery of incompatible aid of € 15.7 million from the eastern German porcelain manufacturer Kahla.

The Commission decision concerns two different legal entities: The first one, Kahla Porzellan GmbH (Kahla I), a porcelain producer based in Thüringen, which was privatised in 1991 and declared bankrupt in 1993 after heavy losses. The second one, its legal successor, Kahla/Thüringen Porzellan GmbH (Kahla II), created in 1993 to take over the assets of the bankrupt Kahla I and to continue its activities in the production of porcelain dishes and household china.

The investigation started on the basis of complaints alleging illegal awards of State aid in favour of Kahla I and II. Following unsuccessful and repeated requests from the Commission to receive full information on the case, the formal investigation procedure was initiated in November 2000 to verify the State aid character and compatibility of numerous financial measures. The information subsequently submitted by Germany evidenced additional financial measures, of which the Commission had not been informed before. In November 2001 the procedure was extended to assess these new measures. The Commission has examined a total of 33 support measures from the public hand in favour of both Kahla I and II, totalling some € 79 million.

The Commission examined 10 measures in favour of Kahla I and concluded that some € 37 million were not state aid since they did not confer any advantage to the company. Further € 19 million were covered by aid schemes approved by the Commission and thus constituted existing aid, which needed not be reassessed. The remainder € 3 million was not covered by any approved legal basis and thus had to be assessed by the Commission. The Commission evaluated these measures under the Community Guidelines on State aid for

rescuing and restructuring firms in difficulty concluding that the criteria of these guidelines were not fulfilled, notably due to the lack of a restructuring plan, and declared the aid incompatible.

Regarding Kahla II, the Commission examined 23 measures and concluded that all of them constituted aid because no market economy operator would have made them available. Of the total amount of € 20 million, some € 7.3 million are covered by aid schemes approved by the Commission and thus constituted existing aid, which needed not be reassessed. However, the remaining € 12.7 million aid, not granted under any approved legal basis, fell to be assessed by the Commission.

On the basis of reports elaborated when Kahla II was set up, the Commission concluded that the company had been in difficulties since its creation and until 1996. Hence, the aid awarded during that period was assessed under the Community Guidelines on State aid for rescuing and restructuring firms in difficulty. The Commission found that the criteria of these guidelines were not fulfilled, notably due to the lack of a sound restructuring plan and in the absence of a substantial private contribution to the restructuring. This aid was thus declared incompatible.

The aid to Kahla II awarded as from 1996 was assessed as regional investment aid under the Guidelines on national regional aid. However, the aid was clearly operating aid not linked to any initial investment. Consequently it was also declared incompatible.

As a conclusion, the Commission ruled that aid of some € 3 million in favour of Kahla I and aid of some € 12.7 million in favour of Kahla II was incompatible and has to be recovered. It is noted that part of the aid (some loans from public sources and a public capital injection) has already been repaid. The measures repaid roughly account to half of the total incompatible aid of € 15.7 million.

## France — Bull: Approbation conditionnelle de l'aide au sauvetage

*Bernadette WILLEMOT, Direction générale de la concurrence, unité H-2*

Le 13 novembre 2002, la Commission a décidé que l'avance de trésorerie de € 450 millions, accordée par l'Etat français à Bull au titre d'aide au sauvetage, était compatible avec les dispositions communautaires en matière d'aides d'Etat, et plus particulièrement avec les lignes directrices communautaires pour les aides d'Etat au sauvetage et à la restructuration d'entreprises en difficulté <sup>(1)</sup>. La Commission a toutefois soumis l'approbation de cette aide au sauvetage à la condition expresse du remboursement de l'aide pour le 17 juin 2003. Le non-respect de cette condition permettrait à la Commission de saisir directement la Cour de Justice, et ceci en vertu de l'article 88(2) du Traité CE. L'intérêt de ce cas réside essentiellement dans le fait qu'il illustre les difficultés d'application du principe de l'aide unique <sup>(2)</sup>.

La France a accordé une aide totale de € 450 millions à Bull au cours de la période allant de fin décembre 2001 à juin 2002, ceci dans le but d'éviter le dépôt de bilan de Bull. Cette aide, qui n'a pas été notifiée à la Commission, a été versée sous la forme d'une avance de trésorerie remboursable.

Bull est actif dans les domaines des serveurs informatiques professionnels haut de gamme, ainsi que des services spécialisés en ingénierie informatique. Bull est une entreprise bien connue des services de la Commission, étant donné qu'elle a, par le passé, bénéficié à plusieurs reprises d'aides d'Etat. La dernière en date est une aide à la restructuration d'un montant de € 1311 millions en 1993-1994. Cette aide avait été approuvée par la Commission <sup>(3)</sup>, moyennant une restructuration de Bull. Depuis 1999, la situation de Bull s'est dégradée. Bull a été contraint de céder des actifs et de licencier du personnel sur base d'un plan de redressement et de développement.

Le 9 avril 2002, la Commission a décidé d'ouvrir la procédure prévue à l'article 88(2) du Traité CE, en raison des doutes qu'elle éprouvait quant à la compatibilité de l'avance de trésorerie avec les lignes directrices au sauvetage et à la restructuration d'entreprises en difficulté. Les doutes principaux de la Commission concernaient le fait que l'aide au sauvetage s'inscrivait dans un processus

de restructuration de longue durée mené par l'entreprise, alors qu'une aide au sauvetage est en principe exceptionnelle. Par conséquent, la Commission craignait que l'aide accordée ne puisse être utilisée pour couvrir les coûts de restructuration. Or, Bull ayant déjà reçu une aide à la restructuration en 1993-1994, une nouvelle aide à la restructuration ne pourrait être acceptée en raison du principe de l'aide unique. Les autorités françaises ont démontré que les coûts de restructuration avaient été financés par des cessions d'actifs, et que l'avance de trésorerie avait uniquement servi à couvrir les besoins en trésorerie de Bull. La France a, à cet effet, soumis des chiffres clairs à la Commission, ainsi qu'un plan de restructuration détaillé.

La Commission a donc été en mesure de conclure, sur base des éléments précités, que l'avance de trésorerie remplissait tous les critères pour l'aide au sauvetage tels que prévus dans les lignes directrices au sauvetage et à la restructuration. Cependant, cette approbation est soumise à la condition expresse du remboursement par Bull de l'avance de trésorerie et des intérêts y afférents pour le 17 juin 2003 (soit douze mois après le versement de la dernière tranche d'aide), dans le but d'assurer le respect de l'obligation de remboursement inscrite dans les lignes directrices au sauvetage et à la restructuration d'entreprises en difficulté.

Dans sa décision, la Commission rappelle à la France que, sauf conditions exceptionnelles, aucune aide au sauvetage ne pourra être accordée à Bull, et ceci afin de respecter le caractère exceptionnel de l'aide au sauvetage. Elle insiste également sur le fait qu'aucune aide à la restructuration ne pourra être accordée à Bull avant le 31 décembre 2004, et ceci en vertu du principe de l'aide unique.

Dans le cas présent, étant donné qu'aucune aide à la restructuration n'a été accordée, la Commission se devait donc de se limiter à une appréciation exclusive de l'aide au sauvetage, et de vérifier que les critères ad hoc, établis dans les lignes directrices au sauvetage et à la restructuration d'entreprises en difficulté, soient respectés.

<sup>(1)</sup> JO C 288 du 9.10.1999.

<sup>(2)</sup> Le principe de l'aide unique, contenu au paragraphe 3.2.3 des lignes directrices au sauvetage et à la restructuration d'entreprises en difficulté, implique qu'une nouvelle aide à la restructuration ne peut être autorisée si la période de restructuration ne s'est pas achevée depuis moins de dix ans, sauf circonstances exceptionnelles, imprévisibles et non-imputables à l'entreprise.

<sup>(3)</sup> Décision 94/1073/CE de la Commission du 12 octobre 1994, JO L 386 du 31.12.1994, p. 1.

## Information Section

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	<i>Joaquin FERNANDEZ MARTIN (f.f.)</i>	02 2951041

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Conseiller auditeur	<i>Karen WILLIAMS</i>	02 2965575



## New documentation

### European Commission Directorate General Competition

*This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: [http://europa.eu.int/comm/competition/speeches/index\\_2002.html](http://europa.eu.int/comm/competition/speeches/index_2002.html)*

#### Speeches by the Commissioner, 1 September 2002–31 December 2002

*The integration of European capital market infrastructures and competition law* — Mario MONTI — Association of Private Client Investment Managers and Stockbrokers (APCIMS) — Brussels, Belgium — 05.12.2002

*Les réformes en cours en matière de concurrence: mise en perspective* — Mario MONTI — Cercle Fédéraliste européen — Brussels, Belgium — 22.11.2002

*Merger control in the European Union: a radical reform* — Mario MONTI — European Commission/IBA Conference on EU Merger Control — Brussels, Belgium — 07.11.2002

*EU Competition Policy* — Mario MONTI — Fordham Annual Conference on International Antitrust Law & Policy — New York — 31.10.2002

*L'evoluzione della regolamentazione comunitaria nel settore delle comunicazioni* — Mario MONTI — Seminario di studio sulla regolamentazione Autorità per le Garanzie nelle Comunicazioni — Università degli Studi di Napoli Federico II — Naples, Italy — 14.10.2002

*Analytical Framework for Merger Review* — Mario MONTI — International Competition Network Inaugural Conference — Naples, Italy — 28.09.2002

*A Global Competition Policy?* — Mario MONTI — Copenhagen, Denmark — 17.09.2002

*The fight against Cartels Summary* — Mario MONTI — EMAC — Brussels, Belgium — 11.09.2002

#### Speeches and articles, Directorate-General Competition staff, 1 September 2002–31 December 2002

*Convergence between media and telecommunications: competition law and regulatory perspectives* — Miguel MENDES PEREIRA — GSM Europe Plenary — Lisbon, Portugal — 29.11.2002

*Review of the EC Merger Regulation* — forging a way ahead — Philip LOWE — European Merger Control Conference — Conrad Hotel, Brussels, Belgium — 08.11.2002

*Kontrolle staatlicher Beihilfen und Daseinsvorsorge* — Humbert DRABBE — Delegation of Thüringen — Brussels, Belgium — 07.11.2002

*Future directions for EU Competition Policy* — Philip LOWE — The International Bar Association — Fiesole, Italy — 20.09.2002

*Converging technologies and regulations: broadcasting, datacasting, communications* — Herbert UNGERER — 23rd ETP Plenary Session — Brussels, Belgium — 19.09.2002

*Enlargement and Competition Policy* — Jean-François PONS — EPP-ED Group Bureau — Ljubljana, Slovenia — 16.09.2002

#### Community Publications on Competition

##### New publications and publications coming up shortly

- *XXXI report on Competition policy — 2001*
- *Competition policy newsletter, 2003, Number 2 — June 2003*

Information about our other publications can be found on the on the DG Competition web site: <http://europa.eu.int/comm/competition/publications>

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

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



## Press releases

1 September 2002–31 December 2002

*All texts are available from the Commission's press release database RAPID at: <http://europa.eu.int/rapid/start/> Enter the reference (e.g. IP/02/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.*

### ANTITRUST

**IP/02/1951 — 20/12/2002** — Commission opens proceedings into joint selling of media rights to the English Premier League

**IP/02/1908 — 17/12/2002** — Commission fines eight firms for taking part in a concrete reinforcing bar cartel in Italy

**IP/02/1907 — 17/12/2002** — Commission fines Ajinomoto, Cheil and Daesang in food flavour enhancers (nucleotides) cartel

**IP/02/1906 — 17/12/2002** — Commission fines seven companies in specialty graphites cartels

**IP/02/1869 — 12/12/2002** — Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG

**IP/02/1852 — 11/12/2002** — Price decreases of up to 40% lead Commission to close telecom leased line inquiry

**IP/02/1746 — 27/11/2002** — Commission takes decision against Aventis and Merck in methylglucamine cartel

**IP/02/1744 — 27/11/2002** — Commission imposes heavy fines on four companies involved in plasterboard cartel

**IP/02/1739 — 26/11/2002** — Landmark reform simplifies and strengthens antitrust enforcement

**IP/02/1677 — 14/11/2002** — Commission approves revised TACA liner conference

**IP/02/1651 — 12/11/2002** — Antitrust clearance for licensing of patents for third generation mobile services

**IP/02/1603 — 04/11/2002** — Commission closes cartel procedure against Carlsberg and Heineken

**IP/02/1585 — 30/10/2002** — Commission rules against collusive behaviour of Christie's and Sotheby's

**IP/02/1584 — 30/10/2002** — Commission fines Nintendo and seven of its European distributors for colluding to prevent trade in low-priced products

**IP/02/1436 — 08/10/2002** — Commission clears one-stop agreements for the licensing of TV and radio music via the Internet

**IP/02/1430 — 04/10/2002** — Commission closes certain proceedings against IMS Health

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