



EC COMPETITION
POLICY NEWSLETTER

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Commission adopts Jurisdictional Notice under the Merger Regulation

Johannes LÜBKING ⁽¹⁾

I. Introduction

On 10 July 2007, the Commission adopted the Commission Consolidated Jurisdictional Notice under the Merger Regulation (the “Jurisdictional Notice” or the “Notice”) ⁽²⁾. The Jurisdictional Notice replaces the four previous Notices dealing with jurisdictional issues under the Merger Regulation, all adopted by the Commission in 1998 under the previous Merger Regulation 4064/89. These are (i) the Notice on the concept of concentration ⁽³⁾, (ii) the Notice on the concept of full-function joint ventures ⁽⁴⁾, (iii) the Notice on the concept of undertakings concerned ⁽⁵⁾ and (iv) the Notice on calculation of turnover ⁽⁶⁾.

The Jurisdictional Notice covers all issues relevant for the Commission’s jurisdiction under the Merger Regulation, with the exception of referrals ⁽⁷⁾. The rationale of the consolidation of the four previous Notices in one document was to make the Jurisdictional Notice more user-friendly and to allow notifying parties to establish more easily whether the Commission is competent for an envisaged transaction. This consolidation also removes the overlaps between four notices and thus eliminates the possibility of conflicting interpretations.

However, the adoption of the Jurisdictional Notice was not only an exercise of consolidation, but the guidance given in the previous Notices has been reviewed in the light of the developments which have occurred in the meantime. Three general sources have been used for the amendments incorporated in the Jurisdictional Notice:

- First, the Jurisdictional Notice takes into account the changes introduced by the new Merger Regulation in relation to jurisdictional issues.
- Second, it also incorporates recent jurisprudence. For example a number of issues arising from the judgments of the Court of First Instance (“CFI”) in the cases *Cementbouw* ⁽⁸⁾ and *Endesa* ⁽⁹⁾ are, for instance, included in the Jurisdictional Notice.
- Third, the developments in the Commission’s decisional practice in recent years, are reflected in the Jurisdictional Notice.

The Commission carried out a public consultation on a draft of the Jurisdictional Notice from September to December 2006. Overall, 30 comments were received, among them 14 from law firms, 6 from industry organisations, 2 from undertakings directly and further comments from associations of competition lawyers ⁽¹⁰⁾. In the consultation, in particular the consolidation of the different previous Notices in one document was welcomed by all the respondents.

II. The structure of the Jurisdictional Notice

Two basic conditions have to be fulfilled for the Merger Regulation to apply to a given concentration: First, there must be a concentration of two or more undertakings within the meaning of Article 3. Second, the turnover of the undertakings concerned, calculated in accordance with Article 5, must satisfy the thresholds set out in Article 1 of the Regulation. The Jurisdictional Notice follows this basic structure and sets out, in the first part, the notion of a concentration (dealing with the issues previously explained in the Notices on the concept of concentration and on the concept of full-function joint ventures), followed, in the second part, by explanations

⁽¹⁾ Directorate-General for Competition, Deputy Head of unit C-5. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. Currently, the Jurisdictional Notice can be found in English, French and German language on the European Commission Competition web-site under http://ec.europa.eu/competition/mergers/legislation/draft_jn.html.

⁽³⁾ OJ C 66, 2.3.1998, p. 5.

⁽⁴⁾ OJ C 66, 2.3.1998, p. 1.

⁽⁵⁾ OJ C 66, 2.3.1998, p. 14.

⁽⁶⁾ OJ C 66, 2.3.1998, p. 25.

⁽⁷⁾ For referrals, see Commission Notice on Case Referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2.

⁽⁸⁾ Judgment in Case T-282/02 *Cementbouw v Commission*, [2006] ECR II-319; see also opinion of AG Kokott in Case C-202/06 *Cementbouw v Commission* of 26 April 2007, paragraph 56 (not yet reported).

⁽⁹⁾ Judgment in Case T-417/05, *Endesa v Commission*, [2006] ECR II-2533.

⁽¹⁰⁾ The comments can be found on the European Commission Competition website: http://ec.europa.eu/competition/mergers/legislation/draft_jn.html.

as regards to the Community dimension of the concentration (containing issues previously dealt with in the Notices on the concept of undertakings concerned and on calculation of turnover).

III. Main new features of the Jurisdictional Notice

In the following, the main changes introduced in the Jurisdictional Notice (as compared to the four previous Notices) are discussed.

1. New features in the section on the concept of concentration

Acquisition of control by investment funds

The Jurisdictional Notice clarifies how acquisitions of control by investment funds are treated. In the section on the concept of concentration ⁽¹¹⁾, the Notice explains that, normally, the investment company which has set up the investment fund acquires indirectly — via the fund company, often a limited partnership — control of the target undertaking. The investment company will generally have the power to exercise the rights directly held by the fund company so that such an acquisition, usually, fulfils the requirements for an indirect acquisition of control provided for in Article 3(1)(b) and 3(3)(b).

The Jurisdictional Notice sets out that the investment company is also considered to indirectly fulfil the requirements provided in Article 5(4)(b) in relation to the undertakings directly held by the investment funds. Taking the most important criterion of Article 5(4)(b), the investment company will normally have the power to indirectly exercise the voting rights held by the fund in the portfolio companies ⁽¹²⁾. Consequently, the turnover of all the portfolio companies, even if held by several investment funds set up by the same investment company, is to be taken into account when one of the funds is involved in an acquisition.

Control on a contractual basis

The Jurisdictional Notice extends the explanations on the acquisition of control on a contractual basis ⁽¹³⁾. Generally, in order to acquire control on a contractual basis, first, the contract must lead to a similar control of the management and resources of the other undertaking as in the case of acquisition of shares and assets and, second, such agreements, in order to bring about an acquisition of control, must be long-term contracts. The Commission had a number of cases concerning

the acquisition of control based on agreements in recent years, such as acquisition of control via long-term hotel management contracts ⁽¹⁴⁾.

Object of control

As regards the object of control, the Notice clarifies under which circumstances assets, in particular brands and licences, constitute a part of an undertaking ⁽¹⁵⁾. This is the case when the assets form a business with a market presence to which a market turnover can be attributed. The Notice explains further that, for a transfer of a license to constitute a concentration, it is a necessary (but not sufficient) requirement that the licence is exclusive at least in certain territories.

Applying the same principles, the Notice clarifies the circumstances under which a concentration arises under the Merger Regulation if a company out-sources the provision of services or the production of goods, previously performed in-house, to a third party. Essentially, a concentration arises if assets are transferred which can also be used to supply to third parties and therefore allow for a market presence of the acquirer and outsourcing provider at least after a start-up period ⁽¹⁶⁾.

Split-up of assets

Under the heading “Change of control on a lasting basis”, the Notice deals with the situation where several undertakings acquire a target company in order to immediately divide the assets between them ⁽¹⁷⁾. In such a scenario, in a first step, the acquisition of the entire target company is carried out by one or several undertakings and, in a second step, the acquired assets are divided among several undertakings. Several concentrations with the ultimate purchasers of the respective parts of the target occur in these circumstances if, first, the break-up is agreed between the different purchasers in a legally binding way and, second, if there is no uncertainty that the division of the acquired assets will take place within a short period of time after the first acquisition. The Notice explains that normally the maximum time-frame for the division of the assets should be one year. If these conditions are not met, the Commission will consider the first transaction as a separate concentration, involving the entire target undertaking, and the other transactions which might follow as separate concentrations.

⁽¹¹⁾ Point 15 of the Jurisdictional Notice.

⁽¹²⁾ See points 189 ff. of the Jurisdictional Notice.

⁽¹³⁾ Point 18 of the Jurisdictional Notice.

⁽¹⁴⁾ See, e.g., Case COMP/M.3858 — Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005.

⁽¹⁵⁾ Point 24 of the Jurisdictional Notice.

⁽¹⁶⁾ Points 25 ff. of the Jurisdictional Notice.

⁽¹⁷⁾ Points 30 ff. of the Jurisdictional Notice.

Parking transactions

Following comments of many respondents in the public consultation, the Notice also clarifies the treatment of so-called “parking transactions”, whereby an ultimate acquirer arranges for a business to be temporarily acquired by an interim buyer, often a financial institution, while, in many cases, already taking on a significant part of the financing costs and related commercial risks and also gaining certain rights⁽¹⁸⁾. In such circumstances, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer.

The Notice explains that the Commission will consider the transaction by which the interim buyer acquires control in such circumstances only as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer. In a corresponding section, the Notice clarifies that this scenario also does not fall under the exceptions in Article 3(5) of the Merger Regulation⁽¹⁹⁾.

Interrelated transactions

Under the header “Interrelated transactions”, the Notice clarifies the circumstances when several transactions are to be considered a single concentration under Article 3 (which is distinct from the question whether several transactions are considered a single concentration under Article 5(2)(2)). In drafting this section of the Notice, use was made of the clarifications which were brought about by the recent *Cementbouw* judgment and recital 20 of the new Merger Regulation⁽²⁰⁾.

Essentially, the line set out in the draft Notice is that several transactions may be considered a single concentration if they are unitary in nature. In order to determine the unitary nature of the transactions in question, it is necessary, in each individual case, to ascertain whether those transactions are interdependent, in such a way that one transaction would not be carried out without the other⁽²¹⁾. This will be the case if, assessed on the basis of the economic aims of the parties, those transactions are either *de jure* or *de facto* interconditional. If transactions are, however, not interdependent and the parties would proceed with one of the transactions if the others were not to succeed, the transactions have to be assessed individually.

It has to be underlined that several transactions, even if linked by conditions, can only be treated as a single concentration if ultimately control is acquired by the same undertakings. Therefore, assets swaps or de-mergers of JVs, involving several acquirers, are not considered a single concentration, even if the parties consider them interdependent. As several undertakings acquire control of different assets and a separate combination of resources takes place for each of the acquiring undertakings, the impact on the market of each of those acquisitions of control needs to be analysed separately under the Merger Regulation.

In addition, several transactions can only be combined to one concentration if each of them could constitute a concentration in itself. It is not possible under the Merger Regulation to link different legal transactions which only partly concern the acquisition of control of undertakings, but partly also the acquisition of other assets, such as non-controlling minority stakes in other companies. It is not in line with the general framework and the purpose of the Merger Regulation if also transactions, which do not lead to a change in control of a given target, were assessed as under the Merger Regulation.

Examples of cases in which several transactions were considered a single concentration are the acquisition of control over one business, consisting of different companies and requiring several transactions or parallel inter-conditional acquisitions of different targets, as in the *EQT/H&R/ Dragoco* case⁽²²⁾, or the serial acquisition of different companies, as in the *Kingfisher* case⁽²³⁾.

Sole and joint control

In the section dealing with sole control, the Notice expands on the concept of “negative control”. Negative control is considered only as a sub-category of sole control, not a separate quality of control in addition to sole and joint control. The consequence is that a change from negative to positive sole control is not considered a concentration⁽²⁴⁾. In relation to the establishment of *de facto* sole control scenarios, the Notice sets out that this will be analysed on the basis of historic voting patterns at company general meetings, the position of the other shareholders, and in particular by making a prospective analysis, taking into account foreseeable changes in the future⁽²⁵⁾.

⁽¹⁸⁾ See point 35 of the Jurisdictional Notice.

⁽¹⁹⁾ See point 114 of the Jurisdictional Notice.

⁽²⁰⁾ See points 36 ff. of the Jurisdictional Notice.

⁽²¹⁾ Judgment in Case T-282/02 *Cementbouw v Commission*, paragraphs 104-109 [2006] ECR II-319.

⁽²²⁾ Case COMP/M.2926 — *EQT/H&R/Dragoco* — of 16 September 2002.

⁽²³⁾ Case IV/M.1188 — *Kingfisher/Wegert/ProMarkt* of 18 June 1998.

⁽²⁴⁾ See points 54, 83 of the Jurisdictional Notice.

⁽²⁵⁾ See point 59 of the Jurisdictional Notice.

The Notice extends the guidance given on *de facto* joint control scenarios. A commonality of interests, leading to joint control, exists if there is a high degree of mutual dependency, such as the situation when each parent provides a contribution to the JV which is vital for its operation. The same result may occur in situations with a majority shareholder: if there is a high degree of dependency on a minority shareholder which has the required know-how whereas the majority shareholder is a mere financial investor ⁽²⁶⁾.

The Notice further clarifies that a mere reduction of the number of shareholders in a joint control scenario, without a new shareholder acquiring joint control, will not be considered a concentration. This does not affect the consideration that a concentration exists if an operation involves a reduction in the number of shareholders from joint to sole control ⁽²⁷⁾.

Joint Ventures

In the section of the Notice on joint ventures and the concept of full-functionality, two changes should be highlighted.

First, the draft Notice sets out the dividing line between the application of Article 3(1) and Article 3(4), the requirement that a joint venture is full-function. Generally, the joint acquisition of control of another undertaking already falls under Article 3(1)(b). Only the creation of a joint venture by the parties, irrespective of whether the joint venture is created as a “greenfield operation” or whether the parties contribute assets to the joint venture, falls under Article 3(4) and therefore requires that the joint venture is considered full-function. The main difference lies in the consideration that, in order to fall under Article 3(1)(b), the target — qualifying as an object of control as discussed above — must have a current market presence, whereas the qualification as “full-function” undertaking requires a more forward-looking assessment on the basis of the criteria set out in the Notice. If joint control of an undertaking is acquired, a concentration (and a structural change in the market) arises even if, for the future, the full-functionality criterion were not to be met as the new parent companies intended to remove the target from the market.

Second, the draft Notice sets out the circumstances when changes in the activities of a joint venture are considered to constitute a concentra-

tion ⁽²⁸⁾. First, this is the case if a joint venture acquires additional assets, constituting a business, from its parents. Second, a concentration may also arise if the parent companies transfer significant additional assets, contracts, know-how or other rights to the joint venture and these assets and rights constitute the basis for an extension of the activities of the joint venture into other product or geographic markets which were not the object of the original joint venture, and if the joint venture performs such activities on a full-function basis. As the transfer of the assets or rights shows that the parents are the real players behind the extension of the joint venture’s scope, the enlargement of the activities of the joint venture can be considered in the same way as the creation of a new joint venture within the meaning of Article 3(4).

Third, a concentration arises if a change in the activity of an existing joint venture occurs that makes it full-function.

Abandonment of concentrations

As regards the abandonment of concentrations, the Notice generally reiterates the guidance given in the DG COMP Information Note on this issue which was published in 2005 on DG COMP’s web-site. Essentially, the line is that, after initiating proceedings, the requirements for the proof of the abandonment, as a general principle, must correspond in terms of legal form, intensity etc. to the initial act that was considered sufficient to make the concentration notifiable ⁽²⁹⁾.

Changes of transactions after a Commission authorisation decision

The Notice also deals with the situation when parties may wish not to implement the concentration in the form foreseen after authorisation of the concentration by the Commission. In such circumstances, the Commission’s authorisation decision does not cover the changed structure of the transaction if, before implementation of the authorised concentration, the transactional structure is changed from an acquisition of control, falling under Article 3(1)(b), to a merger according to Article 3(1)(a), or vice versa. The consequence is that a new notification is required. However, less significant modifications of the transaction, for example minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price or changes in the corporate structure

⁽²⁶⁾ See points 76 ff. of the Jurisdictional Notice. See, e.g., case COMP/M. 4085 — Arcelor/Oyak/Erdemir of 13 February 2006.

⁽²⁷⁾ See point 90 of the Jurisdictional Notice.

⁽²⁸⁾ See points 106 ff. of the Jurisdictional Notice.

⁽²⁹⁾ See points 117 ff. of the Jurisdictional Notice.

by which the transaction is implemented without effects on the relevant control situation under the Merger Regulation, are considered as being covered by the Commission's authorisation decision.

2. *New features in the section on Community dimension*

The second main section of the Consolidated Notice deals with the Community dimension of the concentration. In the following, only major amendments will be discussed.

Relevant date for establishing the Commission's jurisdiction

The Jurisdictional Notice includes a section on the relevant date for establishing the jurisdiction of the Commission (or of National Competition Authorities) ⁽³⁰⁾. This is particularly relevant in order to decide the moment in time at which acquisitions or divestitures are taken into account for the calculation of turnover of the undertakings concerned (see below).

The legal situation for establishing the Commission's jurisdiction has changed under the new Merger Regulation as parties can now notify earlier, i.e. on the basis of a good faith intention to conclude an agreement or where they have publicly announced an intention to make such a bid. The Notice explains that the relevant date for establishing the Commission's jurisdiction is now either the date of the first notification or the date of the conclusion of the binding legal agreement or the announcement of a public bid, whichever date is earlier. Regarding the date of notification, a notification to either the Commission or to a Member State authority is relevant. These considerations will provide legal certainty for notifications to the Commission as well as for those to national competition authorities.

Turnover calculation and audited accounts

Following the Endesa judgment ⁽³¹⁾, the Notice stresses that, for the calculation of turnover, the audited accounts of the most recent financial year are normally relevant. Generally, the Commission will refer to accounts which relate to the most recent financial year to the date of the transaction and which are audited under the standard applicable to the undertaking in question and compulsory for the relevant financial year ⁽³²⁾.

Adjustments have to be made only in case of permanent changes in the economic reality of the undertakings concerned. This would only be the case if acquisitions or divestitures have been closed or closures of parts of its business have occurred before the relevant date for establishing jurisdiction and are not or not fully taken into account in the latest accounts.

Geographic allocation of turnover

The Notice further clarifies and gives more examples for the geographic allocation of turnover. For the sale of goods, the Notice explains that, if the place of delivery differs from the place where the customer was located at the time when the purchase agreement was concluded, the place of delivery may prevail. The delivery is in general the characteristic action for the sale of goods. In particular for the case of a sale of mobile goods, the place of delivery will be decisive even if the agreement was concluded by telephone or Internet.

For services, the Notice explains that services containing cross-border elements can be considered to fall into three general categories. The first category comprises cases where the service provider travels, the second category cases where the customer travels. The third category comprises those cases where a service is provided without either the service provider or the customer having to travel. In the first two categories, the Notice explains that the turnover generated is to be allocated to the place of destination of the traveller, i.e. the place where the service is actually provided to the customer. In the third category, the turnover is generally to be allocated to the location of the customer.

IV. Conclusions

Some nine years after the previous four notices on jurisdictional issues under the Merger Regulation had been adopted, it was time to adapt the guidance given on jurisdictional issues, taking into account the developments which have occurred in the meantime. These developments are not only of a legal nature, such as legislative changes or decisions of the European Courts, but are also new developments in relation to the legal structures chosen by parties to accomplish their transactions or the organisational structure of the undertakings concerned. The Jurisdictional Notice now gives up-to-date guidance on how the Commission will deal with these developments.

⁽³⁰⁾ Points 154 ff. of the Jurisdictional Notice.

⁽³¹⁾ CFI, judgment in Case T-417/05, *Endesa v Commission*, [2006] ECR II-2533.

⁽³²⁾ See points 169 ff. of the Jurisdictional Notice.

The application of Articles 81 and 82 EC in the sport sector

Philip KIENAPFEL and Andreas STEIN ⁽¹⁾

I. Introduction

On 11 July 2007 the Commission adopted a White Paper on Sport ⁽²⁾. The White Paper on Sport is the first comprehensive initiative on sport undertaken by the Commission and aims at providing strategic orientation on the role of sport in the EU. It addresses a host of sport-related issues ranging from public health aspects to corruption and money laundering. Competition law, which has figured prominently in the public debate preceding and following the adoption of the White Paper, is only briefly touched upon. However, competition issues are addressed in more detail in the accompanying Staff Working Document “The EU and Sport: Background and Context” ⁽³⁾ and particularly in Annex I of that document, specifically dedicated to “Sport and EU Competition Rules” (hereinafter the “Annex”). The Annex provides an overview regarding the principal case law of the Community Courts and the decisional practice of the Commission with respect to the application of Articles 81 and 82 EC in the sport sector.

The importance of the application of Articles 81 and 82 EC in the sport sector has increased proportionally to the growing economic significance of professional sport (football in particular), a trend largely driven by the ever-rising prices paid by media operators for sport rights. Professional sport has become “big business” involving billions of Euros. As a result, in recent years the Commission and the Community Courts have had to deal with an increasing number of antitrust cases in this sector.

The purpose of this article is to summarize the Annex ⁽⁴⁾. The article makes a distinction between the application of Articles 81 and 82 EC to (i) organisational aspects of sport, notably sporting rules and (ii) revenue-generating aspects of sport, notably the sale of sport media rights.

The first aspect concerns the compatibility with Articles 81 and 82 EC of sporting rules, i.e. rules

regulating a given sporting activity. Such sporting rules are normally adopted by the respective sport associations that are traditionally in charge of regulating “their” sport. The second aspect concerns the conditions under which sport media rights may be sold by right owners or acquired by media operators without infringing Articles 81 and 82 EC.

II. The application of Articles 81 and 82 EC to rules governing the organization of sport

1. The application of Articles 81 and 82 EC and the “specificity of sport”

It has long been established by the Commission and the Community Courts that sport is subject to EC Treaty provisions, notably Articles 81 and 82 EC in so far as it constitutes an economic activity ⁽⁵⁾. While the presence of economic activity is the point of departure for any legal analysis under EC competition rules, it is also undisputed that sport features some particular characteristics that set it apart from other economic activities. These distinctive qualities of sport are frequently referred to as the “specificity of sport”. They have been consistently taken into consideration by the Community Courts and the Commission and include, most notably, the following aspects:

- Sport events are a product of the contest between a number of teams or athletes. This **interdependence between competing adversaries** is specific to sport and distinguishes it from other industry or service sectors. Since sport events are of interest to the spectator only if they involve **uncertainty as to the result**, the interdependence leads to the requirement of a certain degree of equality or, in other words, competitive balance. As opposed to other economic sectors where competition serves the purpose of eliminating inefficient firms from the market, sport clubs and athletes have a direct interest not only in there being other clubs and athletes but also in their sporting and economic viability as competitors.
- Sport fulfils important **educational, public health, social, cultural and recreational functions** which require a certain degree of

⁽¹⁾ Directorate-General for Competition, units A-5 and F-2. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ COM(2007)391 final.

⁽³⁾ SEC(2007) 935.

⁽⁴⁾ The Annex also includes a chapter on the compatibility of ticketing arrangements with Articles 81 and 82 EC which is not summarized in this article.

⁽⁵⁾ This is established case-law of the European Court of Justice since case C-36/74, *Walrave*, [1974] ECR 1405.

redistribution of financial resources from professional to amateur sport (principle of solidarity).

- The organizational level of sport in Europe is characterized by a **monopolistic pyramid structure**. Traditionally, there is a single national sport association per sport and Member State, which operates under the umbrella of a single European and a single worldwide federation ⁽⁶⁾. The Community Courts and the Commission have both recognized the importance of the freedom of internal organization of sport associations.

2. The Meca-Medina judgment

a. The rejection of a concept of “purely sporting rules” falling outside the scope of Articles 81 and 82 EC

In the landmark *Meca-Medina* ruling of 18 July 2006, the European Court of Justice (ECJ) for the first time had to deal with the application of Articles 81 and 82 EC to sporting rules ⁽⁷⁾. The case concerned a challenge of the anti-doping rules of the International Olympic Committee under Articles 81 and 82 EC by two professional long distance swimmers who alleged that the prescribed maximum level of the substance for which they had been tested positive was too low and that the penalties for a violation of the rules were excessive.

The ECJ held that the qualification of a rule as “purely sporting” ⁽⁸⁾ is not sufficient to remove

the sport association adopting the rule in question from the scope of Articles 81 and 82 EC. The exclusion *a priori* of the anti-doping rules at issue from the scope of Articles 81 and 82 EC by the Court of First Instance (CFI) due to their purely sporting nature was considered an error of law that entailed the annulment of the CFI’s judgment ⁽⁹⁾. The ECJ further held that whenever the sporting activity in question constitutes an economic activity and thus falls within the scope of the EC Treaty, the conditions for engaging in it, such as the anti-doping rules in question, are subject to obligations resulting from the various provisions of the Treaty, most notably Articles 81 and 82 EC ⁽¹⁰⁾. The broad scope of this statement indicates that the vast majority of sporting rules are subject to scrutiny under the EC anti-trust provisions inasmuch as they determine the conditions for athletes, teams or clubs to engage in professional sport which undoubtedly constitutes an economic activity.

The *Meca-Medina* judgment has therefore contributed to legal certainty by clearly establishing that no category of “purely sporting rules” exists that is excluded from the scope of Articles 81 and 82 EC. Instead, it must be determined, on a case-by-case basis and irrespective of an alleged “purely sporting” nature of the rule, whether the specific requirements of Articles 81 or 82 EC are met. This is not to say, however, that the ECJ did not take into account the specificity of sport referred to above when assessing the compatibility of sporting rules with Articles 81 and 82 EC. Rather, it ruled that this cannot be done by way of declaring certain categories of rules *a priori* exempt from the application of Articles 81 and 82 EC.

b. The methodology of applying Articles 81 and 82 EC to sporting rules

The second important aspect of the *Meca-Medina* ruling enhancing legal certainty is the establishment of a clear methodological framework for the examination of the compatibility of sporting rules with Articles 81 EC and 82 EC. The ECJ specified that not every sporting rule that is capable of restricting competition infringes Article 81 or 82 EC. In assessing the compatibility of sporting rules with EC antitrust rules, account must be taken of

- the **overall context** in which the rule was adopted or the decision was taken or produces its effects, and more specifically, of its **objectives**; and

⁽⁶⁾ The pyramid structure results from the fact that the organization of national championships and the selection of athletes and teams for international competitions often require the existence of one umbrella organization.

⁽⁷⁾ Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991. In prior judgments cases were decided on the basis of other provisions of the EC Treaty, most notably those on the freedom of movement for workers and the freedom to provide services.

⁽⁸⁾ The Court of First Instance had differentiated between (i) sporting rules concerning the economic aspect of sporting activity and thus falling within the scope of the Treaty and (ii) sporting rules concerning questions of purely sporting interest and having nothing to do with economic activity and therefore falling outside the Treaty. The Court of First Instance considered the anti-doping rules to be “purely sporting” in nature (Case T-313/02, *Meca Medina* [2004] ECR, II-3291, paras. 40-41). The concept of “purely sporting rules” had appeared in previous Court judgments but the criteria to identify a purely sporting rule and the precise consequences of such classification (i.e. whether it removed the rule from the scope of the EC Treaty provisions or not) had remained vague.

⁽⁹⁾ *Meca-Medina*, supra, par. 33.

⁽¹⁰⁾ *Meca-Medina*, supra, par. 28.

- whether the restrictive effects are **inherent** in the pursuit of the objectives; and
- are **proportionate** to them ⁽¹¹⁾.

In applying those principles, the *Wouters* test ⁽¹²⁾, to the case at hand, the ECJ held that the anti-doping rules were capable of restricting competition under Article 81(1) EC because of adverse effects on competition resulting from a potentially unwarranted exclusion of athletes from sporting events ⁽¹³⁾. The Court then found that the objective of the challenged anti-doping rules was to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The restrictions caused by the anti-doping rules, in particular as a result of penalties, were considered by the ECJ to be "*inherent in the organisation and proper conduct of competitive sport*". The ECJ also carried out a proportionality test examining whether the rules went beyond what is necessary to achieve those objectives as regards (i) the threshold for the banned substance in question and (ii) the severity of the penalties; however, the Court failed to identify such disproportionate effects, and thus failed to find a breach of Articles 81 and 82 EC. The methodology of applying Articles 81 EC and 82 EC to rules adopted by sport associations as established by the ECJ in *Meca Medina* can be summarized as follows:

Step 1:

Are the EC anti-trust rules, i.e. Articles 81 and/or 82 EC applicable to the sporting rule?

1. Is the sports association that adopted the rule in question an "undertaking" or an "association of undertakings"?
 - a. The sports association is an "undertaking" to the extent it carries out an "economic activity" itself (e.g., the selling of broadcasting rights).
 - b. The sports association is an "association of undertakings" if its members carry out an economic activity. In this

respect, the question will become relevant to what extent the sport in which the members (usually clubs/teams or athletes) are active can be considered an economic activity and to what extent the members exercise economic activity. In the absence of "economic activity", Articles 81 and 82 EC do not apply.

2. Does the rule in question restrict competition within the meaning of Article 81(1) EC or constitute an abuse of a dominant position under Article 82 EC?

3. Is trade between Member States affected?

Step 2:

If the EC anti-trust rules are applicable, does the sporting rule fall outside the prohibition of Articles 81(1) and 82 EC taking into account

- a. the overall context in which the rule was taken or produces its effects and its objectives;
- b. whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and
- c. whether the rule is proportionate in light of the objective pursued.

Step 3:

Can the rule be considered compatible with EC anti-trust rules because it fulfils the conditions of Article 81(3) EC or because of an objective justification under Article 82 EC?

The case-by-case approach adopted by the ECJ in *Meca-Medina* and particularly the requirement of a proportionality test to be carried out for each sporting rule under the *Wouters* principles prevent any general categorisation of sporting rules as to their compatibility or non-compatibility with Articles 81 and 82 EC. The variety of sporting rules is almost limitless and even the same type of sporting rule may vary greatly from sport to sport and from Member State to Member State, each rule requiring a separate legal assessment.

At the same time, *Meca-Medina* demonstrates that Articles 81 and 82 EC provide sufficient flexibility as to duly take into account the specificity of sport and illustrates how the distinctive features of sport play an essential role in analyzing the compatibility of sporting rules with Articles 81 and 82 EC.

⁽¹¹⁾ *Meca-Medina*, supra, par. 42. The material parts of the judgment in that respect make reference only to Article 81(1) EC but the logic of the methodology established by the ECJ would appear to be transferable to Article 82 EC.

⁽¹²⁾ These principles were established by the ECJ in case C-309/99, *Wouters*, [2002] ECR, I-1577 concerning rules of the Dutch bar association prohibiting lawyers from entering into professional partnerships with accountants.

⁽¹³⁾ *Meca-Medina*, supra, par. 47.

3. Examples of sporting rules

In view of the case-by-case approach adopted by the ECJ in *Meca-Medina*, guidance on the compatibility of sporting rules with Articles 81 and 82 EC can be drawn mainly from the increasing body of case law at European and national level. The Commission has carried out in the Annex a detailed stocktaking of the existing relevant case-law of the Community Courts and decisional practice of the Commission. It has, on that basis, identified an indicative list of rules that are more likely to comply with Articles 81 and 82 EC and an indicative list of rules that are less likely to comply with Articles 81 and 82 EC ⁽¹⁴⁾.

a. Sporting rules that are more likely to comply with Articles 81 and 82 EC

- *Selection criteria for sport competitions* ⁽¹⁵⁾. As the number of athletes or teams that may participate in sport competitions is inherently limited, certain limitations are necessary for the proper organisation of a sport competition.
- *“At home and away” rules* ⁽¹⁶⁾. Such rules are commonly applied for club competitions such as football and provide that, in principle, each club must play its home match on its own ground. The objective of this rule is to ensure equality of chances between clubs.
- *Transfer periods* ⁽¹⁷⁾. Many club/team sports have rules that only allow the transfer of players within a certain time period during the season (“transfer windows”). The objective of such rules is to ensure the regularity of competitions since, for example, transfers late in the season may upset the competitive balance and damage the effective functioning of a championship.

⁽¹⁴⁾ It is important to note that apart from the anti-doping rules discussed above, the *Meca-Medina* methodology was not applied in any of these cases and that previous Court rulings, with the exception of *Meca-Medina* and *Piau*, did not apply Articles 81 and 82 EC. The categorization of the rules below does therefore not constitute a final assessment as to their compatibility or their non-compatibility with Articles 81 and 82 EC.

⁽¹⁵⁾ Joined Cases C-51/96 and C-191/97, *Christelle Delière v Ligue francophone de judo etc.*, [2000] ECR, I-2549 concerning the selection rules applied by the Belgian judoka federation to authorise the participation of professional and semi-professional athletes in an international judoka competition.

⁽¹⁶⁾ Commission decision of 9 December 1999, Case 36851, *C.U. de Lille/UEFA (Mouscron)*, decision not published (see Commission press release IP/99/965 of 9 December 1999). It is noteworthy that the Commission considered the rule in question to fall outside the scope of Articles 81 and 82 EC. Following *Meca-Medina*, this case would more likely be decided on the basis of the *Wouters* test.

⁽¹⁷⁾ Case C-176/96, *Lehtonen et al v. FRSSB*, [2000] ECR, I-2681.

- *Nationality clauses for national teams* ⁽¹⁸⁾. Most sports have rules limiting the participation in national teams to the citizens of the respective team. The objective is to enable the proper organisation of meaningful competitions with national teams.

- *Rules prohibiting the multiple ownership of clubs* ⁽¹⁹⁾. Such rules provide that two or more clubs/teams participating in the same competition may not be directly or indirectly controlled by the same entity or managed by the same person. The objective of this rule is to ensure the uncertainty of the outcome and to guarantee honest sporting competitions.

- *Anti-doping rules* ⁽²⁰⁾. Anti-doping rules prohibit the use of certain performance enhancing substances. As mentioned earlier, the objective of these rules is to ensure fair sport competitions with equal chances for all athletes as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.

- *“Rules of the game”*. Rules of the game are regulations establishing the elementary rules of a sport (e.g., the rules fixing the length of matches or the number of players on the field) ⁽²¹⁾.

b. Sporting rules that are less likely to comply with Articles 81 and 82 EC

- *Rules shielding sports associations from competition* ⁽²²⁾. In many cases sport associations not only act as regulators but also as commercial exploiters of a sport. In order to protect their commercial interests they may adopt rules that prohibit clubs or athletes from participating in competitions other than those organised by themselves under threat of penalties.

- *Rules regulating professions ancillary to sport*. In *Piau* the Commission dealt with a complaint against rules imposing a number of restrictions under Article 81 and 82 EC on the profession of football players' agents (e.g., the requirement to deposit a bank guarantee). As a result of the Commission's investigation, the most restric-

⁽¹⁸⁾ Case 36/74, *Walrave and Koch v. Union Cycliste Internationale*, [1974] ECR, 1405.

⁽¹⁹⁾ Commission decision of 25 June 2002 Case 37806, *ENIC/UEFA*, para. 25, available at <http://ec.europa.eu/competition/antitrust/cases/decisions/37806/en.pdf>.

⁽²⁰⁾ *Meca-Medina*, *supra*.

⁽²¹⁾ To the extent that rules of the game do not involve economic activity they would, as such, fall outside the scope of application of EC competition law.

⁽²²⁾ See, for example, the Commission's *FIA* (Formula 1) investigation (XXXIst Report on Competition Policy 2001, para. 221 *et seq.* and Commission press release IP/01/1523 of 30 October 2001).

tive limitations were removed and the complaint was rejected ⁽²³⁾.

- *Rules excluding legal challenges of decisions by sport associations before ordinary courts* ⁽²⁴⁾. Legal challenges of sporting rules before ordinary courts must not be excluded as a result of existing internal challenging procedures or arbitration to the extent that the denial of access to ordinary courts facilitates anti-competitive conduct or agreements.

In addition, the following points, which the ECJ in *Bosman* found to be violations of Article 39 EC, could also potentially fall to be assessed under Articles 81 and 82 EC.

- *Rules limiting the number of foreign players* ⁽²⁵⁾. The *Bosman* ruling took objection to a rule which limited the number of foreign players with EU nationality that football clubs could field in their national championships.
- *Rules requiring transfer payments for players in case of expired contracts* ⁽²⁶⁾. The ECJ in *Bosman* found that transfer rules requiring payment of international end-of-contract transfer fees within the EU with respect to football players who are nationals of an EU Member State violated Article 39 EC.

III. The application of Articles 81 and 82 EC to the sale of sport media rights

1. Introduction

Sport media rights constitute one of the main factors that have driven economic growth in the sport sector. For many media operators, sport rights are must-have content and the Commission has recognized in various decisions that sport rights constitute “vital input” and “key sales drivers” in the media sector. Live football rights in particular have proven to be “make or break” content especially for pay-TV operators ⁽²⁷⁾. Unsurprisingly, the

prices paid for these rights have soared in recent years ⁽²⁸⁾. In view of the economic significance of sport media rights, it is clear that the application of Articles 81 and 82 EC is of fundamental importance in this sector.

The main antitrust issue in the area of sport media rights in recent years has been the question if and under what circumstances the collective sale of media rights is compatible with Article 81 EC.

2. Market definitions and the specific features of sport media rights

As regards **product market definition**, a distinction is usually made between the upstream markets (i.e., the markets where rights-owners and, increasingly, sport rights agencies sell rights to media companies) and downstream markets (i.e., the markets where media companies such as TV operators are active).

Separate **upstream product markets** have been identified in previous Commission decisions for certain audiovisual content on the basis of specific criteria such as brand image, the ability to attract a particular audience and advertising/sponsoring revenues. The Commission has defined upstream markets for, e.g., (i) the broadcasting rights for certain major sport events ⁽²⁹⁾, (ii) the broadcasting rights (and new media rights⁽³⁰⁾) for football events played regularly throughout every year ⁽³¹⁾ and (iii) the broadcasting rights for football events that do not take place regularly where national teams participate ⁽³²⁾. In the recent *CVC/SLEC* decision, the Commission left open the question,

⁽²³⁾ Upheld on appeal by the CFI in Case T-193/02, *Piau v. Commission*, ECR (2005) II-209. The appeal to the ECJ was rejected as being partly manifestly inadmissible and partly manifestly unfounded by order of 23 January 2006, Case C-171/05P, [2006] ECR I-37.

⁽²⁴⁾ This was the case in the FIA investigation (Commission press release, IP/01/1523 of 30 October 2001) and the investigation concerning FIFA transfer rules in case of valid contracts (Commission press release, IP/02/284 of 6 June 2002).

⁽²⁵⁾ Case C-415/93, *URBSFA v. Bosman*, [1995] ECR I-4921.

⁽²⁶⁾ *Bosman*, *supra*, par. 114.

⁽²⁷⁾ For example, BSkyB's strong position in the pay-TV market in the United Kingdom has largely been the result of its acquisition of the football Premier League rights. The importance of sport media rights is also illustrated by the fact that the shares of the leading German pay-TV operator Premiere fell by more than 40% when it lost the football Bundesliga rights to a competitor in December 2005.

⁽²⁸⁾ For example, at the creation of the English Premier League in 1992, the media rights were acquired by BSkyB for around €280 million for five seasons, i.e., around €56 million per season. In 2006, BSkyB and Setanta paid around €2.5 billion only for the live rights in the UK for three seasons, i.e., more than €830 million per season. The total revenues generated by the Premier League from the latest round of tenders in 2006/2007 including international rights, highlights etc. amounted to around €4.1 billion for three seasons.

⁽²⁹⁾ See Commission decision of 10 May 2000, Case 32150 *Eurovision*, paras. 42-43 where the Commission considered that there was a strong likelihood that distinct markets existed for the acquisition of broadcasting rights for some major sporting events such as the Olympic Games. This decision was annulled by the CFI, but the CFI accepted the market definition.

⁽³⁰⁾ Commission decision of 23 July 2003, Case 37398 *Joint selling of the commercial rights of the UEFA Champions League*, OJ 2003 L 291/25 (hereinafter «UEFA CL»), par. 85.

⁽³¹⁾ *UEFA CL*, *supra*, par. 62 (national leagues and cups, the UEFA Champions League and the UEFA Cup); also see Commission decision of 2 April 2003, Case M.2876 *Newscorp/Telepiu*, OJ 2004 L 110/73, par. 66.

⁽³²⁾ *Newscorp/Telepiu*, *supra*, par. 65 (e.g., the Football World Cup or the European Football Championship).

with respect to Italy and Spain, whether an upstream market for major motor sport events (Formula One and Moto Grand Prix) exists or whether the relevant market includes all regular major sport events (excluding football) ⁽³³⁾.

The Commission has defined separate **downstream product markets** for free-TV and pay TV on the basis of the different trading relationships involved, the different conditions of competition, the price of the services, and the characteristics of the two types of television ⁽³⁴⁾. The Commission also identified separate downstream markets for on-demand sport content services delivered via wireless mobile devices or via the Internet ⁽³⁵⁾.

With regard to the **geographic markets** the Commission has held thus far that the downstream markets are of a national character or at least confined to linguistic regions ⁽³⁶⁾. The geographical borders of the upstream markets also tend to be national not only for national events (e.g., rights for national football leagues) but also for international sport events since such rights are normally also sold on a national basis. This is due to the national character of distribution as a result of national regulatory regimes, language barriers and cultural factors ⁽³⁷⁾. At least as regards the sale of rights for national sport events (e.g., national football leagues), future cases will therefore normally be dealt with by the national competition authorities.

Any legal analysis of cases involving sport media rights must take into account their **specific features** including in particular the fact that (i) the media sector evolves rapidly and requires a constant review of market definitions, (ii) the most important sport media rights are concentrated in the hands of few rights owners (usually sport associations) and, following their sale, in the hands of few powerful media operators and (iii) sport media rights are most valuable when broadcast live.

⁽³³⁾ Commission decision of 20 March 2006, Case M.4066, *CVC/SLEC*, par. 30. The decision confirmed that regular major sport events, i.e., sport events that take place throughout the year or throughout a significant time period each year such as Formula One races are not in the same market as major irregular sport events (e.g., Olympic Games) which take place for a few weeks every four years (see paras. 33 to 37).

⁽³⁴⁾ Commission decision of 21 March 2000, Case JV.37 *BSkyB/Kirch*, par. 24; *Newscorp/Telepiu*, *supra*, paras. 18-47.

⁽³⁵⁾ *UEFA CL*, *supra*, par. 82. Also see in this respect the concluding report on the sector inquiry into the provision of sports content over third generation mobile networks of 21 September 2005, available at http://ec.europa.eu/comm/competition/sectors/media/inquiries/final_report.pdf.

⁽³⁶⁾ See, e.g., *UEFA CL*, *supra*, par. 90.

⁽³⁷⁾ See, e.g., *UEFA CL*, *supra*, par. 88.

3. Competition concerns resulting from the behaviour of sellers (joint selling)

The Commission's decision making practice is limited thus far to cases relating to the joint selling of sport media rights under Article 81 EC. No decisions have been adopted with regard to the behaviour of a single seller (e.g., sport associations or sports rights agencies) under Article 82 EC. The Commission has taken decisions in three cases involving the joint selling of football broadcasting rights on the basis of Article 81 EC, namely *UEFA CL* ⁽³⁸⁾, *German Bundesliga* ⁽³⁹⁾ and *FA Premier League* ⁽⁴⁰⁾.

a. Joint selling may constitute a restriction under Article 81(1) EC

The Commission's consistent policy has been that joint selling constitutes a horizontal restriction of competition under Article 81(1) EC. Joint selling describes the situation where sport clubs (e.g., football clubs) entrust the selling of their media rights to the respective sports (league) association which then sells the rights collectively on their behalf. Joint selling arrangements are horizontal agreements which prevent the individual clubs each having a relatively small market share from individually competing in the sale of their sports media rights. One uniform price is applied to all rights collectively which constitutes price-fixing. In addition, the number of rights available in the upstream acquisition markets is often reduced which may create barriers to entry on downstream broadcasting markets and may lead to access foreclosure in these markets.

b. Joint selling may fall under Article 81(3) EC

The Commission has recognised that joint selling creates **efficiencies** and accepted joint selling arrangements under Article 81(3) EC ⁽⁴¹⁾. Joint selling arrangements have the potential of improving the media product and its distribution to the advantage of football clubs, broadcasters and viewers. The Commission in its decisions has in particular identified three types of benefits:

- The creation of a **single point of sale** provides efficiencies by reducing transaction costs for football clubs and media operators.

⁽³⁸⁾ *Supra*.

⁽³⁹⁾ Commission decision of 19 January 2005, Case 37214 *Joint selling of the media rights to the German Bundesliga*, OJ 2005 L 134/46.

⁽⁴⁰⁾ Commission decision of 22 March 2006, Case 38173 *Joint selling of the media rights to the FA Premier League*, available at http://ec.europa.eu/competition/antitrust/cases/decisions/38173/decision_en.pdf.

⁽⁴¹⁾ See in particular the detailed analysis of Article 81(3) EC in *UEFA CL*, paras. 136 et seq.

- **Branding** of the output creates efficiencies as it helps the media products getting a wider recognition and hence distribution.
- **The creation of a league product** means that the product is focused on the competition as a whole rather than the individual football clubs participating in the competition. This is attractive to many viewers.

In this context, it may be interesting to note that while the Commission in *UEFA CL* stated that it was in favour of the principle of **financial solidarity** (i.e., an equitable distribution of revenues among richer and poorer clubs of a league in order to ensure a competitive balance), this consideration had no impact on the Commission's assessment under Article 81(3) EC ⁽⁴²⁾.

c. Remedies applied to address competition concerns

In the cases decided thus far, the Commission limited the negative effects of joint selling through a number of remedies which will be presented below. This list of remedies is, however, not exhaustive or binding for future cases and different or new remedies may be adopted depending on the specific circumstances of a given case. It is also important to note that any remedies have to be examined on a case-by-case basis taking into account the specific market situation which may vary considerably from Member State to Member State.

- *Tendering.* The Commission in all cases required the collective sellers on the upstream market to organise a competitive bidding process under non-discriminatory and transparent terms, thereby giving all potential buyers an opportunity to compete for the rights.
- *Limitation of the duration of exclusive vertical contracts.* The Commission also required the collective selling entities to limit the duration of the exclusive rights offered in vertical contracts to no more than three football seasons. It considered that longer contract duration would risk creating a situation where a successful buyer would be able to establish a dominant position on the downstream market reducing the scope for effective *ex ante* competition in the context of future bidding rounds.
- *Limitation of the scope of exclusive vertical contracts.* The Commission further sought to limit the risk of market foreclosure — resulting from a single buyer acquiring all the valuable rights — by obliging the collective selling entity to unbundle the media rights in separate pack-

ages, thereby limiting the scope of the exclusivity. In this context, the Commission required the creation of two or more independently valid packages for the most important rights, notably the exclusive live rights. These packages were to be balanced and meaningful and not so large so as to only allow the most powerful operators to bid. The Commission also earmarked packages for certain distribution platforms in order to enable mobile operators and internet service providers to acquire rights. However, a careful analysis of the specific market conditions is necessary in order to determine whether such earmarking is appropriate in a given case ⁽⁴³⁾.

- *No conditional bidding.* In *FA Premier League*, an obligation was imposed on the seller to accept only stand-alone unconditional bids for each individual package ⁽⁴⁴⁾. The rights would be sold to the highest standalone bidder. Such unconditional selling is aimed at preventing a powerful buyer interested in acquiring the most valuable package(s) from offering a bonus on condition that all the valuable rights are sold to it, thus inciting initial rights owners not to sell at least some packages to competitors in the same market or operators in neighbouring markets.
- *Fall-back option, use obligation, parallel exploitation.* In order to limit the risk of output restrictions caused by the collective sale of exclusive rights, the Commission required in *UEFA CL*, *German Bundesliga* and *FA Premier League* that there be no unused rights. Rights not sold by the collective entity within a certain time period would fall back to the individual clubs for parallel exploitation ("no hoarding"). In addition, the Commission ensured market availability of less valuable rights such as deferred highlights and new media rights by imposing the parallel exploitation of these rights by individual clubs and UEFA in *UEFA CL*.
- *No single buyer obligation.* In order to prevent that all packages of valuable live rights were sold to the incumbent pay-TV operator in the United Kingdom, BSkyB, which had held the

⁽⁴²⁾ *UEFA CL*, *supra*, par. 165.

⁽⁴³⁾ In the *German Bundesliga* decision, three separate packages for live rights were earmarked for (i) TV (pay-TV and free-TV), (ii) internet and (iii) mobile phones. In the *FA Premier League* decision one year later, on the other hand, only two separate packages for live rights were earmarked for (i) audio-visual rights on a "technology neutral basis" (including pay-TV, free-TV and internet) and (ii) audio-visual mobile rights. This was a result of the increasing convergence of the TV and internet platforms (e.g., as a result of IPTV).

⁽⁴⁴⁾ *FA Premier League*, *supra*, para. 40 and points 7.5 to 7.7 of the commitments.

live rights since 1992 the Commission considered it necessary to impose a no single buyer obligation on the collective selling entity in the *FA Premier League* decision. In the absence of such remedies there was a risk that competition would remain eliminated well beyond the duration of any on-going contract as due to the long-term presence of the dominant buyer competition was ineffective. It is noteworthy that the issue did not arise in the *UEFA CL* and *German Bundesliga* cases ⁽⁴⁵⁾.

- *Trustee*. The Commission in *FA Premier League* required that the tender procedure was overseen by a trustee that reported back to the Commission to ensure and guarantee that the tender procedure was undertaken in a fair, reasonable a non-discriminatory manner.

4. Competition concerns resulting from the behaviour of buyers (joint acquisition)

The Commission's decision-making practice is limited thus far to cases relating to the joint acquisition of sport media rights under Article 81 EC. No decisions have been adopted with regard to the behaviour of a dominant acquirer under Article 82 EC.

In cases involving joint acquisition agreements under Article 81(1) EC it is important to assess, on a case-by-case basis, whether the joint acquisition agreement forecloses competitors from accessing the sport rights at the upstream acquisition market (a question which will largely depend on the market definition upstream) and, as a result, competition is restricted on the downstream markets (a question which will largely depend on the importance of the rights concerned). The Commission found in *EBU* that the joint acquisition agreement operated by the European Broadcasting Union (an association of mainly public national broadcasters) and relating, *inter alia*, to sport media rights, restricted Article 81(1) EC under the prevailing market conditions at the time ⁽⁴⁶⁾.

The Commission in *EBU* exempted the joint acquisition agreements under Article 81(3) EC in view of certain improvements (reduction of transaction and other costs benefiting in particular smaller

channels from smaller countries) and by imposing sublicensing obligations (annulled by the CFI) ⁽⁴⁷⁾. The *Newscorp/Telepiù* ⁽⁴⁸⁾ merger decision is interesting also from an antitrust perspective as the remedies for the approval of this merger included a limitation of the duration of exclusive football rights to two years to take into account the fact that the merged entity (holding a near monopoly in the Italian pay-TV market) would have combined for a long duration an unparalleled portfolio of exclusive premium content, thereby foreclosing access to third parties.

IV. Conclusion

Since modernisation of the EC antitrust enforcement rules in May 2004 undertakings must assess themselves whether they comply with Articles 81 and 82 EC. This applies notably to sport associations adopting sporting rules and to those undertakings selling or acquiring sport media rights. In view of the enormous variety of different sporting rules, the fast-changing and very country-specific market conditions of the media sector and in view of the case-by-case approach that needs to be adopted in this area, it is impossible to categorise definitively and in advance rules and practices in sport as to their compatibility or non-compatibility with Articles 81 and 82 EC. Regarding sporting rules, the increasing body of jurisprudence and decisions of the Commission as well as case law at national level provide useful guidance. The *Meca-Medina* judgment also establishes a clear methodology as to how to assess sporting rules under Articles 81 and 82 EC and clarifies how to take into account the specificity of sport in the process. Concerning the collective sale of media rights, the three decisions adopted by the Commission to date as well as case law at national level provide equally useful guidance.

The Annex to the White Paper aims to facilitate the difficult task of assessing, on a case-by-case basis, whether a given rule or practice infringes Article 81 or 82 EC by summarizing the existing case law at the European level in the sport sector. Finally, it should also be emphasized that with respect to sporting rules the Commission has no intention of becoming a sport regulatory body or to take over the role of sport associations which are best placed to organise a sport.

⁽⁴⁵⁾ In *UEFA CL* there was no need to examine the individual national market situations. In *German Bundesliga* no such issue arose considering the value of the different packages and the distribution of market players (also taking into account the bankruptcy of Kirch which had previously acquired the Bundesliga rights).

⁽⁴⁶⁾ Commission decision of 11 June 1993, Case 32150 *EBU/Eurovision System* OJ 1993 L 179/23 and Commission decision of 10 May 2000, Case 32150 *Eurovision* OJ 2000 L 151/18.

⁽⁴⁷⁾ The two decisions were annulled by the CFI in Case T-528/93 *Eurovision I* [1996] ECR II-649 and Case T-185/00 etc *Eurovision II*, [2002] ECR II-3805. Following the CFI's judgment, the Commission is currently reviewing the Eurovision Rules under Article 81 EC.

⁽⁴⁸⁾ *Supra*.

The Commission will only intervene in cases where

- (1) economic activity is involved (which would typically, for example, exclude certain “rules of the game”);
- (2) the sporting rule in question does not fulfil the *Wouters* criteria applied in *Meca-Medina*;
- (3) there is a significant impact on competition on a commercial market; and
- (4) there is a sufficient Community interest to deal with the matter in question at the European level.

Public procurement and State aid control — the issue of economic advantage

Nóra TOSICS and Norbert GAÁL ⁽¹⁾

1. Introduction

In recent years, the Commission received several State aid notifications in which Member States asked the Commission to confirm in advance that the complex public procurement transactions they were planning would not lead to the granting of State aid. This indicates some uncertainty regarding the application of State aid rules in the case of public procurement: Are public procurements affected by the State aid rules at all? If so, what would be considered State aid in this context? How could this be avoided before concluding the contract award procedure?

Based on the Commission's experience in the field of telecommunications and in particular of a recent State aid decision concerning the procurement of broadband services, this article aims at clarifying the above issues.

2. Procurement and State aid in general

Public purchases of goods, services and infrastructure in all EU Member States are subject to public procurement rules. These aim at creating a level playing field for private operators to compete for public contracts, and to increase the efficiency of public expenditure. The public procurement rules of the Member States are coordinated by two EU Directives adopted on the basis of the Treaty provisions on freedom of establishment and free movement of services:

- Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public service contracts and public supply contracts; and
- Directive 2004/17/EC on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors ⁽²⁾.

⁽¹⁾ Directorate-General for Competition, unit C-4. The views expressed are purely those of the authors and may not under any circumstances be regarded as stating an official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ In addition to these two directives concerning the procedures for the award of public contracts, there are two directives concerning the remedies available in the field of public procurement (Directive 89/655/EEC and Directive 92/13/EEC), which have been amended by Directive 2007/66/EC.

These Directives do not cover all public procurement throughout the EU. For instance, contracts with a value below certain thresholds and service concessions ⁽³⁾ are outside their scope. However, these contracts are also subject to the general principles of the EC Treaty concerning transparency and non-discrimination ⁽⁴⁾.

As there are detailed secondary rules at Community level concerning the award of public contracts, it could be argued that there is no reason for the same contracts to be subject to State aid control as well. However, automatically exempting public purchases from State aid control would not be in line with Article 87 (1) of the EC Treaty, which refers without distinction to *“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market”*. Therefore, procurement transactions may fall within the scope of State aid control and may be prohibited if they qualify as State aid.

Such a transaction would be considered to have benefited from State aid if it displays all of the following characteristics:

- it is financed directly or indirectly through State resources;
- it confers an economic advantage to undertakings ⁽⁵⁾ exercising an economic activity;
- the advantage is selective and distorts or threatens to distort competition; and
- it has an effect on intra-Community trade.

⁽³⁾ In line with the procurement directives, a service concession “is a contract of the same type as a public service contract except for the fact that the consideration for the services consists either solely in the right to exploit the service or in this right together with payment.”

⁽⁴⁾ See for instance the judgement of the European Court of Justice in the case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745 and the Commission Interpretative Communication on the Community rules applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, OJ C 179, 1.8. 2006, p. 2.

⁽⁵⁾ The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. See for instance: judgement of the Court of 23 April 1991 in case C-41/90, *Klaus Höfner and Fritz Elser vs Macrotron GmbH*.

Since according to the jurisprudence of the European courts, the majority of public procurements could be considered as being financed through State resources ⁽⁶⁾, the key issue is to consider whether, and under which conditions, public procurement favours certain undertakings by giving them an economic advantage. In case there is an economic advantage above the *de minimis* threshold ⁽⁷⁾ under the State aid rules, the remaining conditions concerning selectivity, distortion of competition ⁽⁸⁾ and effect on trade are likely to be met.

The issue of economic advantage

In line with the case law of the European Courts, the concept of economic advantage under the State aid rules includes any advantage “*which the recipient undertaking would not have received under normal market conditions*”. With regard to the economic operator selected as a result of a tender procedure, this implies that if a public purchase corresponds to a normal commercial transaction and the authorities are paying a market price for the works, goods or services procured, no State aid is involved. However, the question is: what is necessary in practice to meet the market economy buyer test in the case of public procurement?

In the field of State aid, the use of competitive, transparent and non-discriminatory public tenders has traditionally been considered sufficient to presume that no State aid is provided to the economic operator selected as a result of the procedure. In the London Underground Public-Private Partnership case ⁽⁹⁾, the Commission concluded that “*when these types of infrastructure arrangements are concluded after the observance of an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any market sector support can be regarded as representing the market price for the execution of the project.*”

⁽⁶⁾ There may be some exceptions in the case of contracts granted by contracting entities (in particular private undertakings operating on the basis of special or exclusive rights) in the field of utilities, depending on whether these entities may be considered as being under State control. However, these considerations go beyond the limits of the present article.

⁽⁷⁾ Up to € 200,000 may be granted to an undertaking over any period of three years without prior Commission approval, see Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006.

⁽⁸⁾ Except in the case of the provision of general infrastructure with public funds, where no selectivity element would be present as regards the users of the infrastructure.

⁽⁹⁾ Case N 264/2002 *London Underground Public Private Partnership*, para 79

This conclusion should lead to the assumption that, in principle, no State aid is involved”. Albeit in a different context, the Altmark judgement of the European Court of Justice concerning services of general economic interest also expressed the view that public procurement procedures allow for the selection of the tenderer capable of providing the given services “*at the least cost to the community*” ⁽¹⁰⁾.

However, in practice, the assessment of procurement transactions under the State aid rules before they have taken place has not always been entirely straightforward. Sometimes, doubts have been expressed concerning the ability of certain procurement procedures to guarantee a market price. In addition, it has also been argued that the Commission would not be in a position to declare in advance that State aid would not be provided through a particular tender procedure. Moreover, especially in the case of the provision of network infrastructures or network services, it has been suggested that the presence of aid at the level of the end users or third parties should also be considered. More recently, a notification concerning the procurement of broadband services for the public sector in Wales gave the Commission an opportunity to clarify these issues.

3. The Welsh Public Sector Network Scheme ⁽¹¹⁾

The notification submitted by the UK authorities concerned the procurement of high bandwidth network services by the Welsh Assembly Government for public sector organisations in Wales.

Initially, public organisations in Wales had their own networks, which were procured separately by the different public service organisations. According to the UK authorities, this resulted in higher costs, lack of sufficient connectivity and duplication of resources. Moreover, in their view, the fragmentation and lack of interconnectivity, interoperability and common network standards between the Welsh public service bodies reduced the efficiency of public services and hampered their improvement.

In order to address the above shortcomings, the Welsh Assembly Government decided to award a service contract for the provision of consolidated network services. The public service contract included:

⁽¹⁰⁾ Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, para 93

⁽¹¹⁾ Case N 46/2007 “Welsh Public Sector Network Scheme”, United Kingdom, of 30.5.2007, see http://ec.europa.eu/community_law/state_aids/comp-2007/n046-07.pdf

- (i) a collective electronic communications network service consisting of a range of core infrastructure services;
- (ii) an initial connection of selected public sector organisations (around 1000 connections shared between the Health Service, local government and the Higher Education / Further Education Sectors).

Given that the existing networks of private operators already reached 98 % of all public buildings in Wales, there appeared to be no need for significant new infrastructure.

The procurement aimed to ensure common standards of service, increased interoperability and extended service reach throughout Wales. This allowed these organisations to work more effectively together and to improve the delivery of public sector services to the citizens. By aggregating the needs of the individual bodies and conducting a centralised procurement, the procurement also aimed to avoid duplications and to make economies of scale.

In view of the particular complexity of the public contract ⁽¹²⁾, the Welsh Assembly Government followed the competitive dialogue procedure in compliance with the Directive 2004/18/EC, awarding the contract to the most economically advantageous tender. For the application of this award criterion, several sub-criteria were used concerning commercial, technical and quality aspects, risk distribution and contractual compliance. The UK authorities also envisaged specific mechanisms to ensure that the price paid would remain cost effective (gain sharing, benchmarking by means of independent reviews of tariffs and service performance, etc.).

The contract award procedure was not yet concluded at the time of the State aid assessment. In line with the general considerations outlined above, the pivotal point of the Commission's assessment under the State aid rules was whether the procurement of the Welsh Public Sector Network Scheme provides an economic advantage to any undertaking within the meaning of Article 87 (1) of the EC Treaty.

⁽¹²⁾ The Welsh authorities considered the public contract particularly complex, since there were a large number of various users with different service requirements and needs (for instance in case of security, bandwidth or managed services) and these differences had to be dealt with in the implementation of a single managed network. Moreover, the best technical means for achieving the new network were not known.

Advantage to the service provider

In relation to the service provider, the decision of the Commission confirmed the possibility to assess in advance that a procurement transaction does not involve State aid to the operator selected as a result of the procedure. The Commission concluded that the award of the contract would not provide any economic advantage to the service provider which would go beyond market conditions. To arrive at this conclusion, the Commission first ascertained that the award of the contract was a pure procurement transaction, aiming to satisfy a public need ⁽¹³⁾. This was clearly the case since the objective was to purchase network services for UK public service organisations.

Furthermore, the Commission verified whether a competitive procurement procedure was being carried out in compliance with the EU public procurement rules. In this context, it has also examined whether in line with the requirements of the public procurement directives, the award criteria correspond to the objective of achieving best value for money. This condition was also met. The award in question was made in line with the EU procurement directives, using a competitive procurement procedure with prior publication at EU level in which any economic operator could request to participate under equal conditions. In compliance with the requirements of Directive 2004/18/EC, the contract was to be awarded to the most economically advantageous tender, using criteria which corresponded to the objective of achieving best value for money.

The Commission also concluded that the contract did not give rise to extra advantages to the service provider beyond the scope of the contract. Beyond the initial order fixed in the public service contract, there was no obligation for the public service organisations to use the connectivity services provided by the service provider. In addition, the provision of the network services did not result in additional spare capacities which could have been exploited commercially. Finally, the Commission valued positively the fact that there were appropriate mechanisms to ensure cost-effectiveness over the whole duration of the contract ⁽¹⁴⁾.

⁽¹³⁾ In general, public procurement serves to satisfy a public sector need, by definition. However, it cannot be excluded that, in certain exceptional circumstances, the State may enter into transactions without a clear public need and may thereby grant aid to a certain enterprise, see for example Case T-14/96 *Bretagne Angleterre Irlande (BAI) v. Commission* [1999] ECR II-139.

⁽¹⁴⁾ For instance benchmarking by means of independent reviews of tariffs and service performance, etc.

Additional levels of assessment

In addition to the issues concerning the service provider, the decision of the Commission concerning the Welsh Public Sector Network Scheme also verified the presence of State aid concerning the users of the network and third parties.

The users of the network were all part of the public administration and exercised public functions⁽¹⁵⁾. Therefore, these entities were not found to exercise an economic activity and hence did not qualify as undertakings under the State aid rules. However, note that, had the State been purchasing network services for economic undertakings, State aid could have been present at their level.

Similarly, in the Welsh case, the network was not considered to provide an advantage to third party operators given that the need for significant new infrastructure was unlikely and wholesale access was not envisaged beyond potentially existing regulatory requirements⁽¹⁶⁾. Had there been a possibility for wholesale access for commercial use by third parties on preferential terms, depending on the conditions, State aid could have been found to be present.

On the basis of the above, the Commission concluded that the procurement of the Welsh Public Sector Network Scheme does not constitute State aid within the meaning of Article 87 (1) of the EC Treaty.

4. Conclusion

Public procurement in the EU is subject to the principles of the Treaty, and to the detailed provisions of the EU public procurement Directives coordinating the national procurement rules. However, this does not automatically exempt public procurements from the scope of the State aid rules.

To see whether a public procurement involves State aid to the winning economic operator, the most important issue is to consider whether the procurement may entail any advantage which the operator would not receive under normal market conditions. As confirmed by the Welsh Public Sector Network Scheme, in the case of pure procurement transactions, the use of a competitive procurement procedure which is in line with the EU public procurement rules and thus suitable to achieve best value for money, i.e. fair market price for the goods, services or infrastructure purchased, creates a presumption that no State aid will be involved to the economic operator concerned.

In certain cases, such as the provision of broadband networks, State aid might be provided to the end users of the network — in case there are economic undertakings among them — or to third parties which get access to the network provided out of public funds.

⁽¹⁵⁾ Such as the National Health Service Wales, local authorities, fire services, police, national parks authorities, the Welsh Assembly Government and the National Assembly for Wales, higher and further education and assembly sponsored public bodies, such as the Welsh language board.

⁽¹⁶⁾ There may be a regulatory obligation to provide wholesale access if the selected provider was deemed to have significant market power.

Territorial restrictions and profit sharing mechanisms in the gas sector: the Algerian case

Eleonora WÄKTARE ⁽¹⁾

Introduction

With the recent conclusion of the territorial restrictions case relating to the import of Algerian gas into Europe, the Commission successfully closed all previously pending cases on this issue. The Commission had started to investigate territorial restriction clauses in gas contracts in 2000, with the aim to increase supply competition. Numerous contracts concluded between external suppliers and the European importers were examined and a number of cases were opened. Some of these cases could be closed, once the upstream suppliers had agreed to delete territorial restrictions (and comparable provisions) from their contracts and not to introduce them in new contracts. Commitments were received gradually in July 2002 from Norwegian Statoil and Norsk Hydro ⁽²⁾; in December 2002 from NLNG, the Nigerian gas company supplying liquefied natural gas ⁽³⁾; and in 2003 and 2005 from Italian ENI ⁽⁴⁾, Austrian OMV ⁽⁵⁾ and German E.ON Ruhrgas ⁽⁶⁾ with respect to their supply agreements with Gazprom ⁽⁷⁾. Moreover, in 2004, the Commission provided clear guidance on its legal assessment of territorial restriction clauses with the adoption of a decision in the GDF case ⁽⁸⁾.

⁽¹⁾ Formerly Directorate-General for Competition, unit B-1. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Press release IP/02/1084 of 17 July 2002, «Commission successfully settles GDF case with Norwegian gas producers». This case concerned a joint selling agreement between producers from the Norwegian continental shelf, but incidentally the abolition of territorial restrictions was also achieved.

⁽³⁾ Press release IP/02/1869 of 12 December 2002, «Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG».

⁽⁴⁾ Press release IP/03/1345 of 6 October 2003, «Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses».

⁽⁵⁾ Press release IP/05/195 of 17 February 2005, «Commission secures improvements to gas supply contracts between OMV and Gazprom».

⁽⁶⁾ Press release IP/05/710 of 10 June 2005, «Commission secures changes to gas supply contracts between E.ON Ruhrgas and Gazprom».

⁽⁷⁾ Nyssens, H., C. Cultrera and D. Schnichels, «The territorial restrictions case in the gas sector: a state of play», Competition Policy Newsletter, 1/2004, p. 48.

⁽⁸⁾ Press release IP/04/1310 of 26 October 2004, «Commission confirms that territorial restriction clauses in the gas sector restrict competition».

Discussions with the Algerian Government representatives and the Algerian national supply company Sonatrach were to take longer, as Sonatrach was keen to replace territorial restriction clauses with alternative mechanisms, most prominently so-called profit sharing mechanisms, on which a common understanding needed to be reached. On 9 July 2007, Commissioner Kroes and the Algerian Minister for Energy and Mines Dr Chakib Khelil had the final discussions in this matter. In this context the Algerian party committed to delete territorial restrictions from existing contracts and not to introduce such clauses in new contracts ⁽⁹⁾. A common understanding was also found on profit sharing mechanisms.

The substance of the common understanding has only been made public via a press release by the Commission and the Algerian Government ⁽¹⁰⁾, as agreed by the parties. The aim of this article is to provide further information to stakeholders and other interested parties.

Territorial restrictions and profit sharing mechanisms

In gas supply contracts between a gas producer and a European gas wholesaler, territorial restriction clauses, also called destination clauses, undermine the creation of a common energy market by preventing the buyer from reselling the gas outside a defined geographic area, normally a Member State. The clauses impede arbitrage between low price areas and high price areas.

Profit sharing mechanisms (hereafter «PSMs») have been used as an alternative to territorial restrictions. PSMs oblige the buyer to share a certain part of the profit with the supplier/producer if the gas is resold by the buyer to a customer outside the agreed territory or to a customer using the gas for another purpose than the one agreed upon. Typically the contracts provide for a 50/50 split of the additional profits, however often not clarifying how these «additional» profits are calculated.

⁽⁹⁾ This is valid for any contract by which gas is supplied to the European Union, even where gas transits via another Member State before reaching the Member State for which it is initially bought. It should be noted that the common understanding does not cover contractual relationships relating to sales of gas in Algeria's neighbouring countries, namely Morocco and Tunisia.

⁽¹⁰⁾ Press release IP/07/1074 of 11 July 2007.

Whilst territorial restrictions are generally considered hardcore restrictions of competition, the situation as regards PSMs is more complex. By requiring the importer to share part of the profit gained through the deviation of the gas to a more profitable destination, the PSM may have an anti-competitive effect, if it removes or reduces the importer's incentive to deviate the gas. In practice, the effect of the PSM would then be equivalent to that of a territorial restriction clause. In addition, PSMs raise concerns as they tend to include reporting obligations for the buyer. It is argued that the supplier must know the final destination of its gas to calculate the profit to be shared. However in this way, commercially sensitive information could be communicated between the upstream supplier and its European buyer.

Gas can be supplied either via pipeline or as liquefied natural gas ("LNG"). Historically and generally, territorial restrictions have been included in pipeline contracts, whereas PSMs have been inserted in LNG contracts.

Algeria as a gas supplier

In 2006 ⁽¹¹⁾, Algeria produced 84.5 billion cubic meters (hereafter "BCM") of natural gas and internally consumed 23.7 BCM thereof. Of its production, 35.6 BCM were supplied to the European Union via pipeline, namely 24.4 BCM to Italy, 8.6 BCM to Spain, 2.1 BCM to Portugal, and 0.4 BCM to Slovenia. Algeria also supplies 1.3 BCM to neighbouring Tunisia. LNG allows diversifying the countries supplied. In 2006, Algeria shipped LNG tankers to the European Union for about 19 BCM, of which 7.3 BCM to France, 3.3 BCM to Belgium, 3 BCM to Italy, 2.8 BCM to Spain, 2 BCM to the UK and 0.4 BCM to Greece. Outside the EU, Algeria sells 4.6 BCM to Turkey, 0.5 BCM to the U.S.A., 0.3 BCM to South Korea, 0.2 BCM to Japan and 0.08 BCM to India.

If one adds pipeline gas and LNG, Algeria supplied in total 54.6 BCM to the European Union in 2006. This is equivalent to 11% of the EU's total consumption (483 BCM) in 2006 and makes Algeria the third largest external supplier after Russia (127 BCM in 2006) and Norway (84 BCM in 2006). However, in some Member States, Algerian supplies represent a much higher share of national

consumption. In particular, Algerian supplies represent 35% of Italy's total gas consumption and 34% of Spain's total gas consumption ⁽¹²⁾.

The common understanding reached with Algeria

Whilst accepting the need to delete territorial restriction clauses from gas supply contracts concluded with European importers, Sonatrach and the Algerian Government insisted — as indicated above — on replacing such clauses with PSMs. The possible drafting of the PSM clauses was discussed at length between the Commission and the Algerian side, but no solution could be found, as the Commission insisted that it was essentially for the commercial partners (i.e. Sonatrach and the European importers) to agree on contractual terms acceptable to them. The Commission could only express itself on the compatibility of concrete proposals with EC competition law. In this respect, the Commission noted that the proposals submitted to it could not be considered compatible with EC competition law.

Typically, LNG supplies are contracted under three Incoterms, or international commercial terms, DES, CIF and FOB. Incoterms are standard trade definitions most commonly used in international sales contracts. They are devised and published by the International Chamber of Commerce ⁽¹³⁾.

DES ("delivery ex ship") means that the seller fulfils its contractual obligations when the goods are placed at the disposal of the buyer (title and risk) on board the ship at the named port of destination. The seller bears all the costs and risks involved in bringing the goods to the named port of destination. In other words, the LNG remains the property of the seller until handed over to the buyer in the port of destination.

CIF ("cost insurance and freight") means that the seller fulfils its contractual obligations when the goods pass the ship's rail in the port of shipment. The seller must pay the costs and freight necessary to bring the goods to the named port of destination, but the risk of loss of or of damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. However,

⁽¹¹⁾ BP Statistical Review of World Energy 2007 (discrepancies due to rounding).

⁽¹²⁾ BP Statistical Review of World Energy 2007. In 2006, Italy consumed 77.1 BCM; 24.46 BCM were imported from Algeria by pipeline and 3 BCM as LNG. The same year, Spain had a total gas consumption of 33.4 BCM; 8.62 BCM were imported from Algeria by pipeline and 2.8 BCM as LNG.

⁽¹³⁾ <http://www.iccwbo.org/incoterms/id3042/index.html>

in CIF the seller also has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. In brief, CIF contracts provide that the goods are delivered to the buyer at the port of shipment (title and risk), but the seller bears the costs of the insurance and the freight.

FOB ("free on board") means that the seller has fulfilled its contractual obligations when the goods pass the ship's rail at the named port of shipment. This means that the buyer bears all costs and risks of loss of or damage to the goods from the port of shipment. FOB contracts therefore transfer the title and risks of the good at the port of shipment.

A key factor in distinguishing the different types of contracts in which PSMs may be applied is the transfer of title and risk. As soon as the buyer takes title to and bears the risks for the gas, he should be entitled to take the gas to another destination, i.e. divert the ship. The Commission took the view that to restrict this freedom through the application of a PSM would amount to a restriction of competition contrary to Article 81 EC Treaty. The application of the PSMs proposed by Sonatrach would likely have reduced or possibly even eliminated the buyers' incentive to resell the gas in another geographical area.

In the framework of the common understanding, the Algerian Government and Sonatrach accepted not to insert PSMs in new LNG contracts under FOB and CIF conditions, when the contracts are related to the supply of the European Union. On the other hand, under the common understanding PSMs can be applied in DES contracts. In DES contracts, title and risk pass to the buyer at the port of destination. Should the gas be diverted from its initial destination while still underway a change of contract would be required. Moreover, as the gas still belongs to the seller, it is difficult to speak of a resale restriction in such circumstances.

The Algerian party is also going to remove PSMs from existing pipeline contracts and will not insert them in future pipeline contracts, also for transit

contracts where the gas runs through another Member State prior to arriving at its final destination. While not expressly stated in the press release, the underlying rationale is the same. Once title and risk pass to the buyer the PSMs should not be applied.

Be it for territorial restriction clauses or for PSMs, the common understanding with the Algerian party does not foresee any type of compensation or renegotiation of contract following the deletion of the contested clauses.

The common understanding reached with Sonatrach and the Algerian Government covers only contracts relating to the supply to the European Union. This means that the contractual regime of Algerian gas sales outside the EU is not affected by the common understanding. The Algerian party underlined in particular gas sales in Morocco and Tunisia.

Conclusion

The common understanding reached with the Algerian side on territorial restrictions and PSMs concludes seven years of at times difficult discussions and further contributes to the development of a positive relationship between the European Union and Algeria. It was important to reach a solution for this specific competition issue, considering the broader context of the development of the European neighbourhood policy and in particular the negotiation of the Memorandum of Understanding on strategic partnership between the EU and Algeria in the field of energy. It is now expected that the commercial parties adapt their contracts to make them compatible with European competition law. In this respect it is important to underline that the Commission will not interfere with the commercial negotiations between Sonatrach and the European importers. The commercial parties remain free to negotiate what is for them the best suited solution, as long as it is ensured that the gas can be effectively sold across borders.

Margin squeeze in the Spanish broadband market: a rational and profitable strategy

Jean-Christian LE MEUR, Iratxe GURPEGUI and Katja VIERTIÖ ⁽¹⁾

On 4 July 2007, the European Commission adopted a decision against the Spanish incumbent telecoms operator Telefónica for a very serious abuse of its dominant position in the Spanish broadband market ⁽²⁾. The fine imposed on Telefónica amounted to €151 875 000. The Commission found that Telefónica imposed unfair prices in the form of a margin squeeze between the wholesale prices it charged to competitors and the retail prices it charged to its own customers from 2001 to 2006. In so doing, Telefónica weakened its competitors, making their continued presence and growth in the market difficult: competitors were forced to make losses if they wanted to match Telefónica's retail prices. This resulted in considerable consumer harm in the form of retail prices that are among the highest in EU-15 and low broadband penetration.

This is the third Commission decision on price abuse since the telecommunications sector was fully liberalised in 1998. On 21 May 2003, the Commission fined Deutsche Telekom for abuse of dominant position in the form of a margin squeeze in German telecommunications markets ⁽³⁾. On 16 July 2003, the Commission fined Wanadoo, the internet arm of France Télécom for abuse of a dominant position in the form of predatory prices in the French retail broadband market ⁽⁴⁾.

1. The control of the broadband value chain in Spain by Telefónica

1.1. The broadband value chain in Spain

Broadband access is a key element of the information society. The main technology used in Spain to provide broadband internet access services is ADSL ⁽⁵⁾, which provides high-speed internet access using a telephone line and represents 80% of broadband internet connections. The incumbent Telefónica is the only Spanish telecommu-

nications operator that has a nation-wide fixed telephone network. It rolled out this local access network over significant periods of time protected by exclusive rights and was able to fund investment costs through monopoly rents from the provision of voice telephony infrastructure and services.

It is uneconomical to duplicate Telefónica's local access network. Therefore, Telefónica's competitors wishing to provide broadband internet access to end-users have no other option but to contract wholesale broadband access. Three non substitutable types of wholesale broadband access services are available to them, all of which are built on Telefónica's local access network:

- Unbundled access to the local loop ⁽⁶⁾ ("ULL") requires being physically present in the 6836 main distribution frames that Telefónica has throughout Spain. This involves significant network roll-out investments. Since the beginning of 2001, Telefónica is legally obliged under Community law ⁽⁷⁾ to provide ULL.
- Wholesale access at regional level ("WAR") concentrates the traffic at 109 regional points of interconnection and therefore still requires rolling out a network reaching those regional points of presence. Since March 1999, Telefónica is legally obliged under Spanish law to provide wholesale access at regional level. Spanish regulation also obliges Telefónica to ensure that its retail prices are replicable on the basis of its regional wholesale product. From 2001 to 2006, Telefónica's regional wholesale prices were only subject to a maximum level.
- Wholesale access at national level ("WAN") concentrates the traffic at one point of interconnection and enables operators to offer retail broadband services without having to roll out any network. Since April 2002, Telefónica is legally obliged under Spanish law to provide wholesale access at national level. From 2001 to 2006, Telefónica's national wholesale prices were at no time regulated.

⁽¹⁾ Directorate- General for Competition, unit C-1. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Commission Press Release IP/07/1011, 04.07.2007.

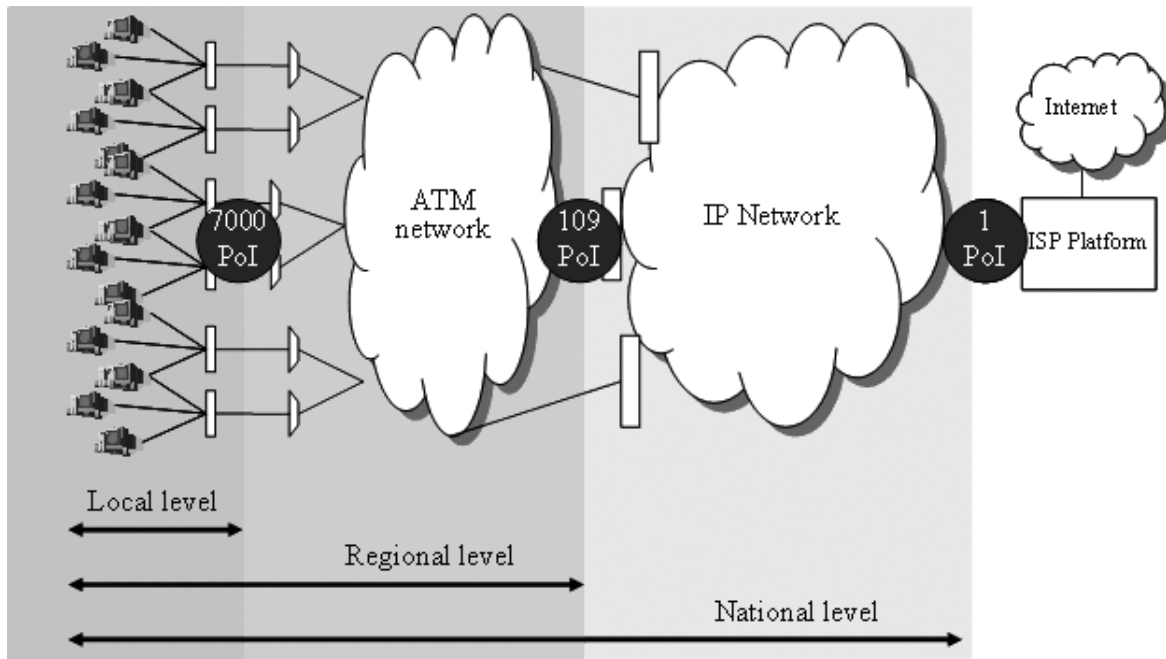
⁽³⁾ Commission Decision of 21 May 2003 in Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG.

⁽⁴⁾ Commission Decision of 16 July 2003 in case COMP/38.233 — Wanadoo Interactive

⁽⁵⁾ Asymmetric Digital Subscriber Line

⁽⁶⁾ The local loop is the physical circuit between the customer's premises and the telecommunications operator's main distribution frame («MDF»). Traditionally it takes the form of pairs of copper wires.

⁽⁷⁾ Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18.12.2000 on unbundled access to the local loop, OJ L 336, 30.12.2000, p.4.

Figure 1 — Wholesale access at different levels of capillarity of Telefónica's network

Because of the necessity to reach a minimum critical size before incurring the heavy and risky investments necessary to use WAR or ULL, Telefónica's competitors have entered the retail market on the basis of purchasing WAN from Telefónica. As their customer base has increased, they have gradually rolled out their network allowing to contract successively WAR and ULL in some limited areas of Spain (densely populated areas). It is only from the last quarter of 2004 that some competitors have started offering retail services on the basis of ULL while progressively rolling-out their networks. However, despite the clear-cut regulatory obligations, there have been significant problems with the effective availability of ULL which were sanctioned by the Spanish Regulatory Authority ("Comisión del Mercado de las Telecomunicaciones" or "CMT")⁽⁸⁾.

1.2. Telefónica's dominant position

The Commission defined three relevant product markets, the retail broadband "mass" market and two different wholesale broadband markets, namely the market for wholesale broadband access at regional level and the market for wholesale broadband access at national level. The delineation of the wholesale markets is mainly based on the heavy network roll out investments required when switching from the different wholesale products.

Telefónica is dominant on both relevant wholesale markets: WAR is exclusively provided by Telefónica and WAN is provided by both Telefónica and competing operators. The latter are nonetheless dependant upon Telefónica for the inputs required to supply WAN. In 2004, 98% of retail ADSL lines were based on Telefónica's WAN or WAR. In 2006, 87% of retail ADSL lines were based on Telefónica's WAN or WAR.

Case-law does not require to demonstrate that Telefónica is dominant in the retail market for proving the existence of a margin squeeze. However, the Commission has also established that Telefónica is dominant in the retail market.

The cable TV operators are not dependent on Telefónica for wholesale inputs for retail broadband access in the areas where they rolled out their own network. However, they never exercised sufficient constraint on Telefónica's ability to leverage its dominance in the wholesale markets into the retail market as a result of (i) Telefónica's strong pricing power in the retail market, (ii) cable networks' limited footprint and (iii) the cable operators' inability to roll out a national network comparable to Telefónica's and exercise sufficient pricing discipline in the retail market as illustrated by their continuously declining market shares since 2001.

2. The abuse

A margin squeeze is an insufficient margin between the price of an "upstream" product A and the price of a "downstream" product A+B of which A is a component. An abusive margin squeeze can

⁽⁸⁾ On 16 November 2006, the CMT fined Telefónica €20 million on the grounds that at least between January 2004 and April 2005 it infringed the procedures and conditions under which it has to provide the services included in its reference unbundling offer («RUO»).

be found to exist if a vertically integrated company which is dominant in the upstream market sets the upstream price it charges to its downstream competitors and the downstream price it charges to the end users at such a level that downstream competition is likely to be restricted⁽⁹⁾. The Commission's decision concerns Telefónica's price structure as reflected by the difference between Telefónica's wholesale and retail prices. It is this difference and not the specific level of the retail and/or wholesale prices which is decisive in margin squeeze cases.

The Commission's assessment revealed that, from September 2001 to December 2006, the margin between Telefónica's retail prices and the prices for wholesale broadband access at both the national and regional levels was insufficient to cover the incremental costs that an operator as efficient as Telefónica would have to incur to provide retail broadband access. The abuse ended with the Spanish regulator's decision to reduce Telefónica's wholesale prices between a range of 22% to 61% (depending on the speed of the offer).

The Commission used different methodologies:

- The period-by-period method assesses Telefónica's profitability every year from 2001 to 2006
- The Discounted Cash Flows method allows below cost pricing in the initial phase of an expanding market (learning effects, economies of scale) but requires Telefónica to be profitable over a reasonably long period. The Commission's calculations revealed that the net present value ("NPV") of Telefónica's downstream activity was negative over 2001-2006.

In addition, Telefónica's initial business plan of 2001 shows explicitly that the company knew it would engage in a margin squeeze: while Telefónica expected rapid achievement of profitability on an end-to-end basis⁽¹⁰⁾ (break-even EBITDA and EBIT in 2002, positive NPV over 2001-2006), Telefónica's initial business plan indicated that its downstream arm was expected to still make losses in 2006, that the NPV over 2001-2006 was

negative and that the downstream losses incurred during 2001-2006 would not be recovered by any hypothetical profits from 2007 to 2011.

According to Telefónica, the practices concerned by the decision, i.e. margin squeeze, constitute a constructive refusal to supply and therefore the Commission should have proved that the criteria applied in the *Oscar Bronner* case⁽¹¹⁾ are fulfilled. However, the factual, economic and legal circumstances of this case fundamentally differ from those in *Oscar Bronner*. In the present case, Spanish regulation compatible with Community law imposes on Telefónica an obligation to provide wholesale access at regional and national level. This duty has been established with a view to promoting competition and consumer interest and results from a balancing test made by the public authorities between the incentives of Telefónica and its competitors to invest and innovate and the need to promote downstream competition in the long term. In any event, Telefónica's ex ante incentive to invest in its infrastructure have never been at stake in the present case: Telefónica's upstream network is to a large extent the fruit of investments that were undertaken well before the advent of broadband in Spain and in a context where Telefónica was benefiting from special or exclusive rights that shielded it from competition.

2.1. Impact of Telefónica's conduct

2.1.1. Telefónica's conduct was likely to have anticompetitive foreclosure effects

The margin squeeze was likely to restrict competition in the relevant markets. It was likely to constrain the ability of ADSL operators to grow sustainably in the retail market because ADSL operators had to undercut Telefónica's retail prices in order to gain customers and there was no viable substitute to Telefónica's WAR and no viable substitute to Telefónica's WAN with national coverage. What is more, Telefónica's regulatory obligations have structured the Spanish broadband market in an irreversible manner: alternative operators have incurred considerable investments, which have contributed to create a relationship of reliance of the rivals on Telefónica's wholesale products.

The establishment of foreclosure effects does not mean that rivals are forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively. In the case at hand, there was likely foreclosure because the margin squeeze affected Telefónica's competitors' ability to enter the relevant market

⁽⁹⁾ Judgment of the Tribunal of First Instance of 30 November 2000 in Case T-5/97 (*Industrie des Poudres Sphériques*), paragraph 178 — Decision of the European Commission of 19.10.1988 in Case 88/518/EEC *Napier Brown-British sugar* ("Napier Brown-British sugar"), OJ L/284, paragraph 66 — Decision of the European Commission Decision of 21.05.03 in Case COMP/C-1/37.451, 37.578, 37.579 — *Deutsche Telekom AG*; OJ [2003] L 263.

⁽¹⁰⁾ i.e. aggregating costs and revenues all over the broadband value chain, thereby allowing the subsidisation of downstream losses by upstream profits

⁽¹¹⁾ Case C-7/97 *Oscar Bronner* [1998] ECR I-7791 (*"Oscar Bronner"*), paragraphs 43-46.

and exert a competitive constraint on Telefónica. The margin squeeze restricted competition by imposing unsustainable losses on equally efficient competitors: they were either ultimately forced to exit or in any event constrained in their ability to invest and to grow. Even if they met Telefónica both on prices and marketing expenditure, they were poorly placed in the long run to offer a vigorous competitive challenge to Telefónica as a result of their continuing losses. As a result, Telefónica's conduct was likely to delay the entry and growth of competitors. In theory, due to the margin squeeze, the only viable entry would have been by duplicating Telefónica's regional wholesale product on the basis of LLU. However, this option is in any event not a substitute to Telefónica's other wholesale inputs, is extremely expensive and risky and has only been available with significant delays. Telefónica's conduct was likely to delay as long as possible the arrival of ADSL operators at a level of economies of scale which would have justified investments in their own infrastructure and the use of LLU.

The immediate harm to consumers was likely to be significant: absent the distortions resulting from Telefónica's margin squeeze in this case, the retail market for broadband services would have been likely to have witnessed more vigorous competition and would have delivered greater benefits to consumers in the form of lower prices, increased choice and innovation. Other than in a predatory pricing scenario, in a margin squeeze case, consumers may suffer both in the short run and in the long run. This is because a margin squeeze may involve a high retail price (relative to end-to-end costs) in the short-run as well as the long run, which would arise because of the high charge set for the wholesale service.

2.1.2. *The harm to consumers was considerable*

The Commission also establishes that the margin squeeze has had concrete foreclosure effects in the retail market and a detrimental impact for end users.

There is convincing evidence showing that due to the margin squeeze, sustainable entry and growth in the retail market has not been possible, and this containment of competition has allowed Telefónica (i) to benefit from growth rates surpassing by far that of its competitors and thus (ii) to remain by far the largest broadband operator in Spain, in contrast with the situation it held in the narrowband internet access market.

There is also evidence showing that the margin squeeze led to high retail prices which are well above (by 20% at least) EU average and among

(if not) the highest in the EU-15 ⁽¹²⁾, affecting millions of end-users. According to the Spanish regulator CMT ⁽¹³⁾, retail prices in Spain are exceptionally high and 25% above EU average ⁽¹⁴⁾. Prices are critical to the development of the market. Thus it is symptomatic that, whereas Spain was in the top of the EU Member States in terms of number of broadband internet subscribers at the end of 2001, broadband penetration in Spain now ranks below the EU-15 and EU-25 average. The increase of that rate is also below the EU-15 and EU-25 average.

Telefónica acknowledged that a simple comparison of retail prices among Member States leads to the conclusion that Spanish retail prices are the second highest in EU-15 over the period 1999-2005 and 20% above EU-15 average. However, Telefónica claimed that the high level of retail prices in Spain is the result of some country-specific circumstances (population density, per capita GDP, number of young inhabitants, PC penetration, etc) in Spain. Telefónica submitted an econometric study to support its allegations. However, the Commission found that this analysis was seriously flawed and in fact showed that none of the demand or supply factors presented by Telefónica can adequately explain the high level of the Spanish retail prices. It follows that Telefónica's conduct has led to significant consumer harm.

2.1.3. *The margin squeeze has been a rational, profitable strategy for Telefónica*

Telefónica's pricing strategy has been rational and subsequently profitable in three ways:

Firstly, Telefónica's conduct was designed to foreclose its ADSL competitors and be able to sustain supra competitive retail prices. Telefónica stood to benefit the most from the foreclosure of its retail ADSL competitors. This is because neither cable operators nor the late and progressive development of ULL could neutralise the likely effects of Telefónica's conduct on end users. Indeed, although Telefónica does not control the cable operators' access to wholesale inputs, the latter have not exercised a pricing discipline on Telefónica in the retail market. The profits extracted from a high level of retail prices surpassed by far the forsaken

⁽¹²⁾ OECD Communications Outlook 2007; Comreg, Quarterly Key Data Report, December 2006; OCU, Las tarifas españolas, muy altas respecto a Europa, May 2005.

⁽¹³⁾ See *El coste del ADSL en España es un 25% superior a la media de la UE*, El país, 12.07.06. See also *La CMT constata el insuficiente crecimiento de la banda ancha en España*, El mundo, 11.07.06.

⁽¹⁴⁾ CMT decision RO 2004/1811 of 16.11.2006 (page 130).

profits related to the forsaken wholesale sales as a result of the high wholesale prices (relative to the retail prices).

Secondly, creating and maintaining a leading position in the fast growing market of retail broadband access allowed Telefónica to protect its position in adjacent retail mass markets like fixed telephony. Indeed, the provision of retail broadband access services has a loyalty effect on the traditional fixed telephony services. End users are more likely to choose the same provider for all electronic communications services, i.e. fixed telephony, broadband internet, television over broadband and also mobile telephony.

Moreover, many of these services, in particular voice over IP and television over broadband are rapidly growing, and Telefónica's conduct therefore allowed it to be in a position to pre-empt these future booming retail markets.

2.2. Objective justification and efficiencies

Telefónica's behaviour is not objectively justified and did not produce efficiencies.

2.2.1. *As a vertically integrated company, Telefónica was profitable. Therefore the losses imposed on competitors were not inevitable*

Telefónica alleged that Telefónica's downstream losses are, in the context of a non mature market, investments with a view to achieve future profits. This argument is invalidated by Telefónica's initial business plan of 2001 which shows that the company expected rapid achievement of profitability on an end-to-end basis and estimated that the break-even volume for end-to-end profitability was 1 million ADSL end users which was achieved on February 2003. This means that the company did not rely on projected growth from 2003 to achieve profitability (on an end-to-end basis). The business plan of the company indicates that the broadband activity of the company was expected to generate a positive net present value during the period 2001-2006 but would have expected to generate a negative net present value if the company had had to pay the wholesale prices charged to competitors.

2.2.2. *Promoting Internet use is not a justification in this case*

Telefónica claimed that low retail prices were indispensable to increase awareness of broadband and thereby stimulate demand, which would in turn have benefited its competitors and the market in general. Telefónica's argument is deficient in one essential respect: if it had really been Telefónica's

intention to develop the broadband market, Telefónica could have priced all its wholesale products at low levels encouraging the entry of competitors (avoiding a margin squeeze while still being profitable). Telefónica chose instead to oblige its retail competitors to incur losses, thereby diverting the market growth to its advantage. It cannot therefore cogently be maintained that Telefónica was guided by a desire to develop the market for the benefit of all stakeholders. Above all, Telefónica's argument is invalidated by the fact that, as already established, its conduct allowed it to sustain the highest retail prices in Europe, thereby negatively affecting consumers and the market as a whole, with a below EU average rate of penetration.

2.2.3. *Telefónica's retail prices did not change since 2001*

Telefónica also claimed that it was forced to align itself on the retail prices charged by its downstream competitors (meeting competition defence). It is true that a dominant operator is not strictly speaking prohibited from aligning its prices with those of competitors. However, the Commission considered that the meeting competition defence may not legitimise a margin squeeze that enables the vertically integrated company to impose losses on its competitors that it does not incur itself. The meeting competition defence may not legitimise a behaviour whose effect is to leverage and abuse an upstream dominance. Telefónica's conduct was certainly not indispensable in order to defend its commercial and economic interests because Telefónica could have lowered its wholesale prices without increasing its retail prices and still be profitable overall. Also, Telefónica's nominal retail prices are those which were defined by the company in its initial business plan of 2001 and have not been changed since that date. Therefore, it cannot be considered that the margin squeeze is a response to low pricing by competitors. Moreover, the mere fact that the initial business plan of the company shows that the net present value of its broadband business generates a positive net present value on an end-to-end basis while its downstream activity generates a negative present value is a strong evidence that the objective aim of Telefónica's conduct was to foreclose competitors.

3. Liability of Telefónica

Telefónica has taken the view that prices applied on the Spanish broadband market have been supervised by the CMT and that it therefore lacked autonomy in setting the relevant prices.

However, *ex ante* regulation did not preclude Telefónica for avoiding the margin squeeze on its own initiative by decreasing its wholesale prices

or increasing its retail prices. Firstly, Telefónica's national wholesale prices (which represented approximately 70% of the wholesale products covered by the Decision in 2006) were never regulated during the period of infringement. Therefore, Telefónica's argument would only, if at all, be relevant for its regional wholesale prices. Secondly, ex ante regulation of prices for regional wholesale access was limited to maximal prices and Telefónica has always been free to apply for a reduction of its prices.

It is important to note that the CMT imposed a maximum level of Telefónica's regional wholesale prices on the basis of estimates and never on the basis of Telefónica's historical actual costs. In particular, CMT's interventions were not based on the accounting data known to Telefónica and which has been accessible to the Commission during the investigation. The Commission did not find that Telefónica submitted false information to the CMT (despite the mismatch between the information supplied and the data of its own business plan). However, Telefónica could not have been unaware of the limited and necessarily approximate information used by the CMT in its *ex ante* model, and should have been vigilant as to the evolution of actual data. Telefónica could not have been unaware of the fact that its business plan showed that they would engage in a margin squeeze and that the data accumulated every month in its scorecard not only indicated that the estimates made by the Spanish regulator were not matched by actual cost data but also that the company knew it was engaging in a margin squeeze. Seen in the most favourable light for the company, any continued reliance of Telefónica on the accuracy of the CMT's estimates and calcula-

tions, despite the accumulation of actual data to the contrary, is –at the very least – seriously negligent behaviour.

4. The fine

Telefónica committed a very serious abuse of a dominant position for which there are precedents. In particular, the *Deutsche Telekom* decision clarified the conditions of application of Article 82 EC to an economic activity subject to sector specific ex ante regulation. As the Commission indicated in *Deutsche Telekom*, the type of abuse committed by Telefónica jeopardises the objective of achieving EU-wide establishment of an internal market for telecommunications networks and services with undistorted competition, and can certainly be ranked as a very serious infringement⁽¹⁵⁾.

In determining the gravity of the infringement, the Commission took into consideration the fact that the relevant markets are markets of considerable economic importance and which play a crucial role in the development of the Information Society. Broadband connections are a prerequisite for the provision of a variety of on-line commercial and public services to end-users. The Commission also took into consideration the fact that Telefónica's conduct led to significant consumer harm.

5. Conclusion

With this decision, the Commission has shown that it is ready to act forcefully against cases of price abuses, even in a scenario where the industry under examination is subject to sector-specific regulation.

⁽¹⁵⁾ See footnote 3: *Deutsche Telekom*, paragraph 203-204.

OTE is calling: who's going to pick up this call? Is it for the State? Reflexions on the recent Commission's State aid decision

Lambros PAPADIAS ⁽¹⁾

I. Introduction

On 10 May 2007, the Commission approved under Article 87.3 of the Treaty the Greek government's envisaged participation to the Hellenic Telecommunications Organization (OTE) early voluntary retirement scheme. The case raised a number of important legal issues mainly in relation to the definition of the notion of "aid" of Article 87.1 of the Treaty, as well as in relation to the scope of the compatibility assessment carried out under Article 87.3 with regard to undertakings that used to enjoy a monopoly in the past and are now operating in liberalised but still regulated markets. This article discusses in some more detail these issues and focuses on some of the findings contained in the decision that could shed some more light into the Commission's current thinking and policy orientation in this area.

II. Background to the notification: the labour structure of OTE — a relic of the past

Since the full liberalisation of the electronic communications market in 1997, incumbent telecoms operators in the EU have undergone a gradually and often drastic transformation from public monopolies to fully-fledged or semi-privatised competitive undertakings. Full liberalisation in Greece took place at a later stage, in January 2001, a delay justified at the time by the need to enable OTE, the fixed line incumbent operator, to complete the necessary modernisation and digitalisation of its network and to prepare for the imminent opening of the fixed line market by rebalancing tariffs and carrying out the necessary structural adjustments towards a fully commercial market-driven operator ⁽²⁾.

OTE remains today the dominant network and fixed-voice operator in Greece. Competition is slowly but gradually bearing fruits as the company's market share has dropped from 100% before

2001 to almost 60% in 2007. The competitive process is managed by the day-to day application of a comprehensive ex ante regulatory framework that essentially guarantees third party access to OTE's network for the provision of voice, data and other internet related services.

Yet, despite a series of "external adjustments" dictated by the liberalisation of the fixed-line market (i.e., tariff rebalancing, introduction of account separation, publication of a Reference Interconnection Offer), OTE ushered into this new market reality without undergoing any fundamental change in its core "internal" structure. Although a public limited company (plc) since 1994, OTE's labour law structure had remained that of a public sector utility, its employees continuing to enjoy a *de facto* permanent employment status ⁽³⁾. Most labour-related aspects such as hiring, promotions, salaries and pensions remained governed by past rigid collective agreements that were given force of law. The overall employment regulations had thus put OTE in a disadvantage compared to its (new) private competitors and kept its labour costs at a much higher level. Its increasingly large workforce (around 15 000 employees) was the result of an unrestrained (and thus irreversible) policy of hiring during the monopoly years when the company was often treated by its sole shareholder, the State, as an extension of the wider public sector and as a complementary tool for the implementation of the State's own social agenda.

In 2004, asked by OTE to analyse the company's structure and performance, McKinsey, a consultancy group, concluded that OTE had an excess of almost 5000 employees and that most operations were characterised by significant inefficiencies. It was therefore imperative that the company reduces its personnel by at least one third and that an end was put to the permanent status of its employees in order to allow the company to reduce its high fixed labour costs and allow it to behave like any other commercial entity.

⁽¹⁾ Directorate-General for Competition, unit C-4. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Commission Decision 97/607/EC, of 18 June 1997 — concerning the granting of additional implementation periods to Greece for the implementation of Directive 90/388/EEC as regards full competition in the telecommunications markets, OJ L 245, 9.9.1997

⁽³⁾ Although strictly speaking not public servants, OTE had concluded during the monopoly years when the company was fully State-owned, collective agreements with the unions whereby an employee, save in exceptional circumstances, could not be dismissed. Appropriate legislation had given force of law to these agreements. As a result, OTE employees enjoyed a quasi civil servant status.

The choice of a voluntary retirement scheme

OTE was faced with two options to choose from. It could either implement a wide range mandatory redundancy on the basis of new legislation that would abolish retroactively the permanent status of its employees, or try to negotiate with the unions an early voluntary retirement scheme (VRS) to the same effect. The first option was discarded from the outset given the existence of legal (constitutional) doubts as to whether a law could be passed giving effect to OTE's decision to denounce unilaterally the existing collective labour agreements that granted a quasi permanent employment status to its employees. It was accordingly the second option that was actively pursued. In practice that meant that in order to ensure that at least one third of the employees could retire now instead in the next seven years (the expected retirement evolution of the targeted 5000 employees), OTE would have to offer a rather generous package to ensure a successful take up of its offer. That meant offering the kind of incentives that would neutralise the loss of full employment and thus convince the employees that early retirement would not reduce their social and other work related future (and guaranteed) benefits. As a *quid pro quo*, however, OTE demanded that the unions consent to putting an end to the permanent status for any future hires. Agreement was finally reached in 2005, and in July of the same year, Parliament enacted Law 3371 (the Law) giving effect to all the above agreements and providing for a partial State contribution to the costs of the VRS.

The thrust of the VRS: the recognition of notional years of employment

In short, the Law offered to OTE employees close to retirement age the possibility to receive full pension immediately. For that purpose, the Law recognised as much fictitious employment time as necessary ("notional years"). Thus, immediate retirement was offered to those employees eligible to take mandatory retirement between 2005 and 2012, by having up to 8 years of notional employment recognised by the Law. The recognition of notional years of employment was the basis for calculating the basic and the auxiliary pensions, as well as the lump sum payments to which each retiring person is entitled to under the existing legal framework. The idea was that the employees would receive the exact same benefits as if they had exhausted the maximum period of entitled employment. Most employees to whom the right to early retirement was offered were over 50 years old and had completed more than 27 years of service.

The Greek State's financial ("parental") contribution

Given OTE's labour structure the costs of the VRS were higher than any other "ordinary" early retirement scheme offered by a private company under the generally applicable labour laws and regulations. The material difference between OTE's VRS and an ordinary VRS was that apart of the incentives given to induce employees to take up the early retirement offer, OTE had also to make up for the loss of future revenues or social advantages associated with the enjoyment of a permanent employment status. These "extra costs" were the main reason that led the Greek State to assume part of the overall costs of the VRS.

Expressed in net present values, the costs of the VRS were estimated to be € 863 million. Article 74 of the Law provided that the costs of the VRS would be borne by OTE and the Greek government, the latter transferring 4% of its shares in OTE to the Pension Fund to which OTE employees are insured (TAP-OTE). It is important to bear in mind that like any other pension fund in Greece ⁽⁴⁾, TAP-OTE is an independent legal body, governed by public law and part of the country's wider state pension system. It is not thus a company pension fund owned, managed or even supervised by OTE. Yet, the question that was raised was whether the State's direct contribution to the Pension Fund of OTE could still benefit indirectly OTE by reducing the latter's overall pension liabilities arising from the VRS.

Based on the share price of OTE at the date of the publication of the Law (14 July 2005), the value of the 4% shares to be transferred from the State to the Pension Fund was around €315 million. However, up to the date of the adoption of the Commission's decision, the share price of OTE had considerably gained in value, from around €16 in 2005 to almost €21 by February 2007. The value of the State's contribution had thus passed from €315 million in 2005 to almost €411 million in early 2007. The uncertainty and variable character of the State's planned contribution was a point that needed to be addressed before any final finding by the Commission (see below).

⁽⁴⁾ In terms of financing, the Greek pension system is in principle a «pay-as-you-go» system while in terms of structure it is of the defined-benefit type. As to its legal status, it is mandatory and run by the wider public sector, including autonomous, public law governed bodies like TAP-OTE. Under the Greek Constitution, the State is the ultimate guarantor for the payment of pensions. Every year, for most of the funds, the State finances any gap between income from employee and employer contributions and the cost of pensions.

III. The notification by the Greek government: no aid involved — the “*Combust*” line of defence

In its notification the Greek government argued that no aid was involved for two reasons. First, the State had acted in line with the private investor principle, and second because its financial contribution to the costs of the VRS did not confer an economic advantage on OTE within the meaning of Article 87.1 of the Treaty. The State’s transfer of its 4% shares in OTE to TAP-OTE aimed instead to relieve OTE from a “*structural disadvantage*” due to the *de facto* permanency and the high fixed salary costs of its personnel, costs that no other private company in Greece had to bear.

In this regard, the Greek government relied heavily on the *Combust* judgment by the CFI, according to which freeing a public-sector company from structural disadvantages compared to the private sector competitors, such as those due to the “*privileged and costly status of officials*”, does not constitute State aid ⁽⁵⁾. Were the Commission to reach a different view, the Greek government asked that the aid be declared compatible under Article 87(3)(c) of the Treaty on the basis of the principles derived from the *EDF* decision ⁽⁶⁾ and by analogy to those applicable to the *stranded costs* in the energy field.

The calculation of the alleged “extra costs” of OTE’s VRS was one of the interesting aspects of the notification. In this respect, the Greek government came up with a two-pronged calculation aimed at identifying separately (a) the financial burden imposed on OTE by the permanency status of its employees, and (b) the burden imposed by their inflated fixed salaries. This calculation was further refined and substantiated following the opening of the formal investigation (see below).

⁽⁵⁾ In that case, the Court stated that a (state) measure which was “*introduced to replace the privileged and costly status of the officials employed by Combust with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with Combust*” did not constitute aid for “*the intention [of the Danish government] was thus to free Combust from a structural disadvantage it had in relation to its private-sector competitors*”, Case T-157/01, *Danske Busvognmænd v Commission*, 16 March 2004, ECR II-0917, paragraph 57.

⁽⁶⁾ Commission Decision of 16 December 2003 “*on the State aid granted by France to EDF and the electricity and gas industries*”, OJ L 49/9 of 22.2.2005

IV. The opening of the formal investigation: an ex monopolist in the spotlight?

In the opening of the procedure the Commission first questioned whether the contribution of the State could be compatible with the private investor principle mainly because no other shareholder was making any contribution to the costs of the VRS.

As to the question whether aid was involved, the Commission preferred to leave open the issue whether *Combust* was “good law” and/or relevant to the case. Instead, the Commission raised doubts on a number of issues which were essentially related to the fact that up to full liberalisation of the telecoms market, OTE had been a privileged, “protected” monopolist. In particular, it was not clear whether OTE may have benefited in the past (or may have continued to do so) from other kind of special advantages that could neutralise the alleged “extra costs” of the VRS. The Commission distinguished between two main categories of advantages, those that could derive from the overall labour law framework that was applicable to OTE including the likelihood that OTE might have in the past benefited from other State measures that may have reduced its own labour costs (i.e., State measures of the same nature as the notified measure, that is labour law related), and advantages that resulted from OTE’s prior monopoly position (the competition law-related advantages).

As to the alleged costs of the VRS, the Commission considered that there was not enough evidence to back up the claim put forward by the Greek government according to which in an ordinary VRS, an employer would pay twice the redundancy compensation required by law in case of a dismissal (an argument that had an impact on the calculation of the “extra costs” of the VRS). Furthermore, there was no mechanism in place to ensure that the Greek government’s planned transfer of its 4% shares in OTE to TAP-OTE would not exceed the alleged “extra costs” of OTE given that the share price of OTE was fluctuating on a daily basis in the Athens Stock Exchange.

Following the opening of the procedure, the Commission received detailed replies by the Greek government on the aforementioned issues and also comments on behalf of four operators present on the Greek telecoms market. These comments focused mainly on the conditions of competition prevailing on the Greek fixed line market where OTE was said to be abusing its dominant position. Moreover, it was alleged that the regulatory authority had failed to take appropriate measures

to curtail OTE's abusive behaviour. Finally, the said operators argued that in the past, the Greek State had made a number of capital contributions in order to cover the deficits of TAP-OTE that benefited the company and which would have also to be taken into consideration.

V. The Commission's decision — Combust: is the door left open or closed?

With regard to the question of aid, the Commission had no difficulty in discarding the private investor argument raised by the Greek government. In line with the existing case-law, the Commission recalled that a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority ⁽⁷⁾. OTE being a public limited company ("plc"), the Greek State as the majority owner of the share capital of the company would only have been liable for the debts of the company up to the liquidation value of its assets. Social security and other labour law related liabilities are normally for the company concerned, not for its shareholders, to assume. Therefore, the obligations arising from the cost of the early retirement redundancies and the payments of any other associated employment benefits could not be taken into consideration for the purpose of applying the private investor test ⁽⁸⁾. Furthermore, OTE was not a company in a difficult financial situation nor unable to meet on its own the financial liabilities of the VRS.

The actual question was whether OTE needed to be compensated by the State for the burden of the permanency and if yes, whether such a State measure could be said to confer an economic advantage on the latter.

Some preliminary remarks on the concept of aid

The case-law of the Court of Justice (ECJ) had for years been based on a wide interpretation of the notion of "aid" of Article 87.1. In principle, every positive or even negative measure by a Member State that would facilitate or improve the financial or commercial situation of an undertaking would be considered to confer on it an economic advantage. Whether the measure in question aimed to make up for or "compensate" the recipient undertaking for some kind of "disadvantages" or undue

"burdens" that may have been imposed on, this was an issue to be dealt with under the compatibility assessment of Article 87.3(c) ⁽⁹⁾.

However, not all measures that involve the transfer of state resources confer an advantage to a recipient undertaking. The recent case law, as reflected by the *Altmark* ⁽¹⁰⁾ judgment regarding compensation given to undertakings for the performance of a public service or of an activity of general economic interest, has introduced some important nuances to the interpretation of the concept of aid of Article 87.1. In the same vein, the *Combust* judgment by the Court of First Instance (CFI) seemingly expands further the kind of situations of State measures which although *prima facie* appear to benefit a given undertaking, could fall out of the notion of aid (the *compensation* approach) ⁽¹¹⁾.

It is in the light of this evolving background that the Commission examined the issue of aid in the OTE decision.

At the outset, it should be recalled that according to a well-established line of case-law, even a partial reduction of social charges devolving upon an undertaking constitutes aid within the meaning of Article 87(1) of the Treaty if that measure is intended partially to exempt that undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system ⁽¹²⁾. More particularly, the ECJ has ruled that any measure that relieves an

⁽⁹⁾ This approach was reminiscent of the interpretation of Article 81.1 of the Treaty, whereby a rule of reason approach towards the notion of restriction of competition was discarded at an early stage of the evolution of the jurisprudence to the benefit of the compatibility assessment of paragraph 3 of the same Article (the compatibility assessment).

⁽¹⁰⁾ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

⁽¹¹⁾ For some commentators, some recent Court cases could be interpreted as having endorsed the compensation approach in a number of specific and limited circumstances; see in particular, Jan A. Winter "Re(de)fining the notion of State aid in Article 87 (1) of the EC Treaty", (2004) CMLR p. 475, and S Bracq, "Droit communautaire matériel et qualification juridique: le financement des obligations de service public au cœur de la tourmente (à propos de la décision: CJCE 24 juill. 2003, *Altmark Trans GmbH*, aff. C-280/00), (2004) RTDE p.33.

⁽¹²⁾ Case 173/73, *Italy v Commission* [1974] ECR 709, paragraph 15; to the same effect, judgment in Case C-301/87, *France v Commission* [1990] ECR I-307, paragraph 41.

⁽⁷⁾ Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-4103, paragraph 22.

⁽⁸⁾ Case C-305/89, *op.cit.*, paragraph 22.

undertaking from the charges which are normally included in the budget of the undertaking constitutes State aid ⁽¹³⁾.

However, this line of case-law presupposes that the said reductions and other similar measures are decided within the context of an ordinary social security framework, and concern charges which are “normally included in the budget” of an undertaking. OTE’s social security and labour framework however was not that of an ordinary undertaking, and the charges assumed by OTE were not those normally assumed by any other telecom operator in Greece. The question was therefore whether this line of established case-law could still be relevant with regard to a measure which aimed precisely at bringing OTE within the “ordinary” social security framework that applies to all other undertakings in the country. Could the notion of aid coexist alongside measures that purport to relieve an undertaking from obligations that allegedly go “over and above” those imposed on its competitors?

In *Combus* the CFI stated that a (state) measure which was “introduced to replace the privileged and costly status of the officials employed by *Combus* with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with *Combus*” did not constitute aid for “the intention [of the Danish government] was thus to free *Combus* from a structural disadvantage it had in relation to its private-sector competitors”.

The question whether “*Combus*” could, as a matter of principle, apply soon became one of the important aspects of the OTE investigation. For, if one were to accept that compensation given for so-called “structural disadvantages” does not give rise to the granting of an economic advantage within the meaning of the existing jurisprudence, then there is no aid involved and subsequently not a notification obligation for the Member State concerned. On the contrary, if aid is involved, then measures such as the one notified by the Greek government will still need to be assessed under the compatibility framework provided for by Article 87.3 of the Treaty.

The OTE decision does not at the end answer this question on the ground that the measure is in any event compatible with the common market under

Article 87.3 (c). Thus, the decision leaves open the issue of whether and under which circumstances (if any) *Combus* may apply ⁽¹⁴⁾.

That being said, the decision does not entirely eschew the issue; instead it underlines those aspects of the notification that could have been relied upon, for or against the application of *Combus*. Thus, on the one hand, the decision notes that OTE bears a number of similarities with the *Combus* case. In *Combus* the Danish State did not compensate the company concerned, but the officials employed by it. Likewise, the Greek authorities did not compensate OTE, but the employees’ Pension Fund (TAP-OTE) for the loss of revenue due to the early retirement. Like in *Combus*, the permanent status of OTE’s employees constituted a “privileged and costly status” vis-à-vis the status of private sector’s employees. As in *Combus*, the intention of the Greek government was to free OTE “from a structural disadvantage it ha[d] in relation to its private-sector competitors”. Finally, as was also the case in *Combus*, the Greek State’s financial intervention did not aim to make up for or alleviate OTE from its past pensions obligations resulting from the period of time when the company was a monopolist. There was no pension deficit to be covered nor had OTE failed to pay its own employee contributions towards TAP-OTE.

On the other hand, a number of differences between the legal and factual context of OTE and that of *Combus* case were also brought to the fore by the analysis made by the Commission. In particular, when OTE became a plc company in 1994, and especially after full liberalisation of the telecoms market in 2001, there was no measures adopted to ensure that the company’s labour structure would be aligned to that of any other plc. Thus, it was not clear why 13 years after the transformation of the company into a plc, OTE was still subject to a sui generis labour regime and no measures were taken to remedy the structural disadvantages of the company in due time. Accordingly, one could argue that the high labour costs of the company had at the end become charges “which are normally included in the budget of the company” within the meaning of the case-law, and thus the

⁽¹³⁾ Case C-387/92, Banco Exterior, [1994] ECR I-877, para. 13; Case C-241/94, France/Commission, [1996] ECR I-4551, para. 34.

⁽¹⁴⁾ This is not the first time the Commission leaves open the question whether a notified measure that is in any event compatible under Article 87.3 (c) constitutes aid. See for instance, Commission decision in cases NN49/99 — Spain, Régimen transitorio del mercado de la electricidad, N 6/A/2001 — Ireland, Public service obligations imposed on the electricity Supply Board, N 826/01 — Ireland, Alternative energy Requirements, N 34/99 — Austria, Compensation for «Stranded Costs», N 448/2005 — Spain, Aid for the production of theatre, music and dance and N 449/2005 — Spain, Aid for the production of short films.

notified measure relieved OTE from the “*financial charges arising from the normal application of the general social security system*”⁽¹⁵⁾.

The decision also notes that one could not exclude that the large number of employees might have enabled OTE during the post liberalisation period to be present in all the segments of the electronic communications market and thus to maintain its dominant position.

As stated in paragraph 102 of the decision, the above considerations “*examined in conjunction with relevant jurisprudence, including the Combus judgement could suggest that the measure concerned could be regarded as aid; however, the matter does not need to be pursued since, for the reasons explained in more detail below, it is in any event compatible with the common market under Article 87(3)(c) of the Treaty*”⁽¹⁶⁾.

VI. The compatibility assessment: how to deal with ex monopolists

In assessing the notified measure under Article 87.3 (c) the Commission came to the conclusion that the aid was compatible with the Treaty. In particular, the envisaged financial contribution of the Greek government to the costs of the VRS was found to be in line with the common interest to the extent that the aim of the VRS was to reduce by around one third the excessive number of OTE’s employees while at the same time putting an end to the permanency status for future hires, thus paving the way for the company’s planned privatisation and the subsequent relinquish of the Greek State’s control over OTE.

The aid was also found to be an appropriate instrument. Without the recognition of the extra notional years to those employees who would have been subject to mandatory retirement between 2005 and 2012, very few employees would have chosen to retire at an earlier stage and thus forfeit the financial advantages accruing from longer employment and a higher pension that would have gotten had they stayed until the age of mandatory retirement. Clearly, an employee who enjoys a quasi civil servant status has no incentive to go into early retirement without full, forward-looking compensation.

The decision also notes in this respect the analogy with the Commission’s Communication on stranded costs in the energy sector as well with

the EDF decision. The special permanency regime of OTE’s employees had its origins in the previous monopoly era, a period during which OTE although it still incurred higher labour costs compared to other companies, it was however shielded from any intra-industry competition. It was only after the liberalisation of the Greek telecommunication market that the permanency status of its employees became a real burden for the company affecting its competitiveness and overall fixed cost structure.

Two further aspects of the compatibility assessment merit some particular mention, the proportionality character of the aid and the treatment of OTE’s alleged other advantages.

The proportional character of the aid

As stated above, the Greek State’s financial participation aimed only to compensate OTE for the extra costs of the VRS due to the permanency which were reflected in (i) the recognition of up to 8 years of notional employment and (ii) the high salary costs of OTE’s personnel that originated from agreements concluded prior to full liberalisation. The proportional character of the aid was thus dependant on having adequately quantified these extra costs and ensured that the State’s financial participation would not end up over-compensating OTE.

On the basis of a series of calculations and expert advice submitted by the Greek government, the Commission accepted that the extra burden on OTE should be set at €390.4 million. The only difficulty was that during the period following the opening of the formal investigation, the value of the State’s envisaged transfer of 4% of its own shares of OTE to TAP-OTE had already exceeded €390.4 million because of the upward move of the OTE share price in the Stock exchange. In this respect, the Greek government committed itself to repeal the relevant legislation should the value of its 4% stake in OTE exceed the amount of €390.4 million the day of its transfer to the Pension Fund and to take any measure deemed necessary to ensure that the Pension Fund will not receive any amount in excess of €390.4 million.

The alleged other advantages: Not all types of alleged advantages are relevant

Although the decision opening the formal investigation had left open the possibility that the Commission could also look at any other kind of advantages that OTE as a former monopolist may have benefited from (or may continued to do so) which could be set against the extra costs of the VRS, in its final decision the Commission considered that “*the compatibility assessment under*

⁽¹⁵⁾ Moreover, OTE’s stock valuation was always based on the premise that the permanency and high labour costs of its staff are fixed costs were for OTE and for the State to assume, See OTE decision, para. 101.

⁽¹⁶⁾ See paragraph 102 of the decision.

Article 87(3) (c) of measures that aim to compensate an ex monopolist for the extra costs that derive from a period when the company concerned operated under a monopoly regime should be limited to examining whether the latter has benefited or continue to do so from other advantages of similar nature only, in the case at hand, other labour law related advantages enjoyed by OTE and which may neutralise the costs in question”⁽¹⁷⁾.

This is an important statement in relation to the assessment of State aid measures that concern undertakings which used to enjoy in the past the kind of rights that Article 86 of the Treaty declares incompatible. In the life of an ex monopolist one cannot exclude that somewhere there may be still lurking a state measure from the past, other than those that have already been abolished on the ground of Article 86, that could be said to still procure an advantage to the said undertaking. However, it would arguably be beyond the scope of Article 87.3 to link the compatibility assessment of such a measure on first issuing a kind of complete bill of clean health other than focusing on the specific pathogenesis of the patient under examination.

In the case of OTE, the Commission found that the company has not benefited from any other labour advantages that could be set against the extra (labour) costs of the VRS. The investigation also showed that in the past the company was actually “asked” by the State to make more payments towards TAP-OTE over and above its own employer contributions in order to address periodic deficits of the Pension Fund that in principle are for the State to take care of.

The competition advantages: drawing a demarcation line vis-à-vis ex ante regulation

The interplay between State aid and ex ante regulation in a fully liberalised market was one of the other interesting aspects of this case. Competitors of OTE argued during the investigation that a decision to declare the aid compatible should include conditions imposed on the company in order to address a number of competition problems such as the allegedly abusive conduct of OTE in the wholesale fixed-line markets and more generally the alleged shortcomings of the Greek regulatory regime, especially the alleged failure of the National Regulatory Authority (NRA) to take the necessary and timely enforcement measures to tame OTE’s anticompetitive behaviour.

In an important consideration, the Commission took the view that the question whether one would also have to take into account other advantages that derive from the previous monopoly position of the undertaking concerned depends, in essence, on whether the relevant market has been fully liberalised in the sense that an appropriate legal or regulatory framework exists to ensure that the ex monopolists no longer enjoy any exclusive or special rights or other advantages, and that actual or likely distortions of competition can be dealt with effectively under the available ex ante regulatory remedies and/or under the ex post enforcement of the relevant competition law provisions.

In this respect, the Commission noted that under the current regulatory framework⁽¹⁸⁾, the NRA has already designated OTE as having significant market power within all fixed markets that are included in the Commission Recommendation on Relevant Markets⁽¹⁹⁾. To date, OTE remains subject to a set of comprehensive ex ante regulatory remedies both at wholesale and retail level. More particularly, OTE is obliged to provide third parties: (a) wholesale access to its fixed network, (b) carrier selection and carrier pre-selection, (c) transit services and a whole set of network services under the principles of fairness, reasonableness and timeliness. As an operator with significant market power in the fixed line market, OTE has also an obligation of non-discrimination, transparency, accounting separation and auditing and is subject to an obligation of price control and cost accounting based on long run average incremental costs on the basis of current costs of assets⁽²⁰⁾. Overall, the various cost accounting and accounting separation obligations imposed on OTE aim to ensure that OTE as a former monopolist should derive no advantage that could undermine or distort competition in the market.

⁽¹⁸⁾ OJ L 108, 24.4.2002, p.33.

⁽¹⁹⁾ Commission Recommendation 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 114, 8.5.2003, p. 45.

⁽²⁰⁾ See Commission decisions (*No comments*), Case EL/2006/0493 call origination on the public telephone network provided at fixed location, Case EL/2006/0494: call origination on individual public telephone networks provided at fixed location, and Case EL/2006/0495: transit services in the fixed public telephone network. http://circa.europa.eu/Public/irc/info/ecctf/library?l=/ellda/adopted_measures&vm=detailed&sb=Title. See also Commission decision (*No comments*) Case EL/2006/0372: wholesale broadband access in Greece, and Commission decision (*No comments*) Case EL/2006/0491: the minimum set of leased lines in Greece.

⁽¹⁷⁾ See paragraph 136 of the decision

Moreover, the Commission also stressed that since the opening of the formal investigation the regulatory authority had taken a number of ex post measures against OTE finding violations either of the existing regulatory or competition law provisions ⁽²¹⁾.

VII. Conclusions

The OTE case is an illustrative example of the Commission's approach in relation to aid measures which aim to assist the on-going transformation of former monopolists towards truly competitive undertakings that operate within fully competitive markets.

Although the liberalisation of the electronic communications market is now a reality in the EU, certain ex monopolists, like OTE, have yet to complete their transformation course. Most often, the remaining adjustments relate to pension or labour law aspects. The *Combus* case-law and its uncertain still scope of application further shows that the concept of aid can still raise a number of difficult and intriguing questions even after almost 35 years of solid jurisprudence as to the notion of "economic advantage".

In the case at hand, it is hoped that the decision will contribute to a level playing field between OTE and all other private operators and will contribute towards more healthy competition in the relevant market.

⁽²¹⁾ Thus, on 29 November 2006, the NRA fined OTE a total of EUR 3 million, that is EUR 1 000 000 for breach of the existing regulatory framework (carrier pre-selection) and EUR 2 000 000 for an abuse of a dominant position because of its refusal to provide network access, leverage of market power, and abuse of a relation of economic dependency. Finally, on 2 March 2007, in the context of an injunction relief procedure, the NRA issued two «Temporary Orders», following a request filed by a number of alternative providers which OTE threatened with interconnection interruption, invoking the existence of alleged high outstanding debts of such providers to it. The said order temporarily prohibits OTE from proceeding to Interconnection interruption until the NRA has decided on whether OTE's claims are founded in the context of a dispute settlement procedure in accordance with the exiting Regulatory framework. See Press release issued by EETT on 2 March 2007.

Intellectual property rights in standard setting from a competition law perspective

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This article gives an overview of the competition rules that apply to intellectual property rights (IPR) policies in standard setting. It focuses in particular on the recent discussions on ex ante disclosure and licensing policies developed by standard setting organisations.

These instances shed some light on the principles standard setting organisations should abide by under EU competition rules when developing IPR-policies. This paper is not intended to provide a full and detailed analysis of the application of Article 81 to standard setting agreements. Instead, we will focus on specific issues that may arise when technologies protected by intellectual property rights are incorporated in a standard. These issues can be divided into ex ante concerns, i.e. arising prior to the adoption of a standard, and ex post — concerns arising once the standard is set.

General competition issues in standard setting

In general, it is not and should not be an anti-trust agency's role to interfere in the nature of the standard setting process. In hi-tech markets especially, standards, if properly developed, play a positive role in promoting the efficient promulgation of new technologies in a manner that is most beneficial to the consumer and the economy in general. When the choice of one technology over others is made in a transparent and fair way, any potential restrictions of competition are generally outweighed by the countervailing economic benefits.

Standards can be set in formal government standard setting bodies ⁽²⁾, through formalised industry collaboration in the framework of standard setting organizations or by ad hoc agreements among undertakings. Standards may also arise spontaneously outside any collaborative process as a result of technologies' high penetration of a given market.

Industry standards have a positive effect insofar as they drive economic interpenetration in the common market, encourage the development of new markets and promote efficiency, and consumer choice. Standards provide for improved supply conditions, for lower transaction costs, benefiting economies as a whole. These benefits are achieved as standards aid in ensuring interoperability, maintaining quality, and providing information ⁽³⁾.

Within the European internal market, standards provide additional benefits related specifically to the policy objective of market integration within the EU. Pursuant to the case law of the European Court of Justice following the *Cassis de Dijon* case, certain restrictions to the free movement of goods provided for in Article 28 of the EC Treaty are permissible. Common standards, governmental or private, help eliminate restrictions to trade among Member States.

In spite of their benefits, all standard setting scenarios raise a number of issues under competition rules. Some of the concerns associated with standard setting agreements are dealt with in Section 6 of the Commission Guidelines for horizontal cooperation agreements ⁽⁴⁾.

Insofar as a standard is set by agreement among competitors on a given market, consumer choice and other competitive restraints are foregone. The collaborative process of standard setting may therefore raise issues of collusion and exclusion if anti-competitive coordination is only disguised as standard setting and is aimed at suppressing competition and/or price fixing. As a result, standardization agreements caught by Article 81(1) will be prohibited if they “use a standard as a means amongst other parts of a broader restrictive agreement aimed at excluding actual or potential competitors” ⁽⁵⁾.

However, standard setting agreements which contain restrictions of competition may be exempted under Article 81(3) if they “(...) promote

⁽¹⁾ Directorate-General for Competition, unit C-3. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ In the EU there are standards bodies recognized under Directive 98/34 of June 22, 1998, on technical standards and regulations, OJ L 204, 21.7.1998, p. 37.

⁽³⁾ Commission Communication on the role of European standardisation in the framework of European policies and legislation COM(2004) 674 final.

⁽⁴⁾ Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02).

⁽⁵⁾ Ibid, para 165.

economic interpenetration in the common market or encourage the development of new markets and improved supply conditions"⁽⁶⁾. The exemption is conditioned inter alia upon a finding that the agreements contain no restrictions of competition that are not indispensable to achieve the reasonable objectives of the standard, such as unnecessary restrictions on innovation⁽⁷⁾ and that access to the standard must be made available to new entrants on the market wishing to comply with the standard⁽⁸⁾.

Ex-ante IPR disclosure and licensing from a competition perspective

Prior to the adoption of a standard, multiple technologies may compete for incorporation into the standard under consideration. Once a company's essential IPR has been incorporated into the standard, and once the industry has been locked in to the standard, the essential IPR holder might charge an artificially inflated ex post monopoly price which it would not have otherwise been able to charge ex ante due to availability of alternatives at the time the standard was being discussed. It can be difficult in practice for a commitment to licence on fair, reasonable and non-discriminatory terms to constrain the charged price.

The Commission put forward a set of recommendations for standard setting bodies on the ways to deal with intellectual property rights relating to the standards in the 1992 Communication on "Intellectual Property Rights and standardisation"⁽⁹⁾. Many standard setting bodies adopted rules aiming to prevent antitrust liability, including rules forbidding discussions about the terms and conditions of licenses to patents essential to a standard. Standard setting bodies have adopted patent policies ranging from a mere ex ante disclosure of IPR that read on the technologies considered for inclusion in the standard in development to requirements to commit to license the IPR on "reasonable and non discriminatory" ("RAND") terms, to rules on disclosure and commitment to specific licensing terms before a given technology can be included in a standard.

The Commission has indicated in its Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements that ex ante

licensing can have pro-competitive benefits when subject to appropriate safeguards. The Guidelines⁽¹⁰⁾ provide that "*undertakings setting up a technology pool that is compatible with Article 81, and any industry standard that it may support, are normally free to negotiate and fix royalties for the technology package and each technology's share of the royalties either before or after the standard is set*"⁽¹¹⁾. The Guidelines then provide that "*it may be more efficient if the royalties are agreed before the standard is chosen [...], to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies. On the other hand, licensees must remain free to determine the price of products produced under the licence*"⁽¹²⁾.

Standard setting bodies' policies

The issue of ex ante schemes has come into the limelight after developments in a number of standard setting bodies. The European Telecommunications Standardisation Institute (ETSI) adopted a new IPR guide in 2006 which says that "*Without prejudice to ETSI IPR Policy and other sections of this Guide, voluntary, unilateral, public, ex ante disclosures of licensing terms by licensors of Essential IPRs are not prohibited under ETSI Directives. Licensing terms from such disclosures may, in some circumstances, improve transparency for individual Members in considering technologies for inclusion in standards and technical specifications*"⁽¹³⁾.

Suggestions have also been made to adopt a scheme of an ex ante fixed royalty cap. In these proposals the total royalty that can be charged for all patents essential to a standard is capped in advance at an overall percentage of the licensee's product revenues. A holder of an essential patent would receive a proportion of the royalty cap in relation to the overall number of his essential patents incorporated in the standard.

This royalty cap approach carries certain risks. The royalty cap in combination with the proportionality rule appears to preclude any price competition, since the price of each essential patent is fixed in advance as a function of the set royalty cap and the number of essential patents included in the standard.

⁽⁶⁾ Ibid. para 169.

⁽⁷⁾ Ibid. para 173.

⁽⁸⁾ Ibid. para 169.

⁽⁹⁾ Commission Communication on IPRs and Standardization, COM 92/445, October 22, 1992.

⁽¹⁰⁾ Commission Notice 2004/C 101/02 (OJ C 101, 27.4.004, p. 2).

⁽¹¹⁾ Ibid., para 225.

⁽¹²⁾ Idem.

⁽¹³⁾ ETSI Guide on IPRs, Version endorsed by General Assembly #48 on 22 November 2006, page 15.

VITA, a US standard setting body accredited by the American National Standards Institute, adopted new rules of disclosure of relevant patents and pending patent applications as a precondition to participating in the standard setting activity ⁽¹⁴⁾. The policy contains provisions including:

- licensing commitments including maximum royalty rates and most restrictive non-royalty terms that the member company will request when licensing these patents;
- in case where a maximum royalty is specified but other licensing terms are not, members must accept specific limits on grant backs, reciprocal licenses, non-asserts, covenants not to sue or defense of suspension provisions;
- failure to disclose a known essential patent or failure to declare most restrictive licensing terms on a prompt basis leads to a royalty free license of the essential claims of the undisclosed patent;
- finally members agree to binding arbitration by a panel to be drawn from the VITA Board of Directors to resolve any disputes over applications of the patent policy.

The VITA patent policy clearly prohibits negotiations and discussions of specific licensing terms among working group members or with third parties ⁽¹⁵⁾. Actual licensing terms still have to be negotiated subject to limitations imposed by the patent holder's declaration of the most restrictive terms. Any use of the declaration process to fix downstream prices of standardised products, or efforts of patent holders to rig their declarations of licensing terms would be illegal.

The American Institute of Electrical and Electronics Engineers Standards Association adopted a policy that included similar elements in early 2007. A notable difference is that it does not require patent holders to publicly commit to their most restrictive licensing terms during the standard setting process. However, as patent holders will compete to offer the most attractive combination of technology and licensing terms they will most likely make such commitments leading ⁽¹⁶⁾.

Conclusion

Given the increase in patenting and the number of standards which incorporate protected technologies it has become increasingly clear that standard setting may lead to serious distortions of competition on a given market. In fact, a patent essential to the implementation of a standard may have a much higher value once the standard has been adopted than ex ante. This creates an incentive for the patent holder to attempt to extract the ex post rather than the ex ante value of his technology. Specific rules therefore apply to IPR within the context of standardisation organisations from a competition perspective.

There is an important pro-competitive rationale behind requiring disclosure of patents and patent applications in the framework of standard setting before a standard is set. Ex ante disclosure can allow for competition to take place on the basis of both technological merits and price before the standard is agreed. The requirement to declare the most restrictive licensing terms will enable competition among alternative technologies, including those freely available in the public domain, based on licensing terms and technical merit. As a result, companies will likely be encouraged to compete by proposing terms increasing the chances of their proprietary technology to be selected and the adopted standard will be the result of a more informed choice.

Adopting an IPR policy within standards bodies whereby price and other licensing terms are disclosed ex ante can therefore yield pro-competitive benefits, provided that such IPR policies include appropriate safeguards to prevent collective price fixing which would be illegal. When developing IPR policies standard setting organizations should therefore address the question to what extent, if any, ex ante term disclosure is required.

The role of the competition authorities in these is not to impose a specific IPR policy on standards bodies, but to indicate which elements may or may not be problematic. It is then up to industry itself to choose which scheme best suits its needs within these parameters.

⁽¹⁴⁾ The policy was adopted on January 17, 2007. The US Department of Justice Antitrust Division issued a «Business Review Letter» providing guidance to VITA on October 30, 2006. see <http://www.usdoj.gov/atr/public/busreview/219380.htm>.

⁽¹⁵⁾ <http://www.vita.com/disclosure/VITA%20Patent%20Policy%20section%2010%20draft.pdf>.

⁽¹⁶⁾ See IEEE-SA Standards Board Bylaws Section 6 <http://standards.ieee.org/guides/bylaws/sect6-7.html#6>.

The judgment of the Court of First Instance in the Microsoft case

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1. The 2004 Decision

On 24 March 2004, the Commission adopted a decision pursuant to Article 82 EC concluding that Microsoft had abused its dominant position in the PC operating system market by (i) refusing to provide interoperability information necessary for competitors to be able to effectively compete in the work group server operating system market and (ii) tying its Windows Media Player with the Windows PC operating system. The Commission imposed a EUR 497,196,304 fine on Microsoft and ordered it to bring the above-mentioned infringements of Article 82 EC to an end ⁽²⁾. In particular, the Commission ordered Microsoft to provide the interoperability information to interested undertakings and to offer a version of the Windows PC operating system without Windows Media Player.

The main aim of the Commission's 2004 Decision was to ensure that Microsoft does not abuse its de facto monopoly on the PC operating system market to stifle innovation and consumer choice in adjacent markets. The 2004 Decision therefore thoroughly analysed the consequences of Microsoft's behaviour for the concerned markets.

Microsoft filed an application for annulment against the 2004 Decision with the Court of First Instance. Microsoft also sought to stay the implementation of the remedies foreseen in the 2004 Decision through an interim measures application, which the President of the Court of First Instance rejected by order of 22 December 2004 ⁽³⁾. On 17 September 2007, the Court of First Instance (Grand Chamber) rendered judgment with regard to Microsoft's application for annulment ⁽⁴⁾.

The Court upheld the Commission's findings with regard to Microsoft's refusal to supply interoperability information and the tying of Windows Media Player. The Court, however, annulled

Article 7 of the 2004 Decision which foresees the establishment of a monitoring mechanism, including a monitoring trustee, to oversee Microsoft's compliance with the 2004 Decision insofar as Article 7 entails the delegation of powers of investigation to the monitoring trustee and orders Microsoft to bear the costs of the monitoring trustee. The Court's reasoning will be summarised in the following.

2. The Judgment of the Court of First Instance

2.1. *The Court of First Instance's analysis of Microsoft's refusal to supply and authorise the use of interoperability information*

In its application for annulment with regard to the Commission's findings on the refusal to supply interoperability information, Microsoft relied essentially on the argument that it would illegally be required to grant a licence to its intellectual property rights ⁽⁵⁾.

Although the 2004 Decision did not take any position as to whether the interoperability information was indeed covered by intellectual property rights, the Court proceeded on the presumption that the interoperability information was covered by intellectual property rights or constituted trade secrets ⁽⁶⁾.

The Court reiterated well-established case-law ⁽⁷⁾ according to which *"the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such*

⁽¹⁾ Directorate-General for Competition, unit C-3. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Commission Decision 2007/53/EC of 24 March 2004 (hereinafter: «the 2004 Decision»). For a more detailed summary of the 2004 Decision see Competition Policy Newsletter No 2, 2004, p. 44-48.

⁽³⁾ Case T-201/04 R.

⁽⁴⁾ Case T-201/04 *Microsoft v Commission* (hereinafter: «the judgment»).

⁽⁵⁾ Microsoft also argued that it had not in fact refused to supply the interoperability information and that the 2004 Decision was incompatible with the TRIPS Agreement. Both pleas were rejected by the Court (see paragraphs 713-776 and 777-813 of the judgment).

⁽⁶⁾ Paragraph 289 of the judgment.

⁽⁷⁾ Case 238/87 *Volvo* [1988] ECR 6211, Joined Cases C 241/91 P and C 242/91 P *RTE and ITP v Commission* [1995] ECR I 743 («Magill»), Case C 418/01 *IMS Health* [2004] ECR I 5039.

an abuse”⁽⁸⁾. The Court noted that “the following circumstances, in particular, must be considered to be exceptional:

- *in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;*
- *in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;*
- *in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand”⁽⁹⁾.*

The Court then went on to analyse whether these exceptional circumstances were present in the Microsoft case.

Indispensability

With regard to the indispensability of the interoperability information, the Court agreed with the Commission that Microsoft was able to impose Windows as the “de facto” standard for work group computing⁽¹⁰⁾.

The Court therefore concluded that non-Microsoft work group server operating systems had to be capable of interoperating with Windows PC and server operating systems on an equal footing if they were to be marketed viably on the market⁽¹¹⁾ and that there were no viable solutions to achieve interoperability other than disclosures⁽¹²⁾ from Microsoft.

Elimination of competition

As regards the elimination of competition emanating from Microsoft’s refusal to supply, the Court noted at the outset that “[...] Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market”⁽¹³⁾.

The Court also stressed that “[...] the Commission had all the more reason to apply Article 82 EC before the elimination of competition on the work

group server operating systems market had become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse”⁽¹⁴⁾.

The Court fully confirmed the Commission’s definition of the relevant product markets as well as its analysis of market data and the competitive situation⁽¹⁵⁾. The Commission collected a very significant amount of customer evidence showing that it was the artificial “interoperability advantage” that Microsoft reserved for its product via the refusal to supply that drove Microsoft’s rapid gain of market share and prevented other vendors of work group server operating systems from viably competing on the market.

The Court concluded that “[...] Microsoft’s refusal has the consequence that its competitors’ products are confined to marginal positions or even made unprofitable. The fact that there may be marginal competition between operators on the market cannot therefore invalidate the Commission’s argument that all effective competition was at risk of being eliminated on that market”⁽¹⁶⁾.

New product/consumer welfare

The Court noted that whether Microsoft’s “[...] conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in ‘limiting production, markets or technical developments to the ... prejudice of consumers’”⁽¹⁷⁾.

The Court then went on to state that “[...] the contested decision rests on the concept that, once the obstacle represented for Microsoft’s competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important (see, to that effect, recital 699 to the contested decision)”⁽¹⁸⁾.

In the same vein, the Court emphasised that “[...] Microsoft’s competitors would not be able to clone or reproduce its products solely by having access to the interoperability information covered by the contested decision”⁽¹⁹⁾.

⁽⁸⁾ Paragraph 331 of the judgment.

⁽⁹⁾ Paragraph 332 of the judgment.

⁽¹⁰⁾ Paragraph 392 of the judgment.

⁽¹¹⁾ Paragraph 422 of the judgment.

⁽¹²⁾ Paragraph 435 of the judgment.

⁽¹³⁾ Paragraph 561 of the judgment.

⁽¹⁴⁾ Paragraph 562 of the judgment.

⁽¹⁵⁾ Paragraphs 479-620 of the judgment.

⁽¹⁶⁾ Paragraph 593 of the judgment.

⁽¹⁷⁾ Paragraph 643 of the judgment.

⁽¹⁸⁾ Paragraph 656 of the judgment.

⁽¹⁹⁾ Paragraph 657 of the judgment.

Therefore, the Court agreed with the Commission's findings that Microsoft's refusal to supply interoperability information "*limits technical development to the prejudice of consumers within the meaning of Article 82 (b) [...] (20)*".

Objective justification

The Court accepted that even when the above mentioned circumstances are present, the company that refused to supply a product could objectively justify its conduct.

As regards the associated burden of proof, the Court noted that "*[...] it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted (21)*".

Microsoft's first claimed objective justification for its refusal to supply interoperability information was the fact that the technology concerned was covered by intellectual property rights (22).

However, the Court rejected this argument as "*[...] inconsistent with the raison d'être of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply (23)*".

The Court also rejected Microsoft's argument that the disclosure of the interoperability information "*will significantly reduce — still less eliminate — Microsoft's incentives to innovate (24)*". In particular, the Court pointed out that it was "*[...] normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market (25)*".

2.2. The Court of First Instance's analysis of Microsoft's tying of Windows Media Player with the Windows client PC operating system

The Court confirmed that the presence of the following four factors constitutes abusive tying under Article 82 (d) EC:

- "*first, the tying and tied products are two separate products;*
- *second, the undertaking concerned is dominant in the market for the tying product;*
- *third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and*
- *fourth, the practice in question forecloses competition (26)*".

Separate products

The Court confirmed the Commission's assessment that "*[...] the distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand (27)*".

The Court explicitly rejected Microsoft's assertion which claimed that as there was no demand for a Windows client PC operating system without a streaming media player, these could not be considered as separate products. The Court pointed out that complementary products can also constitute separate products and referred to the Hilti (28) case: "*[I]t may be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless. However, that did not prevent the Community Courts from concluding that those two products belonged to separate markets (29)*".

The Court also pointed to the particular role of Original Equipment Manufacturers ("OEMs"), which combine hardware and software from different sources. In this regard, the Court noted that "*[...] OEMs follow consumer demand for a pre-installed media player on the operating system and offer a software package including a streaming media player that works with Windows, the difference being that that player would not necessarily be Windows Media Player (30)*".

(20) Paragraph 665 of the judgment.

(21) Paragraph 688 of the judgment.

(22) Paragraph 689 of the judgment.

(23) Paragraph 690 of the judgment.

(24) Paragraph 701 of the judgment.

(25) Paragraph 702 of the judgment.

(26) Paragraph 862 of the judgment.

(27) Paragraph 917 of the judgment.

(28) Case T 30/89 Hilti v Commission [1991] ECR II 1439, upheld in Case C 53/92 P Hilti v Commission [1994] ECR I 667.

(29) Paragraph 921 of the judgment.

(30) Paragraph 923 of the judgment.

The Court also emphasised that the tying of Windows Media Player was not the consequence of technical constraint but a strategic choice by Microsoft ⁽³¹⁾ “designed to make Windows Media Player more competitive with RealPlayer by presenting it as a constituent part of Windows and not as application software that might be compared with RealPlayer” ⁽³²⁾.

The Court therefore found that the Commission was correct to find that client PC operating systems and streaming media players constituted separate products.

Coercion

In this regard, the Court noted “that it cannot be disputed that [...] consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means[...] that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied” ⁽³³⁾.

The Court also specified that “[...] in most cases that coercion is applied primarily to OEMs, and is then passed on to consumers. OEMs, who assemble client PCs, install on those PCs a client PC operating system provided by a software producer or developed by themselves. OEMs who wish to install a Windows operating system on the client PCs which they assemble must obtain a licence from Microsoft in order to do so. Under Microsoft’s licensing system, it is not possible to obtain a licence on the Windows operating system without Windows Media Player” ⁽³⁴⁾.

Foreclosure

On the foreclosure of competition through Microsoft’s tying of Windows Media Player, the Court found “[...] that the fact that from May 1999 Microsoft offered OEMs, for pre-installation on client PCs, only the version of Windows bundled with Windows Media Player had the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of the other operators” ⁽³⁵⁾.

The Court also noted that “[...] the release of the bundled version of Windows and Windows Media Player as the only version of the Windows operating system capable of being pre-installed by OEMs on new client PCs had the direct and immediate

consequence of depriving OEMs of the possibility previously open to them of assembling the products which they deemed most attractive for consumers and, more particularly, of preventing them from choosing one of Windows Media Player’s competitors as the only media player. On this last point, it must be borne in mind that at the time RealPlayer had a significant commercial advantage as market leader. As Microsoft itself acknowledges, it was only in 1999 that it succeeded in developing a streaming media player that performed well enough, given that its previous player, NetShow, ‘was unpopular with customers because it did not work very well’ (recital 819 to the contested decision). It must also be borne in mind that between August 1995 and July 1998 it was RealNetworks’ products — first RealAudio Player, then RealPlayer — that were distributed with Windows. There is therefore good reason to conclude that if Microsoft had not adopted the impugned conduct competition between RealPlayer and Windows Media Player would have been decided on the basis of the intrinsic merits of the two products” ⁽³⁶⁾.

The Court put significant emphasis on the distribution advantage that Microsoft achieved through its tying: “[...] it is clear that owing to the bundling, Windows Media Player enjoyed an unparalleled presence on client PCs throughout the world, because it thereby automatically achieved a level of market penetration corresponding to that of the Windows client PC operating system and did so without having to compete on the merits with competing products” ⁽³⁷⁾.

The Court concluded that the Commission had demonstrated to the requisite legal standard that the bundling of Windows and Windows Media Player from May 1999 inevitably had significant consequences for the structure of competition. “That practice allowed Microsoft to obtain an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world, thus providing a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs” ⁽³⁸⁾.

The Court therefore held that the Commission’s findings in this first stage of its foreclosure reasoning were in themselves sufficient to establish that the fourth constituent element of abusive tying, namely foreclosure, was present in this case.

Furthermore, the Court also confirmed the Commission’s findings concerning the additional anti-competitive effects of the bundling:

⁽³¹⁾ Paragraph 936 of the judgment.

⁽³²⁾ Paragraph 937 of the judgment.

⁽³³⁾ Paragraph 961 of the judgment.

⁽³⁴⁾ Paragraph 962 of the judgment.

⁽³⁵⁾ Paragraph 1034 of the judgment.

⁽³⁶⁾ Paragraph 1046 of the judgment.

⁽³⁷⁾ Paragraph 1038 of the judgment.

⁽³⁸⁾ Paragraph 1054 of the judgment.

“The Commission is correct to make the following findings:

- *Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market (recital 979 to the contested decision);*
- *because of the bundling, Microsoft’s competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player (ibid.);*
- *Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits (recital 980 to the contested decision);*
- *the bundling increases the content and applications barriers to entry, which protect Windows, and facilitates the erection of such barriers for Windows Media Player (ibid.);*
- *Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players (recital 981 to the contested decision);*
- *by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers (recital 982 to the contested decision);*
- *by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future (recital 983 to the contested decision)”⁽³⁹⁾.*

Objective justification

The Court confirmed that there was no objective justification for Microsoft’s bundling. It rejected all of Microsoft arguments in this respect ⁽⁴⁰⁾. Notably, as regards Microsoft’s assertion that the integration of Windows Media Player in Windows and the marketing of Windows in that form alone led to the de facto standardisation of the Windows Media Player platform, which would have beneficial effects on the market, the Court held that *“[...] Although, generally, standardization may effectively present certain advantages, it cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying”⁽⁴¹⁾.*

⁽³⁹⁾ Paragraph 1088 of the judgment.

⁽⁴⁰⁾ Paragraphs 1144-1167 of the judgment.

⁽⁴¹⁾ Paragraph 1152 of the judgment.

2.3. The Court of First Instance’s analysis of the monitoring mechanism

With regard to the powers of a monitoring trustee, the Court held that *“[...] the Commission has no authority, in the exercise of its powers under Article 3 of Regulation No 17, to compel Microsoft to grant to an independent monitoring trustee powers which the Commission is not itself authorised to confer on a third party”⁽⁴²⁾.*

Secondly, the Court held that *“There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies”⁽⁴³⁾.*

The Court therefore annulled Article 7 of the Decision insofar orders Microsoft to submit a proposal for the establishment of a mechanism which is to include a monitoring trustee with investigatory powers and foresees that all the costs associated with the appointment of the monitoring trustee, including his remuneration, be borne by Microsoft.

2.4. Fines

The Court confirmed the amount of fine that had been imposed, confirming, among other aspects, that the two abuses were held to be very serious infringements of Article 82 EC.

3. Conclusion

It is evident from the judgment that the Court’s findings are based both on a long line of consistent case-law, but also on the specific facts of the case, not least the circumstances relating to Microsoft’s near monopoly position on the client PC operating system market ⁽⁴⁴⁾.

⁽⁴²⁾ Paragraph 1271 of the judgment.

⁽⁴³⁾ Paragraph 1274 of the judgment.

⁽⁴⁴⁾ See paragraph 387 of the judgment: *“Microsoft’s dominant position on the client PC operating systems market exhibits, as the Commission states at recitals 429 and 472 to the contested decision, ‘extraordinary features’, since, notably, its market shares on that market are more than 90% (recitals 430 to 435 to the contested decision) and since Windows represents the ‘quasi-standard’ for those operating systems.”*; Paragraph 392 of the judgment: *«In that regard, the Court finds first, that, in light of the very narrow technological and privileged links that Microsoft has established between its Windows client PC and work group server operating systems, and of the fact that Windows is present on virtually all client PCs installed within organisations, the Commission was correct to find, at recital 697 to the contested decision, that Microsoft was able to impose the Windows domain architecture as the ‘de facto standard for work group computing’; see also paragraph 1152 of the judgment as cited above.*

In this regard, the Court made clear that Microsoft might be able to engage in similar types of abuses in other areas, noting that: “*Since Microsoft is very likely to maintain its dominant position on the client PC operating systems market, at least over the coming years, it cannot be precluded that it will have other opportunities to use leveraging vis-à-vis other adjacent markets. Furthermore, Microsoft had already faced proceedings in the United States for a practice similar to the abusive tying at issue, namely the tying of its Internet Explorer browser*

and its Windows client PC operating system, and the possibility cannot be precluded that it might commit the same type of infringement in future with other application software”⁽⁴⁵⁾.

The judgment will serve as a precedent for the Commission to ensure that Microsoft does not abusively extend its de facto PC operating system monopoly into other markets without constraint so that innovation and consumer choice will suffer.

⁽⁴⁵⁾ Paragraph 1363 of the judgment.

Commission brings air transport in line with other industries by phasing out the block exemptions that have existed in this sector since 1988

Hubert BEUVE-MÉRY and MICHAL STRUK⁽¹⁾

On 28 September 2006, the Commission adopted Regulation (EC) No 1459/2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports⁽²⁾. This Regulation is noteworthy in three particular respects. First, it brings an end to a continuum of block exemption regulations that have existed in the airline industry since 1988, *i.e.* since the Commission has enjoyed the power to implement the competition rules in this sector. Second, it is the first block exemption Regulation in this industry that concerns air services between points in the Community and points in third countries. Finally, the reasons why the short block exemptions in the Regulation are not prolonged are worth noting.

Regulation (EC) No 1459/2006 concerns two categories of agreements:

- consultations on passenger tariffs for scheduled air services to/from/within the Community,
- consultations on slot allocation and airport scheduling in so far as they concern air services to/from/within the Community.

In practice, the exemption for passenger tariff consultations applies to the activities of just one organisation, the passenger tariff conferences organised by the International Air Transport Association (IATA). The stated aim of these conferences is to facilitate interlining. Interlining occurs when a passenger flies using just one ticket with two or more carriers. Interlining allows consumers to combine the services of different airlines and makes multi-carrier journeys seamless: at a transit airport, passengers do not have to collect their luggage and check in again and their baggage will automatically follow through to their final destination. The consultations on slot allocation and airport scheduling are also organised by IATA in the form of Schedule Coordination Conferences.

The main purpose of these conferences is to manage the increasing difficulties posed by airport congestion.

In early 2004, DG Competition started preparatory work to determine whether the then existing block exemption⁽³⁾ should be prolonged or not. In addition to questions that had already arisen in previous reviews of this block exemption, the question arose for the first time whether IATA's activities should be block exempted in respect of air services between the EU and third countries. This came as the result of Regulation (EC) No 411/2004 becoming applicable on 1 May 2004, with the effect that the Commission enjoyed from that date the powers to implement the competition rules in the air transport sector not only within the EU, as was previously the case, but also between the EU and third countries.

In June 2004, DG Competition published a consultation paper⁽⁴⁾ to explore these issues. Responses to this paper were received from industry, trade and consumer organisations as well as national authorities. This was followed by a discussion paper⁽⁵⁾ which drew preliminary orientations from the first round of consultation and invited interested stakeholders and public authorities to submit a second round of comments⁽⁶⁾. Altogether, this public consultation phase lasted almost a year.

In a similar time frame, the competent authorities in Australia and the United States were also revising the antitrust immunities granted to IATA under their respective laws. DG Competition

⁽¹⁾ Directorate-General for Competition, unit F-1. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ OJ L 272, 3.10.2006, p. 3–8.

⁽³⁾ Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports, OJ L 155, 26.6.1993, as last amended by Commission Regulation (EC) No 1105/2002 of 25 June 2002 amending Regulation (EEC) No 1617/93 as regards consultations on passenger tariffs and slot allocation at airports, OJ L 167, 26.6.2002.

⁽⁴⁾ http://ec.europa.eu/competition/antitrust/others/consultation_paper_en.pdf

⁽⁵⁾ http://ec.europa.eu/competition/antitrust/others/discussion_paper_en.pdf

⁽⁶⁾ All submissions made during the consultation are available from the Commission's website: http://ec.europa.eu/competition/antitrust/others/air_transport.html

therefore co-operated closely with the Australian Competition and Consumer Commission and the United States' Department of Transportation between 2004 and 2007.

The consultation phase allowed DG Competition to determine that:

- the interlining system that depends on IATA tariff conferences is one of four types of interlining systems that exist, the others being global airline alliances, code-share agreements, and bilateral interlining agreements. IATA interlining operates at prices agreed by all airlines together in the IATA tariff conferences,
- interlining benefits consumers, but the importance of IATA interlining as part of overall interlining in the EU is relatively small, and there are several alternative forms of interlining. As a result, there is insufficient assurance for routes within the EU that the benefits to consumers continue to outweigh the risks of the restriction of competition arising from the prices being agreed within the IATA conferences,
- on routes between the EU and third countries interlining is more important and so are the potential benefits of IATA interlining for consumers. Compared to air services within the EU however, less data and evidence was available to ascertain these benefits for consumers,
- the consultations organised by IATA on airport slots and scheduling are clearly compatible with the competition rules.

Against this background, the Commission opted to phase out the exemption for passenger tariff conferences for air services within the EU and the exemption for slots and scheduling conferences. Both exemptions were granted for a very short period, *i.e.* from the entry into force of the Regulation until 31 December 2006 only. However, the reasons for phasing out the exemption differ in the one and the other case. The exemption for tariff conferences for intra EU passenger air services was phased out because the Commission had insufficient assurances that these conferences would continue to meet the conditions of Article 81(3). In contrast, it appeared that the slots and scheduling conferences were compatible with the competition rules. This, however, was also a reason for discontinuing the exemption in so far as it appeared that these conferences did not need a safe harbour from the competition rules in the form of a block exemption.

As regards the exemption for passenger tariff conferences for routes between the EU and third countries, the Commission opted for granting a

short block exemption: until 30 June 2007 for routes between the EU and the United States or Australia and until 31 October 2007 for routes between the EU and other third countries ⁽⁷⁾. At the moment of adoption of the Regulation, the Commission stated its readiness to prolong this exemption on condition that air carriers provide further evidence that passenger tariff conferences for these routes are beneficial to consumers. Reporting provisions were included in the block exemption Regulation to this effect. However, the data provided by IATA and its member airlines after the entry into force of Regulation (EC) No 1459/2006 did not give the Commission sufficient assurances that the conditions of Article 81(3) would continue to be fulfilled. The block exemptions for passenger tariff conferences for routes between the EU and third countries were not therefore renewed. The resulting regulatory situation is fully compatible with the outcome of the reviews of IATA's antitrust immunities in the United States and Australia.

As a result of the concerns expressed by several competition authorities around the world, IATA started developing a new system to set interline fares in replacement of tariff conferences. DG competition supports the objectives pursued by this initiative, *i.e.* to preserve the benefits of IATA interlining for consumers whilst addressing its competition concerns.

⁽⁷⁾ The difference in the expiry dates of the exemptions for services to the US and Australia or to other third countries was to take account of the then on-going antitrust reviews by the competent American and Australian authorities. First instance decisions from the Australian Competition and Consumer Commission and from the US Department of Transportation were expected by June 2007. It was therefore appropriate for the Commission to review the situation within the same timeframe.

The Court of First Instance confirms Duales System Deutschland's abuse of dominance in the packaging recycling system

Michael GREMMINGER ⁽¹⁾ and Gerald MIERSCH ⁽²⁾

1. Introduction

On 24 May 2007 the CFI fully upheld two Commission decisions adopted in 2001 concerning the agreements set up by the German system for the collection and recycling of packaging waste called Duales System Deutschland (DSD).

2. The collection and recycling system operated by DSD

DSD was until August 2003 the only undertaking that operated a comprehensive packaging collection and recycling system in Germany. The system serves to meet the requirements laid down in the German Packaging Ordinance as well as in EC directive 94/62 on Packaging and Packaging wastes. Manufacturers and retailers, who have the legal obligation to take back sales packaging, conclude a so-called "trademark agreement" with DSD. According to that contract, DSD provides a collection and recycling service in a way that its clients are exempted from their legal obligations. The contract also regulates the use of the Green Dot trademark on the packaging and determines the fee to be paid by DSD's clients.

DSD does not itself perform the task of collection but uses local collecting companies. DSD has concluded so-called "service agreements" with those undertakings. Once the packaging waste has been collected and sorted out, it is conveyed to a recycling plant either directly by the collector or handed over to so-called guarantee companies. These guarantee companies have given DSD the assurance that they will recycle the used packaging.

3. The Commission Decisions

3.1. The Article 82 decision

In April 2001 the Commission adopted a negative decision under Article 82, according to which DSD abused its dominant position on the basis of

the payment provision in its "trademark agreement" ⁽³⁾. The payment provision obliges its clients to pay for all the sales packaging brought on the German market that bears the Green Dot trademark, irrespective of whether DSD actually provides its exemption service or not. Whenever the client intends to use the services of competitors for parts of its packaging, the provision leads to a double payment situation for the clients or forces them to introduce costly double-packaging lines, given that DSD requires the packaging exempted by its system to be marked with the Green Dot. The contractual arrangement does not safeguard the basic principle of "no service, no fee" and prevents clients from contracting with competitors of DSD. In its decision the Commission ordered DSD to put an end to the infringement, i.e. DSD may no longer charge a fee for that part of packaging bearing the Green Dot for which the recycling obligation has been fulfilled by a competing service provider.

DSD appealed against the Article 82 decision and also applied for interim measures to suspend the effects of the decision. In November 2001, the President of the CFI rejected DSD's application for interim measures ⁽⁴⁾. The President left the decision on the merits open, but found that DSD could not prove urgency and that the balance of interests was not in favour of a suspension. Accordingly, DSD implements the Commission decision by offering to its clients the conclusion of a supplementary agreement to the trademark agreement.

3.2. The Article 81 decision

In September 2001 the Commission adopted a second decision which found no restriction of competition for the remaining parts of the system (statutes of DSD and guarantee agreements), except the service agreement. The latter restricted competition according to Article 81(1) EC due to an exclusivity in favour of one collector per collection area combined with the long duration of the agreement, but was exempted under Article 81(3)

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⁽³⁾ Case COMP/34493 — DSD, OJ L 166, 2001, p. 1. An overview is provided by Gremminger, M./Miersch, G: «Commission acts against Duales System Deutschland AG for the abuse of a dominant position», in: Competition Policy Newsletter (2001), Number 2 (June), page 27-29.

⁽⁴⁾ Order of 15 November 2001 in case T-151/01 R, DSD vs. Commission, [2001] ECR II-3295.

EC until the end of the year 2003 ⁽⁵⁾. The Commission attached two obligations to the exemption decision according to which DSD cannot prevent its collectors from contracting with competitors of DSD. As the duplication of the collection infrastructure for households is in many cases economically not viable, unrestricted access to the collection infrastructure of the collectors, assured by the imposed obligations, was a precondition for the emergence of competition on the market for collection systems.

DSD appealed against the attachment of the two obligations, but did not apply for interim measures.

3.3. *Impact of the decisions*

As a consequence of the Commission decisions, competing collection and recycling systems could enter the previously foreclosed market and successfully challenge the de facto monopoly of DSD. The prices for collection and recycling services went appreciably down.

4. The Judgements of the CFI

4.1. *The Article 82 decision*

The CFI entirely dismisses DSD's appeal ⁽⁶⁾. The CFI backs the reasoning of the decision on the abuse and rejects DSD's arguments. The abusive nature of the payment provision is confirmed by the CFI. The Commission rightly concluded that there is a mismatch between the service provided by DSD and the fee due by its clients. The CFI recognises that selective marking as required by DSD to avoid the double-payment situation leads to significant additional costs for manufacturers and distributors and therefore has the effect of dissuading manufacturers and distributors of sales packaging from using competing systems.

As to DSD's justifications of the abuse, the CFI states that in view of the practical functioning of the collection and recovery system operated by DSD, the Green Dot does not have the role or importance which DSD claims. The CFI agrees with the Commission that the fulfilment of the take-back and recovery obligation according to German law is determined on the basis of the material collected, irrespective of whether the

Green Dot is affixed to the packaging or not. The decision does therefore not call into question the proper functioning of the DSD system.

The CFI confirms that the decision does not adversely affect the essential function of the Green Dot as trademark. The consumer is not confused because the function of the Green Dot is to identify the possibility of having the packaging at issue collected by DSD and not to exclude collection or recovery by another system. In addition, the CFI points out that the trademark agreement only concerns the users of the logo, i.e. manufacturers and distributors of packaging which are contractual partners of DSD, but not the final consumers.

The CFI finds that the remedy ordered by the Commission is proportionate and does not constitute an illegal imposition of a compulsory licence. The remedy merely requires DSD not to charge a fee on the total amount of packaging bearing the Green Dot where it is shown that all or only some of that packaging has been taken back and recovered through another system. The CFI recalls that this requirement does not concern third parties but manufacturers and distributors of packaging which are either contractual partners of DSD or holders of a licence to use the Green Dot in another Member State. The CFI does not exclude that the Green Dot trademark has a value as such and states that the decision does not preclude the possibility for DSD to levy a fee for merely using the trademark.

The CFI recognises that DSD blocked the emergence of competition by imposing a licence fee provision which ignores the basic principle of "no service, no fee". The Commission will therefore continue to insist on the proper implementation of the abuse decision ⁽⁷⁾.

4.2. *Obligations attached to the Article 81 decision*

The CFI entirely dismisses DSD's appeal against the obligations ⁽⁸⁾. The CFI does not accept DSD's claim that it is economically the owner of the collection infrastructure and does therefore not enter into an essential facilities discussion. In this context the CFI stresses that it is the task of the collectors, not DSD, to make the necessary investments for the collection and sorting of packaging waste and that DSD does not bear the risks related to these investments.

The CFI confirms the Commission's view that it is economically difficult to duplicate the collec-

⁽⁵⁾ Cases COMP/34493 — DSD, COMP/37366 — Hofmann + DSD, and others, OJ 2001 L 319, p.1. An overview is provided by Gremminger, M./Laurila, M./Miersch, G: «Commission defines principles of competition for the packaging waste recovery markets, in: Competition Policy Newsletter (2001), Number 3 (October), page 29-31.

⁽⁶⁾ Judgment of 24 May 2007 in case T-151/01, DSD vs. Commission, not yet reported.

⁽⁷⁾ DSD filed an appeal against the judgment to the ECJ.

⁽⁸⁾ Judgment of 24 May 2007 in case T-289/01, DSD vs. Commission, not yet reported.

tion infrastructure for considerations of spatial economics, collection logistics and traditions of waste collection. If DSD was allowed to prevent potential competitors from concluding agreements with its collectors, this would effectively deprive those competitors of any real opportunity of entering the market.

The CFI finds that the obligations attached to the decision are not incompatible either with German law on packaging waste or with trademark law; nor are they disproportionate, in particular since the joint use of the collection facilities does not prevent DSD from taking back and recovering the packaging which has been attributed to it by the manufacturer or distributor concerned in accordance with its responsibilities under the German law.

The CFI rejects DSD's claim that the obligations targeted the market for exemption services and were thus unrelated to the restriction found by the Commission, which concerned the market for collection and sorting. It accepts the Commission's argument that there is a sufficient link between the restriction of competition and the obligation

by rejecting an artificial distinction between the markets concerned. The decision exempted the whole of the service agreement, and the Commission rightly did this on the basis of both its assessment of the exclusivity clause in favour of the collectors and in the light of the need of competitors to conclude agreements with these collectors.

The CFI recognises the importance of unrestricted access of competitors to the collection infrastructure. Formally, the obligation ended with the exemption in 2004. However, the principle remains valid under Article 81 EC.

5. Conclusion

The full confirmation of the two Commission decisions by the CFI gives an important signal to the market players. It can be expected that the emerged competition in the newly liberalised sector of sales packaging waste will further intensify to the full benefit of the consumers. The Commission, together with its partners in the ECN, will remain vigilant to prevent anti-competitive market behaviour of incumbent operators.

Four decisions bind DaimlerChrysler, Fiat, Toyota and General Motors to commitments to give independent repairers proper access to repair information

John CLARK and Anna NYKIEL-MATEO ⁽¹⁾

Introduction: Importance of these decisions for consumers

It is commonly recognised that there is a widespread problem in the motor vehicle sector stemming from car manufacturers' failure to provide brand-specific repair information to independent repairers. Today's cars are becoming increasingly complex, and even basic repairs can only be carried out properly if the repairer has access to the latest brand-specific technical information.

Independent repairers are the only operators able to exert competitive pressure on the carmakers' own authorised repair networks, and they are therefore very important from the point of view of consumer welfare. Vehicle manufacturers may have an economic incentive to shelter their authorised networks from such competitive pressure in order to secure the loyalty of their selected repairers and to protect an important revenues stream deriving from the sale of spare parts.

The Commission's investigations in these four cases have shown that if independent repairers were to be foreclosed from the market due to a lack of access to repair information, this would likely result in less choice and higher prices for consumers. Recent studies have shown, for instance, that in Germany, prices charged by authorised outlets are on average 16% higher than those billed by independent repairers, while in the UK, a typical service job provided by some of the highest priced brands of franchised dealer can in certain cases be more than 120% than the price charged for a similar job by an independent repairer. In Spain, services provided by independent repairers are significantly cheaper than those performed by members of the authorised networks: differences range between 7% and 33% ⁽²⁾. Independent repairers are also able to buy spare parts from different sources that are often cheaper than those supplied by the car manufacturers' authorised networks. Given that over a car's lifetime, repair

and maintenance bills cost as much as the price initially paid for the vehicle itself, these differences can have a big impact on a consumer's wallet. Furthermore, higher prices for repair and maintenance services could affect prices on the markets for second-hand cars, which could in turn have a knock-on effect on the markets for the sale of new motor vehicles. Restrictions on the availability of technical information also raise broader societal concerns, since if vehicles are repaired without the right technical information, they may be unsafe, or may waste fuel and cause additional air pollution. The protection of competition on the EU car repair and maintenance markets is therefore one of the aims of the motor vehicle block exemption regulation (Commission Regulation (CE) 1400/2002 ⁽³⁾), Article 4(2) of which provides that full and non-discriminatory access to technical information must be given to independent repairers in a manner proportionate to their needs.

Developments during the investigation

Investigations involving Fiat, Toyota, DaimlerChrysler and General Motors ⁽⁴⁾ were opened in December 2004, after these firms were identified by an independent study ⁽⁵⁾ as lagging behind in terms of compliance with the Regulation. Requests for information were sent to around 1,000 independent and authorised repairers in several Member States, as well as to the parties themselves.

As the investigations proceeded, all four car manufacturers began to make progress towards compliance with Regulation 1400/2002, in particular by setting up dedicated pay-per-view websites. Moreover, all four expressed willingness to meet the Commission's remaining concerns. The cases were therefore orientated with a view to adopting decisions with commitments pursuant to Article 9 of Regulation 1/2003.

⁽¹⁾ Directorate-General for Competition, unit E-2. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ *Developments in car retailing and after-sales markets under Regulation No 1400/2002*, Final report to EC DG Competition by London Economics, European Communities 2006, p. 171-172.

⁽³⁾ Commission Regulation 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, p.30.

⁽⁴⁾ The investigations covered the Mercedes-Benz, Smart, Fiat, Alfa Romeo, Lancia, Toyota, Opel and Vauxhall brands.

⁽⁵⁾ *Study on access to technical information in the car sector*, report by Institut für Kraftfahrwesen Aachen for the European Commission DG Competition, October 2004. http://ec.europa.eu/comm/competition/sectors/motor_vehicles/documents/ika.html

On 1 December 2006 proceedings were opened, and preliminary assessments were adopted on the basis of Article 9(1) of Regulation 1/2003. Following commitments proposals received from the four carmakers in late January and early February 2007, market test notices were published pursuant to Article 27(4) of Regulation 1/2003 on 22 March and the proceedings were brought to an end through the adoption of four Commissions decisions on 13 September ⁽⁶⁾.

The problem: insufficiencies in terms of both the scope and the accessibility of information provision

Prior to the Commission's intervention, all four manufacturers had made arrangements for providing technical information that did not match independent repairers' needs either as regards the scope of the information available (i.e. the question as to whether all necessary information is provided in accordance with Article 4(2) of Regulation 1400/2002, or whether some is held back) or as regards its accessibility (i.e. whether a repairer can obtain the information that he needs in good time and in a proportionate manner ⁽⁷⁾, without having to purchase a large and expensive bundle of information for which he has no use). All four failed to release certain categories of technical repair information, and at the time when DG COMP started its investigation (i.e. well after the end of the transitional period provided by Regulation 1400/2002), they had not implemented any effective system to allow independent repairers to have access to technical repair information in an unbundled manner.

In addition to these common features, each of the four cases also displays specific factual characteristics. In the *Fiat* case, the investigation revealed *inter alia* that the information distributed to the authorised network in the form of a series of circulars known as the Service News remained unavailable to independent repairers. In the *Opel* case, the main specific feature relates to discrimination against independent repairers as regards the supply of the principal Opel electronic diagnostic tool. As far as *Toyota* is concerned, the main distinct feature relates to the spare parts catalogue, which was only provided to authorised repairers. The *DaimlerChrysler* case is characterised by the withholding of a substantial part of the information relating to on-board electronics, which seemed to

go beyond the scope of the exception described in recital 26 of Regulation 1400/2002. This exception covers technical information that would enable a third party to bypass or disarm on-board anti-theft devices and/or recalibrate electronic devices, or tamper with devices which limit the speed or other performance-related parameters of a motor vehicle.

The agreements between DaimlerChrysler, Fiat, Toyota and GM and their authorised repairers set the conditions under which these repairers must provide after-sales services including maintenance, warranty repairs, recall operations and the distribution of spare parts. In particular, pursuant to these agreements the vehicle manufacturers provide their authorised repairers with the full scope of technical repair information needed to perform repair work on vehicles of their brands. In addition, the agreements require authorised repairers to carry out a full range of brand-specific repair services, and exclude firms who wish to offer a different or more targeted service, as well as stand-alone spare parts wholesalers. The Commission was concerned that as a result of the carmakers' failure to provide independent repairers with appropriate access to their brand-specific technical repair information, possible negative effects stemming from such agreements could be strengthened, and result in a violation of Article 81(1) of the Treaty. The Commission therefore came to the preliminary conclusion that the restrictions created by the service and parts agreements entered into between DaimlerChrysler, Fiat, Toyota and GM and their authorised repair partners might result in a decline in independent repairers' market position, in particular since the four carmakers are the only suppliers able to provide independent repairers with all of the technical information that they need on the brands in question. This could in turn translate into considerable consumer harm in terms of a significant reduction in choice of spare parts, higher prices for repair services, a reduction in choice of repair outlets, potential safety problems, and a lack of access to innovative repair shops.

The risk of foreclosure seems to be confirmed by market data which point to a relative decline in the independent repair sector in recent years. The Commission investigation showed that independent repairers are losing ground to their authorised competitors in terms of the number of operations that they carry out, and that their capacity utilisation is far lower than that within the authorised networks. Moreover, large numbers of independent repairers are leaving the market: in the UK, for instance, in 1999 there were a total of 18,000 independent workshops, but by 2004, this had declined

⁽⁶⁾ See DG Competition's website: http://ec.europa.eu/competition/index_en.html.

⁽⁷⁾ See: Article 4(2), third paragraph, and recital 26 of Regulation 1400/2002.

to less than 14 000 ⁽⁸⁾. As a study prepared for the Commission by an independent consultant ⁽⁹⁾ shows, during one year alone the number of independent repairers in 12 EU Member States ⁽¹⁰⁾ declined by close to 6 000 ⁽¹¹⁾. London Economics links this decline to a lack of appropriate access to brand-specific technical repair information ⁽¹²⁾. This trend seems all the more significant when one considers that the number of authorised repairers has gone up and the overall size of the market has edged downwards ⁽¹³⁾.

In the Commission's preliminary view, the four car manufacturers' conduct did not comply with Article 4(2) of Regulation 1400/2002 and the agreements with their authorised repairers were unlikely to benefit from the provision of Article 81(3).

The remedy: Commitments pursuant to Article 9 of Regulation 1/2003

In order to address the Commission's competition concerns, the four carmakers offered sets of commitments, which despite certain differences are broadly similar and structured around three core elements.

The first element sets out the principle of equal treatment in terms of the scope of technical information to be made available to independent and authorised repairers, and also clarifies the concept of technical information. In accordance with this principle vehicle manufacturers will ensure that all technical information, tools, equipment, software and training required for the repair and maintenance of vehicles of their brands which is provided to authorised repairers is also made available to independent repairers. As to the notion of technical information within the meaning of Article 4(2) of Regulation 1400/2002, the commitments indicate that this includes all information provided to authorised repairers for the repair or maintenance of motor vehicles. The commitments give particular examples of technical information indicated by independent repairers as being problematic, including fault codes and other param-

eters, together with updates, which are required to work on electronic control units (ECUs) with a view to introducing or restoring settings recommended by a vehicle manufacturer, vehicle identification methods, parts catalogues, working solutions resulting from practical experience and relating to problems typically affecting a given model or batch, and recall notices as well as other notices identifying repairs that may be carried out without charge within the authorised repair network. However these examples clearly cannot be interpreted as constituting an exhaustive list.

The second element clarifies the scope of the exception by virtue of which technical information can be legitimately withheld, as set out in recital 26 of Regulation 1400/2002. The commitments make it plain that if vehicle manufacturers were to invoke the exception as a reason for withholding access to certain items of technical information, the burden of proof would be upon them to ensure that the information so withheld is limited to that necessary to provide the protection described in recital 26 of the Regulation, and that it does not prevent repairers from carrying out repairs not directly linked to these safety- and security-related functions.

This is important because manufacturers are increasingly choosing to integrate these functions into the main ECUs governing, for instance, the engine, or on-board comfort systems. Increasingly, these ECUs need to be accessed for even the most basic repairs. Replacing the battery, for example, may require ECUs to be "re-flashed" or "re-initialised". Moreover, in the most modern vehicles, replacement parts need to be registered with a central ECU before they will be accepted. There is therefore a real risk, as illustrated in the case involving DaimlerChrysler, that manufacturers will seek to interpret the safety and security exception in a way that prevents independent repairers from carrying out even the most basic of tasks.

A manufacturer therefore has two choices: it may either choose to design on-board electronics in such a way that safety and security related functions are separate from other elements, or it must make all information, including that on safety and security, available to independent repairers. If it follows the second route, it may still use less restrictive means for ensuring that safety and security are not compromised. As an example, GM has committed itself to allow independent repairers unrestricted access to all information, including information on safety and security, provided that they obtain GM Certification. This certification will be issued to independent repairers without delay subject to the completion of training.

⁽⁸⁾ MFBI (Market Facts and Business Information), *The car service and repair market in the UK, 2005* as quoted in: S. Brooker, *At a crossroads. Getting the UK car servicing and repair sector back on track.*, National Consumer Council, June 2005, p. 6.

⁽⁹⁾ London Economics

⁽¹⁰⁾ 2002-2003 — Denmark, Germany, Estonia, Spain, France, Italy, Hungary, the Netherlands, Poland, Portugal, Sweden, UK.

⁽¹¹⁾ *Developments in car retailing and after-sales markets under Regulation N° 1400/2002*, op.cit., Figure 104, p. 147.

⁽¹²⁾ Ibid., p. 165, 167-168.

⁽¹³⁾ Ibid., p. 165.

The third element sets out the principle of proportionality, according to which access to technical information granted to independent repairers must take account of their needs. This implies both unbundling of information and pricing that takes into account the extent to which independent repairers use the information. The commitments specify that the web-based on-demand system chosen by the parties as their main means to provide technical information will be kept operational during the period of validity of the commitments. Access to these specialised technical websites will be based on time windows, with the price for the shortest window of one hour set at a level which reflects the principle of equal treatment between authorised and independent repairers. During the period that the commitments apply, fee levels will not be increased at a rate that exceeds increases in the average Consumer Price Index within the EU.

Moreover, the commitments provide for a mechanism for resolving disputes relating to the provision of technical information. The particular solutions proposed by the vehicle manufacturers differ, but all the manufacturers have committed themselves to accept arbitration or mediation to resolve such disputes.

In order to avoid a situation where further developments in the area of provision of technical information to independent repairers are blocked by the commitments, the latter contain the minimum standards principle. According to this principle, the commitments are without prejudice to any current or future requirement established by Community or national law that might extend the scope of the technical information to be provided

to independent operators or might set out more favourable ways for such information to be provided.

The future: Competition enforcement paves the way for technical regulation

As already described, problems involving restricted access to technical information are widespread in this sector, and National Competition Authorities are already being faced with complaints along these lines. The commitments agreed to by all four vehicle manufacturers should serve as guidance for all other manufacturers and as a framework for potential new cases to be dealt with either by the Commission or National Competition Authorities.

The commitments will remain in force until May 2010, i.e. until Regulation 1400/2002 expires. By that time the Euro 5 emissions control regulation, which the Council adopted on 30 May 2007, will enter into force. This regulation places an obligation upon vehicle manufacturers to provide independent repairers with standardised access to all technical repair information. As this new regulatory framework becomes operational, the need for competition enforcement as regards technical information provision is thus likely to phase out. It is, however, worth noting that competition enforcement in these four cases and close liaison between the Commission's departments have acted as a spur to enable the Commission to overcome previous resistance from industry to the disclosure of technical information in the context of emissions control regulation.

Commission fines Dutch brewers over €273 million for a beer cartel

Geert WILS ⁽¹⁾

Introduction

On 18 April 2007, the Commission fined Dutch brewers Heineken, Grolsch and Bavaria a total of €273 783 000 for operating a cartel in the beer market in The Netherlands. The Commission's decision names the Heineken group, Grolsch and Bavaria, together with the InBev group which also participated in the cartel. Between 1996 and 1999 at least, the four brewers held numerous unofficial meetings, during which they coordinated prices and price increases of beer in The Netherlands. InBev received no fines as they provided decisive information about the cartel under the Commission's leniency programme.

The product

Beer consumption is around 80 litres per capita in the Netherlands. Around 60% of this consumption reaches the consumer through the off-trade consumption channel, the remaining 40% via the on-trade channel. The value of the beer market in the Netherlands is around one billion EUR per year.

Procedure

After the Commission, on its own initiative, discovered a cartel in the Belgian beer market, InBev provided information under the auspices of the Commission's leniency policy that it was also involved in cartels in other European countries. This led to surprise inspections of brewers in France, Luxembourg, Italy and the Netherlands in the Spring of 2000. These investigations led to decisions condemning cartels in Belgium (see Commission press release IP/01/1739; upheld by the CFI and ECJ, see CJE/07/13), France (see IP/04/1153; not appealed) and Luxembourg (see IP/01/1740; upheld by the CFI). The Italian investigation was closed without charges being brought.

The cartel

The evidence uncovered in the inspections, in particular handwritten notes taken at unofficial meetings and proof of the dates and places when

these meetings took place, showed that Heineken, InBev, Grolsch and Bavaria ran an illegal cartel in the Netherlands. This fully confirms the corporate statements provided by InBev.

At meetings called "agenda meeting", "Catherijne meeting" or "sliding scale meeting", the four brewers coordinated prices and price increases of beer in the Netherlands, both in the on-trade segment of the market — where consumption is on the premises (known as "horeca", an acronym for 'hotels, restaurants and cafés') — and the off-trade market segment — consumption off the premises (mainly sold through supermarkets), including private label beer. Private label beer is either sold under a supermarket chain's own brand, or under a brand name unsupported by advertising.

In the on-trade market segment, the brewers coordinated the rebates granted to pubs and bars, which are the main element of pricing, using the "sliding scale" approach. Moreover, there is proof that they occasionally coordinated other commercial conditions offered to individual customers in the on-trade segment in the Netherlands, and engaged in customer allocation, both in the on-trade and the off-trade segment.

The Commission has evidence that in all four brewery groups high-ranking management (such as board members, the managing director and national sales managers) participated in the cartel meetings and discussions. There is also evidence that the companies were aware that their behaviour was illegal and took measures to avoid detection, such as using a panoply of code names and abbreviations to refer to their unofficial meetings and holding these meetings in hotels and restaurants.

InBev did not contest the facts outlined in the Commission's Statement of Objections.

Fines

As the Statement of Objection had been issued on August 2005, the 1998 Guidelines on fines ⁽²⁾ applied.

⁽¹⁾ Directorate-General for Competition, unit B-3. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author

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

The cartel was classified as a ‘very serious infringement’, and the starting amount for the cartel member with the largest market share, Heineken, was set at €65 million. The starting amounts for the other parties were set at a proportionately lower level based on their own position in the market.

In order to ensure sufficient deterrence, the Commission applied multiplying factors to the largest undertakings: for InBev 2.5, for Heineken 2.5.

The cartel lasted more than 3 and a half years, which resulted in an increase of 35% in total of the starting amount increased by the multiplier where applicable.

As InBev was the first to inform the Commission of the existence of the cartel and met all the further conditions set by the 1996 Leniency Notice ⁽³⁾ it was granted full immunity from fines.

Fines imposed and reductions granted by the Commission:

Name and location of company	Reduction under the Leniency Notice (%)	Reduction under the Leniency Notice (euros)	Exceptional reduction (euros)	Fine (euros)
Heineken NV (NL) & Heineken Nederland BV (NL) (*)	0	0	100 000	219 275 000
InBev NV (B) & InBev Nederland NV (NL) (*)	100	84 375 000	--	0
Grolsch NV (NL)	0	0	100 000	31 658 000
Bavaria NV (NL)	0	0	100 000	22 850 000
TOTAL				273 783 000

(*) Jointly and severally liable

⁽³⁾ OJ C 207, 18.7.1996, p. 4.

Merger control: Main developments between 1 May and 31 August 2007

Mary LOUGHRAN and John GATTI ⁽¹⁾

Introduction

The number of notifications continued to reach record levels with a total of 170 transactions being notified between 1 May and 31 August 2007. The number of decisions adopted also reached record levels with 140 decisions being taken during the trimester. Of these some 130 transactions were approved without conditions pursuant to Article 6 (1) (b) (of which 92 decisions were adopted via the simplified procedure) and 3 proposed acquisitions were approved subject to conditions and obligations pursuant to Article 6 (2). The Commission cleared one case unconditionally after a second phase investigation and cleared three others subject to conditions. There was also 1 prohibition decision taken in June. One case was withdrawn during the Phase II investigation. The Commission also opened 5 Phase II investigations (Article 6 (1) (c)) during the period.

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

Luvata/Eco

On 3 August the Commission approved the proposed acquisition of the Italian company Eco by the Finnish group Luvata. The Commission's decision was conditional upon the divestiture of one of Luvata's plants in Europe.

Luvata is a company active in metal fabrication, component manufacturing and related engineering and design services with a focus on copper and copper alloy products used for heat transfer, electrical and electronic conductivity, signal transmission and corrosion resistance. Eco is an Italian manufacturer of heat exchange products such as coils. It was the property of the private equity fund Compass.

The Commission examined the competitive effects of the proposed merger in the coil markets, where both companies are active as suppliers. Coils are systems which enable the transfer of heat from one liquid or gas to another without the two mix-

ing. They are particularly used in air-conditioning (HVAC) and refrigeration systems and represent up to 40% of the total cost of these systems.

The Commission's market investigation showed that the proposed acquisition, as initially notified, could significantly reduce competition as regards the supply of coils to manufacturers of condensing units, a component of refrigeration systems. The Commission found that Eco was the largest and Luvata the second largest suppliers in Europe. In addition the market investigation pointed toward possible competition concerns on the market for coils used in HVAC.

To address the Commission's serious doubts as to the compatibility of the proposed transaction with the Single Market, Luvata undertook to divest the plant where coils for condensing units and most coils for HVAC are manufactured. After checking these undertakings with other market participants the Commission concluded that they were suitable to remedy the serious doubts.

TUI/First Choice

In June the Commission gave its approval to the proposed acquisition of First Choice, a UK travel services company, by TUI, parent of the German TUI group, active in tourism and shipping services. The Commission's decision was conditional upon the divestiture by TUI of its Irish business operating under the 'Budget Travel' brand.

TUI is the parent company of TUI Group, offering package tours, travel agency services, flights, hotel accommodation, car rental and cruises. First Choice is also active in tourism and supplies package tours, flights, travel agency services, car rental and cruises to customers in a number of Member States. The proposed takeover thus involved two important suppliers of package holidays, inter alia in the UK and Ireland. The UK and Irish markets have vertically integrated tour operators (Thomas Cook/MyTravel, TUI and First Choice), a large number of smaller independent tour operators for short-haul holidays and a few medium-size operators like Virgin Holidays and Kuoni for long-haul package holidays.

The Commission found that the proposed transaction as initially notified raised serious competition concerns in Ireland, where the parties would have been by far the leading tour operator

⁽¹⁾ Directorate-General for Competition, units B-4 and B-3. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

for short-haul package holidays, controlling more than 50% of the market, and would have had the largest, nationwide network of travel agencies. Package holidays and their distribution through high street travel agents are still popular in Ireland, where broadband access to the Internet and the range of independent travel options are less developed than in the UK.

To address the Commission's concerns, TUI offered to divest its Irish business, 'Budget Travel'. In view of this commitment, the Commission found that the transaction would no longer raise serious competition doubts in Ireland.

As regards the UK, the Commission's recent market investigations concerning both this transaction and the merger between Thomas Cook and MyTravel cleared by the Commission on 4th May 2007 showed that the industry had changed substantially since the in-depth analysis, carried out in 1999 in the context of the Airtours/First Choice case. This decision was subsequently annulled by the Court of First Instance on 6th June 2002. The development of the Internet gives consumers access to a wide range of travel sites so that they can choose and book their holidays independently of a travel agent. In 2005, Internet bookings accounted for more than 35% of all UK overseas holidays compared to 31% via travel agents. In parallel, the rise of low cost airlines has opened up many new holiday destinations and encouraged independent travelling. In the UK, independent holidays have increased by over 100% since 1996 and have accounted for the majority of trips abroad since 2003 (58% in 2005).

The Commission's investigation found that in view of the combined market shares of TUI and First Choice on the markets for the supply of short-haul and long-haul package holidays in the UK, the proposed concentration would not enable the parties to independently raise prices. The parties would in particular continue to experience competition from Thomas Cook/MyTravel, as well as from numerous smaller package holiday operators.

The Commission found that the proposed operation would not significantly increase the risk of coordination of prices or capacity between the remaining major tour operators in the UK, taking into account not only the transaction between Thomas Cook and MyTravel but also the recent developments in the travel industry.

The Commission also concluded that the proposed transaction would not adversely affect access to airlines and accommodation capacity for other tour operators, given that the combined market position of TUI and First Choice in these whole-

sale markets would not be large enough to seriously affect the ability of smaller tour operators to compete on the market in the UK. In relation to travel agency services, the parties account for a relatively small number of retail outlets whereas a large majority of travel agents would remain independent from the parties.

In view of the above, the Commission considered that the proposed takeover would not harm UK consumers, who would continue to have access to package tours at competitive prices.

The Commission also assessed the impact of the proposed transaction on tour operating and/or travel agency services markets in France, The Netherlands, Austria and Germany and on the cruise markets in the UK and Ireland. The Commission concluded however that the proposed acquisition would not give rise to a significant impediment of competition in light of the parties' position on these markets and the presence of effective competitors.

Nestlé/Novartis

In June the Commission approved the proposed acquisition of Novartis' Medical Nutrition business by Nestlé. The approval was granted subject to the fulfilment of certain conditions.

Nestlé is active in the production, marketing and sale of a large variety of food and beverage products, including healthcare nutrition products. Novartis' Medical Nutrition business (NMN) is part of the consumer health division of the Swiss company Novartis and is active in the development, manufacture, marketing, distribution and sale of healthcare nutrition products.

The Commission examined the competitive effects of the proposed merger in the healthcare nutrition markets, in particular in the enteral nutrition market, where both companies are active as suppliers. Enteral nutrition products are delivered to patients via the intestinal tract, either orally, if the patient is able to drink (sip-feeding), or directly into the gastric tract through the stomach via tubes and pumps (tube-feeding). These products are sold through two different distribution channels, the hospital channel and the outpatient channel (mainly through pharmacies). The products sold in the outpatient channel are reimbursed by national health care systems.

The Commission's investigation revealed that the proposed transaction would not significantly weaken competition in most of the national markets concerned because a number of credible alternative competitors would continue to exercise a competitive constraint on the merged

entity. However, the Commission found that the proposed transaction could significantly impede effective competition in two national markets, namely France, where the transaction would bring together two of the main suppliers and create a clear market leader, and Spain, where it would strengthen the current leading position of Novartis.

The Commission found significant barriers to entry and expansion linked to the importance of established brands and concluded that the proposed transaction as initially notified would be likely to weaken competition and therefore raised serious doubts as to its compatibility with the common market in France and Spain.

To address the Commission's serious doubts and remove the competition concerns, the parties agreed to divest the entire healthcare nutrition business of Novartis in France and the entire healthcare nutrition business of Nestlé in Spain, thereby removing entirely the overlaps brought about by the proposed transaction. After market testing these remedies the Commission concluded that they would be sufficient to address the competition concerns.

B — Summaries of decisions taken under Article 8 (1)

Travelport/Worldspan

On 21 August the Commission cleared Travelport's proposed acquisition of sole control of Worldspan. Both companies provide electronic travel distribution services through a Global Distribution System (GDS). There were initial concerns that the proposed transaction would give rise to competition problems on the market for the provision of GDS services to travel service providers (airlines, car rental companies, hotels, etc) in the European Economic Area (EEA) and to travel agents in several Member States (Belgium, Hungary, Ireland, Italy, The Netherlands and the UK). A second phase investigation was therefore undertaken. This investigation showed that the acquisition was unlikely to result in unilateral price increases by the merged firm. It also found that the reduction of the number of GDSs operating in the EEA from four to three would be unlikely to result in coordinated behaviour between the remaining GDSs.

A GDS allows travel service providers to distribute their content to travel agencies and consumers and enables travel agencies to access and book travel content such as flights, rental cars and hotel accommodation. There are four GDSs operating on a global basis. Travelport owns and operates Galileo, which is the second largest GDS in the

EU. Worldspan is the fourth largest in the EU. The remaining two are Amadeus (the largest GDS in the EU) and Sabre (the third largest).

Through the proposed transaction, Travelport would acquire sole control of Worldspan. On the market for the provision of GDS services to travel service providers, the merged entity would remain the second largest GDS (behind Amadeus).

GDSs operate in a two-sided market in which travel service providers seek the broadest possible distribution of their travel services. Since GDSs have different networks of travel agencies, which only partially overlap, travel service providers usually conclude agreements with all GDSs. Because GDSs provide similar travel content, travel agencies normally only need one GDS to obtain access to the travel content they need for their operations.

The Commission's in-depth investigation revealed that the market positions of travel service providers and travel agencies would remain sufficiently strong to exclude the likelihood of unilateral price increases by the merged entity. In fact, travel service providers would always have the possibility to withdraw part of their travel content from a given GDS and to distribute it solely via other GDSs and/or their own web-site.

On the market for travel agents, the in-depth investigation has confirmed that in those Member States where the merged entity would obtain high combined market shares, it seems unlikely that the merged entity would be able to increase prices because of the strong degree of competition between the remaining GDSs. Incentive payments from GDSs to travel agents have increased over the last five years and switching costs do not prevent travel agents from switching GDSs.

The in-depth market investigation also confirmed that the reduction of the number of GDSs operating in the EEA from four to three would be unlikely to result in the coordination of competitive behaviour between the remaining GDS providers. In particular the complexity of the pricing structure and product offerings of the GDSs limit the transparency of the market and thus the possibility of successful monitoring of coordinated behaviour.

C — Summaries of decisions taken under Article 8 (2)

SFR/Télé 2 France

In July the Commission approved the purchase of the fixed telephony and Internet access businesses of Télé 2 France by the French mobile telephony

operator SFR. As originally notified, the planned operation raised serious competition concerns in pay-TV markets in France and the Commission launched an in-depth investigation. These concerns have been addressed by commitments guaranteeing DSL operators equal treatment with the new entity as regards access to television content owned by the Vivendi group, of which SFR forms part.

SFR is a French company active mainly in the mobile telephony sector. It is jointly controlled by Vivendi and Vodafone. Vivendi is a French conglomerate active mainly in the media and telecommunications sectors. Vodafone is a British telecommunications company. Télé 2 France, a subsidiary of Télé 2 Europe, is active in France in the areas of fixed telephony, mobile telephony, Internet access provision and pay-TV distribution by DSL. Télé 2 France's mobile telephony business is not affected by the operation.

It was considered that the proposed merger would have an impact on the pay-TV sector in France. Vivendi, through its subsidiary Groupe Canal+, occupies a very strong position throughout the pay-TV sector in France. In the light of the pay-TV distribution activities carried on by Télé 2 France, the Commission examined whether the operation was likely to give rise to competition concerns in that sector.

The market survey carried out by the Commission revealed that DSL operators are collectively the main players capable of bringing competitive pressure to bear on the Vivendi group in the relevant markets. Nevertheless, despite being on the increase, the competitive pressure exerted by DSL operators is still fairly limited given the restrictions on access by such operators to attractive television content (TV programmes and channels) which is largely controlled by Vivendi.

In view of the strong vertical integration of the Vivendi group, the planned operation, as originally notified, would have provided Vivendi with the perfect opportunity to grant its SFR/Télé 2 subsidiary preferential access to the television content it owns. Such preferential access would have given Télé 2 a substantial advantage over other DSL operators. Such a strategy of discrimination on the part of Vivendi would therefore have had the effect of substantially weakening DSL operators competing with SFR/Télé 2 both in the downstream distribution market and in the upstream markets for the acquisition of television content.

In order to remove these competition concerns, Vivendi and SFR proposed commitments aimed at ensuring that Vivendi would not discriminate against DSL operators in favour of SFR/Télé 2. The

commitments concern, first, access to the channels produced by Vivendi or for which Vivendi holds exclusive DSL distribution rights. Vivendi will allow DSL operators to distribute all the channels to which it gives SFR/Télé 2 access on normal market terms, which may not be less advantageous than those granted to SFR. Secondly they concern the channel packages distributed by Vivendi through DSL networks (such as CanalSat and Canal+ Le Bouquet) and the PPV services provided by Vivendi. Vivendi will not be able to grant SFR/Télé 2 subscribers more favourable terms than those granted to subscribers of other DSL operators. Thirdly, they prohibit SFR/Télé 2 from acquiring exclusive DSL distribution rights to channels produced by third parties for which Vivendi does not hold such rights. Lastly, they prohibit Vivendi and SFR from acquiring exclusive VoD rights to recent American and French films.

Universal/BMG

In May the Commission approved the proposed acquisition of the music publishing business of Bertelsmann Music Group (BMG) of Germany by the US-based company Universal. The Commission found that the proposed merger, as initially notified, raised serious doubts as regards adverse effects on competition in the market for music publishing rights for online applications. However, the Commission's investigation found that these concerns would be removed by the remedies package proposed by the parties concerning the divestiture of a number of publishing catalogues.

Universal, a US-based company owned by the French company Vivendi, is a leading player in the music recording and music publishing business. Universal proposed to acquire the worldwide music publishing activities of BMG, a subsidiary of the German media company Bertelsmann. Whereas music recording concerns the rights of the record company and the singer in the song performance, music publishing relates to the rights of song writers (authors), i.e. of composers and lyricists.

Music publishers exploit the copyrights of authors by granting licences to the various operators in the music business. The most common music publishing rights are mechanical rights (e.g. for recorded music), performance rights (e.g. for concerts and TV and radio broadcasting), online rights (e.g. for online music downloading, mobile video streaming and mastertones (clips of songs used in place of ringtones on mobile phones) and synchronisation rights (e.g. for advertisements and film music). For mechanical and performance rights, including rights for the online exploitation of

music, collecting societies have traditionally carried out the licensing on behalf of the songwriters and their publishers.

The Commission's in-depth market investigation has shown that no competition concerns would arise from the merger where the copyrights are still administered by the collecting societies, who usually charge uniform tariffs for the complete administered repertoire.

However, in the field of online rights, publishers have recently started to withdraw their respective rights for Anglo-American song repertoires from the traditional collecting societies system. They have started to transfer their rights to selected collecting societies acting as agents for individual publishers and granting EEA-wide licences — a possibility which has been reaffirmed by a Commission Recommendation issued in 2005.

The market investigation showed that, following these withdrawals, pricing power had shifted from the collecting societies to the publishers. The Commission's concern was that in this new environment, Universal would after the merger be able to exert control over a large percentage of titles either via its (fully or partly owned) copyrights based on the song-writers' works or via its rights based on the individual recordings. In a number of countries, Universal would even control more than half of the chart hits and thereby become a "must-have" product for all online and mobile music services, whose possibilities to circumvent Universal would be significantly reduced by the merger.

The Commission therefore had concerns that the merger would give Universal the ability and the incentive to increase prices for online rights as regards Anglo-American repertoires. In order to remove the Commission's concerns, Universal committed to divest a number of important catalogues, covering Anglo-American copyrights and contracts with authors. These catalogues include the EEA-activities of Zomba UK, 19 Music, 19 Songs, BBC music publishing, Rondor UK as well as an EEA licence for the catalogue of Zomba US. These catalogues contain many bestselling titles and several successful authors such as The Kaiser Chiefs, Justin Timberlake and R. Kelly. Although the competition concerns only relate to online rights, for reasons of viability the commitments cover the complete range of copyrights (i.e. also mechanical, performance, synchronisation and print rights). In the light of the quality of the divested catalogues, the Commission concluded that the commitments would remove the competition concerns and therefore was able to clear the transaction.

For a more extensive treatment of this case see the article in the main section of this Newsletter.

VB Autobatterie GmbH/Italian FIAMM

In May the Commission approved the acquisition by VB Autobatterie GmbH of Germany of the automotive battery business of the Italian FIAMM group. The approval decision was made subject to the implementation of certain conditions that remedy the competition concerns. The Commission's in-depth market investigation confirmed initial concerns that the proposed acquisition, as originally notified, would significantly impede competition in the markets for car and truck batteries by making VB the dominant player.

VB Autobatterie GmbH notified its planned acquisition of the automotive battery business of FIAMM on 26 October 2006. Both VB and FIAMM are active in the production and sale of car and truck batteries. They supply batteries to car and truck manufacturers in the original equipment manufacturing and service markets ("OE markets") as well as sales as replacement parts to independent providers of repair services, wholesalers for automotive parts, supermarkets and other retail outlets in the so-called 'independent aftermarket' (IAM). VB is the automotive starter battery joint venture of Johnson Controls Inc. (US) and the German Robert Bosch GmbH and is the leading supplier of automotive starter batteries in the EEA.

In the OE market for batteries supplied to car and truck manufacturers, the Commission's in-depth investigation confirmed that the transaction, in the form originally notified, would make VB the dominant player (or strengthen its dominance in the case of truck batteries) and would seriously limit the ability of car and truck manufacturers to switch to alternative suppliers. Neither competitors nor customers would be in a position to exercise sufficient constraints on VB's behaviour.

Due to the strong market position of the FIAMM group in Italy, Austria, the Czech Republic and Slovakia prior to the merger, the main concerns about the impact of the planned transaction would be on the IAM in these countries. The Commission found that the planned acquisition would combine in each of these countries VB's strong brands with FIAMM's strong national brands and would give VB a very strong position on the market unmatched by any other supplier. The Commission took into account, in the assessment of the transaction, the likely effects on the market stemming from FIAMM's financial difficulties.

VB offered remedies to address the concerns both in the EEA-wide original equipment car and truck markets and the respective national replacement part (IAM) markets. These included the divestiture of certain manufacturing capacity and of some key FIAMM brands relevant to the replacement part (IAM) markets of Italy, Austria, the Czech Republic and Slovakia. The Commission carefully assessed the remedies and concluded that the remedy package would be sufficient to remove competition concerns in a clear-cut manner.

The Commission concluded that the implementation of the planned merger as modified by the remedies offered would not significantly impede competition in the European Economic Area (EEA) or any substantial part of it. The Commission's decision concluded the assessment of the transaction notified in October 2006, without prejudice to the respective positions of the parties regarding the current contractual status of the transaction.

D — Summaries of decisions taken under Article 8 (3)

Ryanair/Aer Lingus

On 27 June the Commission took the decision to prohibit the proposed takeover by Ryanair of Aer Lingus. Ryanair is an Irish-based “low-cost” airline, offering point-to-point scheduled air transport services on more than 400 routes across Europe. With more than 40 million passengers carried in 2006, Ryanair is one of the largest airlines in the world. Aer Lingus is the former Irish “flag”-carrier, which has changed its business model in recent years to offer mainly “low-cost” point-to-point short-haul flights. Aer Lingus operates more than 80 routes and carried more than 8.6 million passengers in 2006. Aer Lingus' activities are limited to routes to and from Ireland, operating from Dublin, Shannon and Cork.

Both Ryanair and Aer Lingus are currently by far the largest airlines offering short-haul flights to and from Ireland and constitute the main competitive constraints on each other on these routes. Their position is particularly strong to and from Dublin, where the merged entity would have accounted for around 80% of all intra-European traffic. In line with its approach in previous airline merger cases, the Commission analysed the effects of the merger on the individual routes on which both companies' activities overlap. The Commission's extensive in-depth investigation of the case (involving contacts with dozens of airlines, other third parties, a consumer survey at Dublin airport and various quantitative analyses) showed that Aer

Lingus and Ryanair currently compete directly with each other on 35 routes to and from Ireland. On 22 of these routes, the merger would have left customers with a monopoly. On the remaining routes, Aer Lingus and Ryanair are each other's closest competitors, and the merger would have significantly reduced consumer choice, with the merged entity holding market shares of over 60%.

The market investigation also revealed that most airlines were unlikely to enter into direct competition against a merged Ryanair/Aer Lingus in Ireland. This is not only because the merged entity would be able to operate from the very large bases of Ryanair and Aer Lingus in Ireland, having access to customers through their two well-established brands, but also because Ryanair has a reputation of aggressive retaliation against any entry attempt by competitors. A merged Ryanair/Aer Lingus would have had even greater flexibility to engage in selective short-term price reductions and capacity increases if competitors entered routes to/from Ireland, in order to protect its powerful market position. The likelihood of entry is further reduced by peak-time congestion at Dublin airport and other airports on overlap routes.

Ryanair offered various remedies to solve the competition issues identified. However, the scope of these remedies was insufficient to ensure that customers would not be harmed by the transaction. In particular, the limited number of “slots” offered was unlikely to stimulate market entry of a size necessary to replace the competitive pressure currently exercised by Aer Lingus. This was confirmed by the results of the extensive market tests of the proposed remedies.

The facts of this case differ from previous airline mergers. This was the first time the Commission had to assess a proposed merger of the two main airlines in a single country, with both operating from the same “home” airport — Dublin. It was also the first time the Commission had to assess a merger of two “low-cost” airlines, operating on a “point-to-point” basis. Finally, the number of overlapping routes is unprecedented compared with previous airline cases. The acquisition would have combined the two leading airlines operating from Ireland which currently compete vigorously against each other. The Commission concluded that the merger would have harmed consumers by removing this competition and creating a monopoly or a dominant position on 35 routes operated by both parties. This would have reduced choice and, most likely, led to higher prices for more than 14 million EU passengers using these routes to and from Ireland each year. The Commission's investigation and market test of remedies offered

by Ryanair demonstrated that these remedies were inadequate to remove the competition concerns. In particular the limited number of airport “slots” offered was not likely to lead to competition sufficient to replace the competitive pressure currently exercised by each airline on the other.

For a more extensive treatment of this case see the article in the main section of this Newsletter.

E — Summaries of decisions taken under Article 9

AIG Capital Partners/Bulgarian Telecommunications Company

In July the Commission received a request for the referral of this case under Article 9(2) (a) and 9(2) (b) of the EU Merger Regulation from the Bulgarian Competition Authority, but decided to deal with the case itself. The reasons for this were that the request did not meet the criteria set out in Article 9. As regards Art. 9 (2) (a) the parties were not active in the same markets. AIG Capital Partners provides investment advice and market asset management products and services on an international basis. Its parent company AIG offers a wide range of insurance products. Bulgarian Telecommunications Company (BTC) operates a fixed and mobile data and other telecommunication networks and data systems in Bulgaria. The operation did not therefore meet the second criterion of Article 9 (2) (a) which requires that the proposed concentration should ‘threaten to affect significantly competition within a market in a Member State’. With regard to the request for a referral under Article 9 (2) (b) the operation concerned telecommunications for which the markets are national, i.e. the whole of Bulgaria in this case. Bulgaria is a substantial part of the common market. Therefore this second criteria for referral was not fulfilled either.

The Commission informed the Bulgarian Competition Authority of its conclusions in a decision dated July 25 and later in the month cleared the operation.

F — Summaries of decisions taken under Article 22

Apax Partners /Telenor Satellite

In May the UK Office of Fair Trading (OFT) formally requested the Commission, pursuant to Article 22 of the Merger Regulation, to examine the proposed acquisition of Norwegian Telenor

Satellite Services, a company providing satellite-based communication services, by Apax Partners, a French management company of investment funds. Apax Partners manages investment funds which hold interests in companies active in different sectors.

The procedural condition for a referral request to be made by a Member State, pursuant to Article 22(1) of the EC Merger Regulation is that ‘the referral shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned’. As the operation had not been notified in the UK, which has a voluntary notification system, the question arose as to when the Member State became aware of the operation. It was considered that the notion of “made known”, derived from the wording of Article 22, should in this context be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22. In this case such an assessment could only be made on the basis of the information contained in the “satisfactory submission of the parties” of 13 April 2007, made in response to the initial information request of the OFT. As the request was made 4 May 2007 it was considered that this condition was fulfilled.

In addition Art. 22 requires that the operation should: i) affect trade between Member States; and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request. The OFT argued that the relevant geographic market for two-way telecommunications services is likely to be at least EEA wide and that therefore the first condition was met. The OFT pointed out that the combined entity would have a substantial market share of the global market for satellite communications services and that in some narrower segments it would be even higher depending on customer type. In particular it identified concerns relating to the parties activities in relation to Inmarsat where the number of distributors would be reduced from three to two.

As regards the second condition on the basis of the *prima facie* analysis submitted by the United Kingdom, the Commission concluded, without prejudice to the outcome of its investigation, that the concentration threatened to significantly affect competition within the territory of the United Kingdom and therefore accepted the referral.

After carrying out its own investigation the Commission cleared the operation in August.

G — Summaries of abandoned cases

HgCapital/Denton

On 14 June the European Commission acknowledged the abandonment of the proposed acquisition of Denton (US) by the UK-based financial investment group HgCapital, owner of FTSS, and closed its investigation following the parties' agreement to terminate their sale and purchase agreement and to withdraw their notification of the proposed deal to the Commission.

The Commission had opened an in-depth investigation into the proposed acquisition on 30th May 2007, expressing its serious concerns that the transaction would significantly impede effective competition in the common market. The proposed transaction would essentially have resulted in a worldwide quasi-monopoly for the supply of "crash test dummies" — a key product for the launch of new car models and for improving the safety of existing models.

In addition to this horizontal issue, the Commission was concerned that the operation could have allowed the combined entity to deny their competitors' access to inputs and to information on the market for virtual dummies, which are computer simulated representations of dummies. Similar so-called 'foreclosure' concerns had also been raised by market participants in the field of data acquisition systems, which are used to collect data on the behaviour of dummies during crash tests.

The proposed concentration should have been notified in several Member States (Germany, Spain and the UK). However, Hg Capital asked for the case to be referred to the Commission under Article 4 (5) of the Merger Regulation. In the absence of objections from Member States the case was reviewed by the Commission.

In the light of the fact that the parties had demonstrated that they had effectively abandoned the proposed deal the Commission announced that it would close its investigation and that it would not take any further action in the case. The notification was consequently withdrawn.

Ryanair/Aer Lingus: Even “low-cost” monopolies can harm consumers

Richard GADAS, Oliver KOCH, Kay PARPLIES, Hubert BEUVE-MÉRY ⁽¹⁾

I. Introduction

The *Ryanair/Aer Lingus* case, which concerned a proposed merger of the two leading airlines operating from Ireland, raised a number of interesting procedural, legal and economic questions and required a particularly careful investigation ⁽²⁾. The Commission found that the acquisition would have led to very high market shares on more than 30 routes from/to Ireland, reducing choice for consumers and exposing them to a high risk of price increases. The merger would have combined two airlines with a similar operation model (“low-frills”) and with a significant presence in particular at Dublin Airport, where they would together account for approximately 80% of European short-haul traffic. Based on these findings, the Commission ultimately prohibited the transaction in June 2007 ⁽³⁾. It was the first prohibition decision since December 2004 and the first time an airline merger was prohibited.

The acquisition of Aer Lingus by Ryanair was in many aspects different from previous airline merger cases, which involved “network” carriers and combined two airlines with operations at different airports, often in different countries. Unlike those rather “complementary” mergers, Ryanair’s proposed acquisition of Aer Lingus would have combined the two by far largest airlines at one and the same airport (Dublin), both operating according to “point-to-point” and “low-cost/low-fares” business models. Although an expansion of Ryanair, the European pioneer for cheap flights, might intuitively sound like being in the interest of consumers, the Commission found that the transaction would not have been a good deal for the affected passengers, since it would have eliminated Ryanair’s only significant competitor on

more than 30 Irish routes ⁽⁴⁾. Since also a “low-cost” or “low-fares” monopolist ultimately aims at maximising its profits, Ryanair would thus have had the ability and incentive to raise prices (by increasing fares or various associated charges) and/or decrease quality of its services on these routes. This would have had an immediate effect for more than 14 million passengers who are currently flying each year on the routes directly affected by the merger.

The in-depth investigation of the Commission not only made use of the “classic” investigative techniques such as questionnaires and telephone interviews. In addition, the Commission has commissioned a specific customer survey at Dublin Airport, and has complemented its work with a number of detailed econometric analyses which are further described in a separate article in this issue ⁽⁵⁾.

II. The parties and the transaction

Ryanair is an airline offering point-to-point scheduled air transport services on more than 400 routes across 24 European countries. Ryanair operates more than 75 routes between Ireland (mainly Dublin, but also Shannon, Cork, Kerry and Knock) and other European countries. The company has a fleet of around 120 aircraft and more than 20 bases across Europe, the most important ones being London-Stansted and Dublin.

Aer Lingus is a Dublin-based airline. Like Ryanair, it offers point-to-point scheduled air transport services on more than 70 routes connecting the Irish airports of Dublin, Shannon and Cork with a number of European and several non-European destinations. In addition Aer Lingus offers long-haul flights, mainly to the United States, and cargo transport services and seats to tour operators. Aer Lingus is based principally at Dublin Airport (and to a smaller extent in Cork and Shannon) with a total fleet of 30 short-haul and 9 long-haul aircraft.

⁽¹⁾ Directorate-General for Competition, units D-4, B-1, 02 and F-1 respectively. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ See also the article “Econometric and survey evidence in the competitive assessment of the Ryanair / Aer Lingus merger” in this issue of the Competition Policy Newsletter (page 73).

⁽³⁾ COMP/M.4439 — Ryanair/Aer Lingus, decision of 27.6.2007; see: http://ec.europa.eu/competition/mergers/cases/index/m88.html#m_4439.

⁽⁴⁾ It should be noted that the merger would, in addition to actual competition on these routes, also have eliminated potential competition on a number of further routes.

⁽⁵⁾ See also the article “Econometric and survey evidence in the competitive assessment of the Ryanair / Aer Lingus merger” in this issue of the Competition Policy Newsletter (page 73).

The transaction concerned a proposed acquisition of sole control by Ryanair of Aer Lingus by way of a public bid for all outstanding shares not already acquired announced on 5 October 2006. The fact that Ryanair's bid had technically lapsed after the opening of the Phase II did not remove the Commission's jurisdiction, since Ryanair had announced to make a new bid should the Commission clear the transaction.

Like in previous airline merger cases, the Commission had to find a meaningful method for the allocation of the turnover of the Merging Parties' in the respective Member States. After a careful assessment of this issue and the different calculation methods, the Commission concluded that the transaction fulfils the criteria of Article 1(3) of the Merger Regulation and thus fell within the jurisdiction of the Commission.

III. Market definition

The activities of Ryanair and Aer Lingus overlap in the field of *scheduled passenger air transport services* within the EEA.

Ryanair is no market of its own

Ryanair argued that due to the specificity of its business model and its extremely low cost basis, its pricing is not constrained by any airline but rather by consumers' overall discretionary spending. While the Commission acknowledged that Ryanair is indeed a "classic" no-frills carrier, the market investigation did not support that Ryanair was not in competition with other airlines. Both airlines are active in the differentiated market for scheduled passenger air transport services, where different airlines operate with a number of different business and service models. Aer Lingus is indeed positioned somewhat more "up-market" than Ryanair, i.e. it provides some additional services (for instance it also flies into more expensive main airports while Ryanair flies only into secondary ones), which is reflected by the fact that Aer Lingus' average fares are higher than Ryanair's. However, both Ryanair and Aer Lingus are considered as "low-frills" carriers by customers, and despite a certain level of product differentiation, both companies currently compete with each other on the affected routes.

Point-to-point services

In line with the previous decision practice of the Commission, the relevant product market was defined as *point-to-point* scheduled air transport services, whereby each route between a point-of-origin and point-of-destination is defined as a separate market (O&D approach). The other option, namely to define an overall market for

short-haul flights from/to Ireland, which would have been based in particular on the supply-side substitutability between different routes from the common base of the parties in Dublin, was not upheld, mainly because the supply-side substitution (switching capacity between routes to/from Dublin by airlines) would not be sufficiently immediate and effective. Further, this market definition would disregard the lack of demand-side substitution between different routes for a large majority of customers. However, the relevant supply side considerations were not disregarded but were addressed within the framework of the competitive assessment of individual routes.

"City-to-city" approach

Ryanair argued that the relevant O&D markets should be limited to airport-to-airport pairs as, according to Ryanair, even in cases where there are more airports in or in the vicinity of a particular city, the customer do not regard these airports as substitutable. By contrast, the Commission's investigation showed that a large number of these airports are regarded by the customers as substitutable and that the relevant O&D pairs should for many routes rather be defined on a *city-to-city* basis. The qualitative ⁽⁶⁾ as well as the quantitative ⁽⁷⁾ analysis confirmed the substitutability of airports for final passengers for 18 out of the in total 20 routes with exclusively city-to-city but not airport-to-airport overlaps. Serving different airports is thus only an element of differentiation between competing airline services within one market and does not justify defining two different markets.

Indirect flights are disregarded

The market investigation also confirmed that *indirect flights* and other means of transport cannot in general be regarded as substitutes for the direct flights of the parties on the overlap routes. Only intra-European flights with their short journey times are affected by the transaction. The Commission also in the past in general excluded indirect flights for these types of routes (subject

⁽⁶⁾ The qualitative analysis focused on a number of factors such as distance and travelling times from the airports to the relevant city, available transport connections, travel costs for different airports, available flight schedules and quality of services at different airports, views of competitors and customers, studies conducted by the airports (if available) or how the relevant airport is marketed by the carriers flying there.

⁽⁷⁾ The quantitative analysis consisted inter alia in the correlation analysis of the parties' fares for flights to different airports over time. In a number of cases, a high correlation between fares for flights to different airports further confirmed the conclusions of the qualitative analysis about airport substitutability.

to some case-by-case exceptions). Further, as this case concerns primarily point-to-point passengers with no (Ryanair) or only limited (Aer Lingus) connecting services, indirect flights are even more unattractive for the customers. In view of the geographic characteristics of Ireland, other means of transport are either not available (e.g. high speed trains) or not competitive with air transport (e.g. bus/ferry).

No significant impact of charter airlines

Ryanair put forward that in particular on the predominantly leisure routes, *charter airlines* provide significant competitive constraints to the services of the parties. However, the market investigation did not confirm that charter airlines would to a significant extent constrain the merging parties on the Irish routes. Charter seats are predominantly sold in Ireland as part of package holidays, are distributed largely through tour operators, provide less flexibility as the flights are often operated only on weekends and only seasonally. In Ireland, unlike in other countries, charter airlines offer only very few so-called “dry seats”, i.e. seats that are sold separately and not as part of a holiday package to end customers and are more closer to services offered by the merging parties. The Commission left open whether “dry seats” sold by charter airlines may be considered as belonging to the affected relevant markets as even if “dry seats” sales were taken into account, the competitive assessment of the case would not be affected due to their insignificant volumes.

No separate market for “time-sensitive” passengers

Further, the Commission has in the past cases involving network carriers such as Lufthansa or Air France differentiated between *time-sensitive* and *non time-sensitive* passengers (or business and leisure passengers). However, the market investigation confirmed that the specific characteristics of the merging parties’ operation model, in particular the focus on “low-frills” customers, did not justify defining separate markets in the present case. Even though a certain differentiation of the two customer segments may exist, it was not possible to define two distinct and separate groups of customers, as both merging airlines do not discriminate between these types of passengers (no “business” tickets) and as there is rather a continuum of various passenger types between these two extremes. Therefore, although the overall proportion of more time-sensitive passengers was taken into account in the competitive analysis, there were no distinct markets defined for these groups of passengers.

Conclusion on market definition

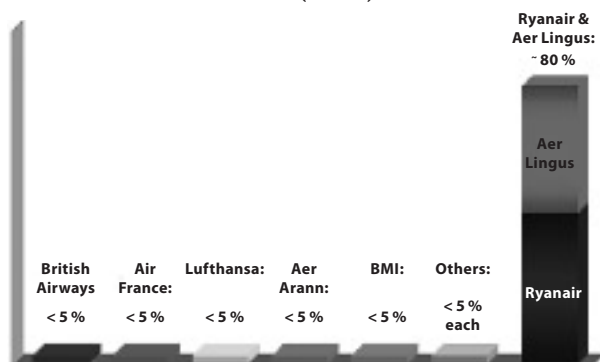
On the basis of this market definition and in view of the flights offered by the merging parties at the time of the Commission decision, the proposed transaction led to actual overlaps between the merging parties in 35 markets defined as individual O&D pairs ⁽⁸⁾. Further, the proposed transaction also raised competition concerns on some other markets where currently only one of the merging parties operates and where the other party is considered as the most likely potential entrant.

IV. Competitive Effects of the Merger

As already mentioned above, the Ryanair / Aer Lingus merger was different from the previous air transport cases assessed by the Commission, combining two “low-frills” carriers concentrating on point-to-point traffic within Europe, with a significant presence at their strong bases at Dublin Airport.

Indeed, Ryanair and Aer Lingus would have together accounted for approximately 80% of European short-haul traffic to and from Dublin post-merger, by far exceeding their next competitors on these routes, as set out in the diagram below:

Graph 1: Shares of European passengers to and from Dublin (2006)



⁽⁸⁾ These routes included direct flights between Dublin and the following cities/airports: Alicante/Murcia, Barcelona/Reus/Girona, Berlin, Bilbao/Vitoria, Birmingham/East Midlands, Bologna/Forli, Brussels/Charleroi, Edinburgh, Faro, Frankfurt/Hahn, Glasgow/Prestwick, Hamburg/Lübeck, Krakow, London (including Heathrow, Gatwick, Stansted, Luton and London City airports), Lyon/Grenoble, Madrid, Malaga, Manchester/Liverpool/Leeds Bradford, Marseille, Milan/Malpensa/Bergamo, Newcastle/Durham Tees Valley, Paris/Beauvais, Poznan, Riga, Rome, Salzburg, Seville, Tenerife, Toulouse/Carcassonne, Venice/Treviso, Vienna/Bratislava and Warsaw. Further the overlap routes include flights between Cork and London (all airports), Cork and Manchester/Liverpool/Leeds Bradford as well as Shannon and London (all airports).

Very high market shares on a large number of routes

Not the least because both airlines operate from the same main airport, Aer Lingus' and Ryanair's operations overlap on an unprecedented large number of individual routes, as shown in the following graph:

Graph 2: 35 direct route overlaps between Ryanair and Aer Lingus (2007)



Ryanair's and Aer Lingus' operations do not overlap only insignificantly on these 35 routes. On the contrary, on all these routes Aer Lingus and/or Ryanair are the strongest airline(s), and the transaction would lead to monopoly on not less than 22 routes, and to very high combined market shares on a further 13 routes, as can be seen from the following table.

Routes	Combined market share
Dublin — Alicante; Berlin; Bilbao/Vitoria; Birmingham; Bologna; Brussels; Edinburgh; Faro; Hamburg/Lübeck; Lyon; Marseille; Milan; Newcastle; Poznan; Rome; Salzburg; Seville; Tenerife; Toulouse/Carcassonne; Venice Shannon — London; Cork — London	100%
Dublin — Glasgow; Malaga; Manchester	[90-100%]
Dublin — Frankfurt; Paris	[80-90%]
Dublin — Barcelona; Krakow; London; Riga; Vienna/Bratislava	[70-80%]
Dublin — Madrid; Warsaw Cork — Manchester	[60-70%]

Despite these high market shares, the Commission has, as in previous airline cases, investigated to what extent these shares do actually translate into a significant impediment to effective competition. Ryanair has indeed provided several arguments why the merger would not lead to competition concerns: It argued that the two merging par-

ties are not the closest competitors as they are different and occupy different spaces in the markets in which they operate. Further, Ryanair argued that there are no significant barriers to entry due to airport congestion and that the position of the merging parties in Dublin and in Ireland in general would not prevent competing airlines from entering the affected markets or even from basing aircraft in Ireland. Ryanair claimed that there are a number of competing airlines which would be able to enter the overlap routes in case the merged entity would increase prices. According to Ryanair these potential competitors do not have to be based at Dublin airport to constitute an effective constraint but could enter the relevant routes either from their existing base at the destination non-Irish airport or even without any base at either end of the route. These arguments were, however, not confirmed by the Commission's in-depth market investigation.

Elimination of competition between the closest competitors on Irish routes

Despite being a former state-owned Irish flag carrier, Aer Lingus has significantly changed its business model recently and has repositioned itself as a "low-frills" airline, focussing on point-to-point services on its short-haul routes. The services included in the Aer Lingus base fare are broadly in line with those included in the Ryanair base fare. Even though there continue to be some differences in the services offered by both carriers, which are also reflected in their different fare level, this does not exclude existence of effective competitive constraints between them. On the contrary, the market investigation confirmed that on the routes where both operate, each of them takes into account the fares and services offered by the other and adjust its operations and fares accordingly. Further, most of the competitors present on the overlap routes are either full-service network carriers or smaller regional airlines, often focusing on business customers, which cannot be considered as close competitors to the parties. Finally, the customer survey conducted as part of the investigation among the passengers at Dublin airport showed that passengers consider the parties to be closer substitutes than other carriers. The investigation has thus confirmed that the services of the merging parties are close substitutes in a differentiated market for passenger air transport services. There is a high degree of competition between Ryanair and Aer Lingus for destinations, capacity, schedules, prices and service to/from Ireland.

The Commission has notably found that both airlines regularly *monitor the prices* of the other on the overlap routes with the help of specialised soft-

ware and adjust their prices in reaction to the price level of the other. This is confirmed by the fact that in marketing campaigns they both present their low fares as a key argument and they often compare themselves to one another. The merger would thus remove the important competitive rivalry between the two parties on a number of routes on which their activities overlap and thus lead to higher prices. This was also confirmed by the Commission's regression analysis which provided additional quantitative evidence about the effect of the presence of Ryanair on Aer Lingus fares.

Apart from competing on direct overlap routes, the fact that both carriers have significant bases at the same airport⁽⁹⁾ leads to a dynamic competitive environment where both carriers frequently enter and exit new routes to/from Dublin. The transaction therefore would not only remove the actual competition between the parties on the overlap routes, but eliminate Ryanair and Aer Lingus as *the most likely potential entrant* on existing routes to/from Ireland currently served by only one of them, i.e. it would remove potential competition between the parties. The merger would remove the competitive rivalry between Ryanair and Aer Lingus on routes to/from Ireland which was at least one of the sources for a major expansion of the Irish short-haul routes in recent years.

Barriers to entry to the affected markets are high

The Commission's investigation confirmed that there are substantial barriers to entry to the routes where the activities of the merging parties overlap. These barriers to entry relate in particular to: (i) a disadvantage of not having large operations ("bases") in Dublin; (ii) significant entry costs and risks for any new competitor in a market which is already served by two strong airlines with well-established brands in particular in Ireland; (iii) Ryanair's reputation to react aggressively to entrants; (iv) capacity constraints at Dublin airport as well as at some destination airports.

The Commission found evidence confirming that a *large base* in Dublin provides important cost advantages and flexibility for any carrier operating routes to/from Dublin. Therefore, removal of Aer Lingus as the main actual or potential competitor of Ryanair based in Dublin would inevitably soften the competitive constraints faced by Ryanair on the Irish routes. None of the other car-

riers would be in a position to effectively replace Aer Lingus with its current flexibility and cost efficiency to compete on a number of routes to/from Ireland. Any new entrant would face a strong and established merged entity with substantial cost advantage which would be able to react quickly to any selective entry on only a few routes.

The *significant entry costs and risks* relate to the fact that Irish intra-European flights are now dominated by Ryanair and Aer Lingus who have well established brands and a portfolio of a large number of routes. Competing against these two brands makes competition much more difficult than in other countries where there are not such two well-established low-frills carriers present with large bases. Further, there are significant shares of Irish-originating passengers on many of the overlap routes. Therefore, any new entrant would have to invest substantial amounts into marketing and promotion in Ireland. In addition, there were several examples of aggressive reaction by Ryanair against new entrants on the Irish markets who were subsequently driven out of the Irish routes. A number of competing airlines thus indicated that, taking into account the limited volume of the Irish market and the investments and risks involved in establishing a presence in this market, they would have better opportunities elsewhere in Europe.

As regards the *capacity constraints* in terms of slots, such constraints played a less prominent role compared to previous air transport merger cases, since in particular Ryanair mainly flies to "secondary", non-congested airports. At some airports, however, congestion was identified as a barrier to entry by the Commission. Notably at Dublin Airport, where the congestion problems were limited to the peak hours of the day, congestion was mentioned as a significant barrier by potential entrants to compete effectively with Aer Lingus and Ryanair in particular on those routes where high frequency services covering peak times of the day are necessary. Further, on a number of these routes, congestion at the destination airports (in particular London, Paris, Frankfurt or Milan) also created a barrier to entry for those carriers which for the supply-side reasons do not have the possibility to efficiently use any possible substitute airport (such as Paris-Beauvais or Frankfurt — Hahn).

Competitors were not likely to replace the loss of competition

In view of the barriers to entry described above, the Commission's market investigation further focused on identifying any carriers which would have the ability and incentive to enter the over-

⁽⁹⁾ At the time of the Commission decision, Ryanair and Aer Lingus based at Dublin airport 20 and 23 short-haul aircraft respectively while the other Dublin based airlines, Aer Arann and Air France/Cityjet, had only 4 and 3 smaller aircraft based in Dublin and several other airlines overnighted only one aircraft each.

lap routes and provide efficient competitive constraints to the merged entity. The Commission has carefully assessed to what extent individual competitors might have the intention and ability to enter into direct competition with Ryanair/Aer Lingus post-merger in case of a price increase. The Commission's investigation showed that there is a likelihood of post-merger entry only on very few routes and that this limited entry would not be likely to provide a significant competitive constraint to the merged entity.

The potential entrants analysed in more detail in the decision include Air France/CityJet, Aer Arann, easyJet, British Airways, bmi/bmibaby, Flybe/BA Connect, SkyEurope, Air Berlin, and Clickair. However, most of these carriers were reluctant to compete directly with Ryanair/Aer Lingus, referring to the above described barriers to entry and difficulties they would face in establishing their operations against the strong position of the merged entity. The investigation clearly showed that no airlines could be expected to enter in competition against Ryanair/Aer Lingus on the short-haul routes to/from Ireland at a larger scale, providing a competitive constraint on the merged entity comparable to the constraint currently exercised by Aer Lingus.

Therefore, the market investigation did not confirm that potential entry or expansion on the individual overlap routes would be likely, timely and sufficient to constitute a competitive constraint for the merged entity and would thus compensate for the loss of the rivalry between Ryanair and Aer Lingus on the affected routes.

Conclusion

The Commission therefore concluded that the transaction would significantly impede effective competition on a large number of routes to and from Ireland.

V. Efficiencies

The Commission has also analysed whether *efficiencies* brought about by the merger might have outweighed its anti-competitive effects. In the most detailed discussion of efficiencies in a merger decision so far ⁽¹⁰⁾, the Commission analysed whether the conditions of the Horizontal Merger Guidelines (i.e. verifiability, merger specificity and benefit to consumers) were met. Ryanair claimed that efficiencies would result essentially from applying Ryanair's low-cost business model and management skills to Aer Lingus. According

to Ryanair, this would enable it to lower Aer Lingus' operating costs towards its own levels. The claimed efficiencies would originate in the fields of aircraft ownership costs, ground operations, staff costs, maintenance costs, airport charges, ancillary sales and distribution efficiencies.

As regards the first criterion (verifiability), the Commission found that Ryanair's efficiency claim was hardly verifiable, mainly because it consisted essentially of a general assertion that Ryanair would transfer its business model and in particular the related cost levels to Aer Lingus, without taking into account implications for product characteristics and revenue of Aer Lingus. With respect to the condition of "merger specificity", the analysis revealed that a number of the claimed efficiencies were not merger specific, since they could be achieved by Aer Lingus even without the merger and did not originate from economic synergies between the two carriers. Finally, the claimed efficiencies would affect primarily Aer Lingus' fixed costs, which makes it uncertain that they would be passed on to consumers. In addition, as indicated in the Horizontal Merger Guidelines, the Commission noted that it is highly unlikely that a merger leading to a market position approaching that of a monopoly, can be declared compatible with the common market on the ground that efficiency gains would be sufficient to counteract its potential anti-competitive effects ⁽¹¹⁾.

For these reasons the Commission was not in a position to conclude that the merger would give rise to efficiencies that would counteract the identified significant impediment to effective competition.

VI. Proposed remedies

During the Commission's proceedings, Ryanair submitted several sets of remedies aimed at removing the identified competition concerns. Following the model of previous airline cases, Ryanair's commitments mainly aimed at removing entry barriers for other airlines, in particular in the form of the transfer of airport slots. The last set of remedies submitted within the legal deadline of the Phase II proceedings included the following main elements:

- a) Heathrow slots: Ryanair offered to make available slots for the Dublin — London Heathrow route, which were exclusively reserved for British Airways and Air France.
- b) Slots for other routes from/to Dublin, Shannon and Cork: Ryanair offered to make available slots for other overlap routes from and to

⁽¹⁰⁾ See already cases M.4000 — Inco/Falconbridge; M.4057 — Korsnäs/Assidomän Cartonboard; M.3732 — Procter & Gamble/Gillette.

⁽¹¹⁾ See paragraph 84 of the Horizontal Guidelines.

Dublin, Shannon and Cork. With respect to Dublin, these slots would, according to Ryanair, allow airlines to operate with up to [4-8] aircraft based in Dublin. Ryanair further offered to make available an equivalent number of slots at specific destination airports on the overlap routes.

- c) “Up-front buyer” provision: Ryanair offered not to complete the acquisition of Aer Lingus before it has found a competitor/competitors that commit to taking up the slots for the [4-8] based aircraft operation at Dublin.
- d) Fare/brand-related commitments: Ryanair offered to reduce immediately Aer Lingus’ short-haul fares by at least 10%, to eliminate immediately the fuel surcharges Aer Lingus applies on its long-haul flights, to retain Aer Lingus’ brand and to continue to operate Ryanair and Aer Lingus separately.
- e) “Frequency freeze”: Ryanair offered not to increase the number of frequencies on any of the claimed overlap routes in the event of a new entrant to the route, in excess of the frequencies jointly operated by Ryanair and Aer Lingus on each route for a period of six IATA seasons. It also offered not to reduce the frequencies on these routes unless a route is or becomes unprofitable.

Having analysed the proposed commitments and conducted an extensive market test, the Commission concluded that they fall significantly short of remedying the identified competition problems and are, on both formal and substantive grounds, insufficient to remove the competition concerns. The conclusion of the Commission was based in particular on the following considerations:

- It was doubtful whether the instrument of slot remedies is appropriate for the transaction at hand. Indeed, Aer Lingus and Ryanair are low-frill airlines, flying to secondary and often to other non-congested airports. Airport congestion is not the main reason why other airlines do not enter Ireland. A slot based remedy thus failed to address many of the other identified barriers to entry described above.
- The market testing of the proposed remedies clearly showed that the offered remedies are not likely to trigger any substantial entry on the overlap routes. Except for a very limited number of routes, there were no indications that new entry was likely on the basis of the proposed remedies.
- The scope of the commitments was insufficient. Even if, hypothetically, the remedies would have triggered entry to the maximum extent

offered, the scope of such entry would still have been far too small to address the parties’ competitive overlap. The market test confirmed that slots for the offered number of aircraft based in Dublin would not suffice to replace the competitive constraint currently exercised by Aer Lingus. Aer Lingus and Ryanair operate in Dublin with 23 and 20 aircraft respectively. Although Aer Lingus does not only serve the overlap routes with its 23 aircraft, the investigation confirmed that [4-8] ⁽¹²⁾ aircraft would be insufficient to serve all overlap routes from/to Dublin and provide sufficient competitive constraints on the merged entity.

- Slots at some important destination airports were missing from Ryanair’s proposal.
- The commitments did not ensure a significant entry of one single airline with a suitable business model which would ensure that the rivalry between the two most important low-frills carriers operating to/from Ireland eliminated by the merger is restored.
- There were, in addition, significant doubts that Ryanair could legally relinquish Aer Lingus’ Heathrow slots. The airline’s Articles of Association confer certain veto rights to the minority shareholders (including the Irish government or the Aer Lingus employees’ trust), which would enable them to block the slot transfer.
- With regard to the various behavioural commitments offered by Ryanair (10% reduction of Aer Lingus’ fares, abolition of fuel surcharges, frequency freeze, maintaining separate brands), it should be noted that they do not directly address any of the identified competition problems. In addition, they raise numerous questions with regard to monitoring and enforceability. These commitments even contain elements that could lessen, rather than strengthen, competition.
- The content of the commitment proposal contained numerous contradictions and vague or ambiguous formulations which put into question the viability of the commitments as such, since it was doubtful whether the commitments as submitted would be at all workable and enforceable.

At a very late stage of the proceedings (more than four weeks after the legal deadline for commitments) Ryanair submitted a slightly revised set of draft commitments. This text was provided explicitly in “draft” form, without signature and without complying with the necessary formal

⁽¹²⁾ The precise number of aircraft is confidential to Ryanair.

requirements. Following an informal reaction by the Commission to the draft modified remedies, Ryanair chose not to submit them formally. Leaving apart this fact, it must be acknowledged that the Commission can in exceptional circumstances accept modifications of submitted remedies even when a renewed market test is no longer possible. Such commitments must, however, resolve all identified competition problems in a clear-cut fashion. This was not the case as even the modified commitments would clearly have not been sufficient to address all of the identified shortcomings of the previous set of commitments. In particular, the draft modified commitments were still based primarily on slot transfers and did not provide any new elements which would address the other identified barriers to entry and thus enable the Commission to re-evaluate the negative results of the market test as to the likelihood of actual entry. Furthermore, the scope of the guaranteed new entry pursuant to the “up-front buyer” provision was still insufficient. The draft modified remedies also did not provide for the transfer of slots at all relevant destination airports. Additional unre-

solved problems included, in particular, the legal uncertainty with respect to the London Heathrow slots and the unspecific criteria for the upfront-buyer.

For these reasons, the Commission concluded that the commitments offered by Ryanair are not sufficient to remedy the identified significant impediment to effective competition and, thus, cannot render the proposed concentration compatible with the common market.

VII. Conclusion

The Commission thus concluded that the proposed acquisition by Ryanair of Aer Lingus would significantly impede effective competition and declared the concentration incompatible with the common market. In view of the identified negative effects of the transaction and clearly insufficient remedies proposed by Ryanair, the prohibition was the only way how the Commission could ensure that a competitive environment beneficial to passengers on the routes to/from Ireland is maintained.

Econometric and survey evidence in the competitive assessment of the Ryanair-Aer Lingus merger

Miguel DE LA MANO, Enrico PESARESI and Oliver STEHMAN ⁽¹⁾

1. Introduction

Recently, the Commission prohibited the hostile takeover by Ryanair of Aer Lingus. The facts of this case differ from previous airline mergers assessed by the European Commission. This was the first time the Commission had to assess a proposed merger of the two main airlines in a single country, with both operating from the same “home” airport — Dublin. It was also the first time the Commission had to assess a merger of two “low-cost” airlines, operating on a “point-to-point” basis. Furthermore, the number of overlapping routes is unprecedented compared with previous airline cases. A comprehensive account of the Commission’s findings and assessment in this case is given in a complementary article in this issue ⁽²⁾. In contrast, this commentary focuses on the use of econometric and survey evidence to assess the non-coordinated effects of the merger ⁽³⁾.

From the Commission’s perspective an atypical and challenging feature of this case was that the merging parties both submitted separate econometric reports assessing the extent to which one merging firm imposes a competitive constrain on the other. At face value the results were contradictory:

- Ryanair’s results suggested that the presence of Aer Lingus in a route served by Ryanair has no statistically significant impact on Ryanair’s prices, whether a route is defined as an *airport-pair* (both airlines connect the same airports) or a *city-pair* (airlines fly to different destination airports close to the same city). In the view of Ryanair’s economists, this finding supports the claim by Ryanair that its business model is to target a passenger base that other (higher cost) airlines cannot profitably target. It follows that the strongest competitive constraint on Ryanair is not Aer Lingus but the price sensitivity of its customer base. Ryanair concludes

that attempts by Ryanair to sustain higher fares would not be profitable — not because of switching to Aer Lingus but due to the fact that passengers, highly price focused, would rather choose not to take a flight on that particular occasion.

- In contrast, Aer Lingus econometric results indicate that on routes where both carriers are operating, Aer Lingus’ fares and load factor are systematically lower on average than on routes which are not served by Ryanair. Further evidence indicates that the reduction in Aer Lingus prices is greater when Ryanair is present on a route than when other carriers are present.

Confronted with such contradictory findings, and given the tight deadlines in merger control one may be tempted to dismiss these econometric reports as cancelling each other out. Quite generally this is a most inadequate response. Even more so in this specific case where in fact econometric evidence has provided a much deeper understanding regarding the competitive interaction between the merging parties.

Ryanair and Aer Lingus’ econometric results differ, largely for three reasons. First, they rely largely on internal data sources and therefore they use a different data set. Second, since each party only had access to its own prices they were in fact testing different hypotheses. Ryanair economists considered the impact of Aer Lingus presence on Ryanair’s prices whereas Aer Lingus economists assessed the converse. Finally, the merging parties relied on different econometric methodologies.

If the data set, the research hypothesis and the econometric methodology differ it is quite unsurprising that the results and conclusions also differ and may even appear contradictory. It was thus necessary for the Commission to conduct its own empirical analysis.

To assess the extent to which the merging parties impose a competitive constrain on each other pre-merger we chose to pursue two alternative but complementary research strategies:

- a price regression analysis based on a data set combining data submitted separately by the parties and the Dublin Airport Authority

⁽¹⁾ Directorate-General for Competition, Chief Economist Team. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ “Ryanair / Air Lingus: even «low-cost» monopolies can harm consumers”, see page 65.

⁽³⁾ Full details can be found in the annexes to the decision (upcoming in the Official Journal)

- (ii) a passenger survey at Dublin airport designed specifically for this case ⁽⁴⁾

In what follows we motivate the use of econometric and survey techniques in this case, we summarise the methodology and the main findings, with an emphasis on the rationale for placing more weight on certain results than others.

2. The Commission's price regression analysis

Regression analysis is a statistical tool for understanding the relationship between two or more variables. Multiple regression analyses involves a variable to be explained — called the dependent variable — and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable. The mathematical model of their relationship is the regression equation or regression specification, set by the researcher on the basis of his knowledge of the phenomenon to be explained. The dependent variable is modelled as a random variable because of uncertainty as to its value, given values of the independent variables. A regression equation contains estimates of one or more unknown regression coefficients which quantitatively link the dependent and independent variables. Once a regression equation is defined and an econometric methodology is chosen, the presence of a negative or positive relation between two or more variables and its magnitude (i.e. the sign and the value reported coefficient, respectively) completely rely on the data used for the estimation.

In interpreting the results of a multiple regression analysis, it is important to distinguish between correlation and causality. Two variables are correlated when the events associated with the variables occur more frequently together than one would expect by chance. A correlation between two variables does not imply that one event causes the second to occur. Therefore, in making causal inferences, it is important to avoid spurious correlation. Spurious correlation arises when two variables are closely related but bear no causal relationship because they are both caused by a third, unexamined variable.

Causality cannot be inferred by data analysis alone — rather, one must infer that a causal relationship exists on the basis of a theory that explains the relationship between the two variables. In this case, the theory of harm is that the merger between Ryanair and Aer Lingus may significantly impede

effective competition in certain routes by removing important competitive constraints the merging parties exert on each other. The most direct effect of the merger will be the loss of competition between the merging firms, allowing the merged entity to exercise increased market power to the detriment of customers.

2.1. Hypotheses of interest

As is typical of no-frills carriers Ryanair's pricing policy is geared to ensure that its planes carry passengers at least up to a certain percentage of total capacity (or target load-factor). Thus, if it were competitively constrained by the presence of Aer Lingus, it can be expected that Ryanair would offer lower fares on average when Aer Lingus is on the same airport or city pair. Conversely, if Ryanair imposes a competitive constraint on Aer Lingus we would expect that Aer Lingus fares are negatively affected by Ryanair's continued presence. On the basis of this argument we derive two core hypotheses to be tested:

- The presence of Ryanair in the route is associated with a statistically and economically significant reduction in the fares of Aer Lingus;
- The presence of Aer Lingus in the route is associated with a statistically and economically significant reduction in the fares of Ryanair;

In addition a number of subsidiary hypotheses are of immediate interest:

- Aer Lingus and Ryanair exert on each other a stronger competitive constraint than any other existing competitor;
- The existence of an actual or potential competitor with a significant presence at the destination airport on a route originating in Dublin has an impact on (i) Aer Lingus' prices and (ii) Ryanair's prices;
- A stronger presence of one of the merging parties (in terms of number of frequencies) has a more pronounced effect on the other's fares.

The next step is to select the most appropriate econometric methodology on the basis of the available data and to determine a regression equation which allows to validate or refute the identified hypotheses of interest. We recall that two types of error are possible in hypothesis testing. For example, we might accept the hypothesis that Aer Lingus and Ryanair competitively constraint each other even though it is false (leading to a "false conviction" — or type 1 error). The converse error is to reject this hypothesis even though it is true (leading to a "false acquittal" — or type 2 error).

⁽⁴⁾ Interviews were conducted by a specialised survey agency hired by the Commission but the processing and analysis of the responses was done by the Commission's services.

Both types of error typically result from omitting important variables in the regression specification. For example, even if Aer Lingus' fares appear to be lower on routes where Ryanair is present this relationship may be spurious. This may be the case if the presence of Ryanair is positively correlated with the presence of other competitors (for example because entry into these routes is easier). To some extent, this may be corrected by controlling in the regression analysis for the presence of other rivals — for example, by introducing a variable indicating the number of rivals in the route or even their identity.

In contrast, a regression analysis may fail to detect any impact of Ryanair's presence on Aer Lingus' fares when it exists. In cross-section regressions, in particular, this may occur because the threat of entry by one of the merging parties may be almost as strong as actual presence. Indeed, in such cases a cross-section comparison of Aer Lingus' prices contingent on Ryanair's presence leads to a negative result even though Ryanair constrains Aer Lingus by the mere threat of entry even if it is not actually active in the route.

In performing econometric analysis, the probability of incurring in type 1 or 2 errors could be high even if the model is correctly specified. Sometimes, indeed, the lack of important information or the unavailability of a sufficient number of observations may induce errors in establishing (or failing to detect) a relation between different events. The risk of making type 1 and type 2 errors is an important reason why regression analysis should be used only as complementary to the overall qualitative and descriptive assessment of the facts of the case.

2.2. Econometric methodologies

The Commission's econometric specification and choice of methodology builds on the submissions of both Ryanair and Aer Lingus. All parties followed essentially the same strategy: to determine whether the presence of one of the merging parties on a route would have an impact on the prices of the other. Hence, the variable to be explained is the net average fare in a certain month on a given route; and the explanatory variable of interest is one that indicates that a rival firm was present (i.e. offered one or more flight services) in that same month and route. Other variables are added to "control" for other possible systematic influences on fares. These control variables refer to route characteristics that may affect demand or supply on that route.

The Commission considered two econometric methodologies.

- (i) Cross-section regression analysis, which examines differences in prices across a number of affected routes at a point in time.
- (ii) Fixed-effects regression analysis with panel data, which exploits the variation in market structure at individual routes over time.

Cross section regressions

Cross-section regressions use information on different market structures across routes, directly controlling for observed route specific factors that affect fares. The primary advantage of this methodology arises where market structure varies substantially across routes and where there are a large number of routes in the data. Ryanair's expert economists focused essentially on this approach, using as samples the routes operated by Ryanair in different moments in time.

The disadvantage of using a cross-section approach is that it may not be possible to control for important but unobserved or unmeasured influences on price that vary from route to route. When important variables affecting price in different routes cannot be observed and are correlated with the explanatory variables included in the regression, the estimated coefficients can be subject to bias. This problem is often referred to as *omitted variable bias*.

We derived no definite conclusions from our cross-section regressions and thus the results from these regressions are not reported here (for details see annex 4 in the Commission's decision). Essentially the reason we place no weight in our cross-section regression is that it is not possible to control for a number of unobserved factors that are likely to affect prices and differ across routes. Any coefficient estimates are thus likely to be biased in unpredictable directions. Further results are insufficiently robust to be relied upon given the small number of observations, (i.e. total number of routes operated by Ryanair or Aer Lingus). Furthermore, the sensitivity of the results to the month considered and the fact that the inclusion of additional explanatory variables, even if statistically insignificant, sometimes affects dramatically the results of the overall regression cast additional doubts about the suitability of this method in this case.

Fixed-effects regressions

An alternative to making inferences about price effects from cross-sectional comparisons is to exploit the variation in market structure at individual routes over time. For example, the entry of Ryanair on a route dominated by Aer Lingus may affect the latter's price (after controlling for

observable changes in other variables such as entry by other rivals). Effectively the method compares the level of Aer Lingus prices on a route after Ryanair entered, with the level before Ryanair entered. This before-and-after comparison is done systematically for all routes where Aer Lingus operates and thereby generates the average effect of Ryanair's presence on Aer Lingus fares. Aer Lingus' expert economists focused essentially on this approach.

The fixed-effects procedure compares the incumbent's prices before-and-after entry of a rival within the same route. Such comparison can mitigate the omitted variable bias that affects cross-section regressions because many unobservable or non-measurable cost or demand factors affecting fares and varying across routes are not likely to vary over time within a given route (such as the type of destination, the popularity of the route according to purpose of travel, customer awareness, destination airport characteristics, number of alternative airports at destination, safety considerations, total duration of travel, air traffic regulations at country of destination etc). Thus, the primary advantage of fixed-effects regressions comes where most unobservable or non-measurable factors affecting price remain relatively stable during the sample period.

Fixed-effects regressions are suitable if there are sufficiently long time series for all the variables of interest and the variation in the data is enough to permit precise estimates of the relationship between price and presence of a rival. It turns out that there were many instances of Ryanair entering or exiting a route already served by Aer Lingus within the period of analysis (five years). In contrast, Aer Lingus had entered or exited routes where Ryanair was present in very few instances. A likely explanation is that Aer Lingus was taking the lead in the opening of routes out of Dublin with Ryanair following. In any event this pattern in the data meant that the fixed effects methodology was primarily suitable to assess the effect of Ryanair's presence or capacity expansion on Aer Lingus' prices.

The fixed-effects procedure is subject to two caveats. Firstly, it is based on the assumption that entry and exit decisions are exogenous, i.e. not decided on the basis of the competitors' fares observed in the route right before the entry. This assumption may only be approximately correct. It is possible that a high Aer Lingus price on a route makes it profitable and so encourages entry and expansion by both Ryanair and its rivals. If so entry or expansion would be endogenous. If this was the case, there would be an inverse causal relation between the dependent variable, i.e. Aer Lingus fares, and

the main explanatory variable, the presence of a competitor on a given route. In practical terms, this means that the estimates may be subject to some selection bias since they are conditional on the carrier being present on a given route.

A second problem is that the frequency variables, an alternative variable used as a proxy of the strength of the presence of a competitor, may also be possibly endogenous. It seems sensible, though, to assume that airlines set these frequencies at least a few weeks in advance and then optimize their pricing and load factors conditional on the pre-set frequencies.

In theory, these problems can be addressed by instrumenting the explanatory variables ⁽⁵⁾. The Commission has tested a number of candidate instruments included in the data set, such as intra-route frequency rank, own costs or own total frequencies at destination airport. However all these instruments turned out to have very poor properties.

2.3. Fixed-effects specifications

The baseline fixed-effects regression is as follows:

$$\ln p_{it} = \alpha_i + f(\text{competition}) + \sum_t y_t \cdot D_t + \delta_j X_{it} + e_{it}$$

Where:

- The dependent variable is the average net monthly fares of first Aer Lingus and then Ryanair.
- α_i is the route fixed effect (time invariant dummy variables =1 for the route and 0 otherwise). The α_i dummy accounts for systematic but unobserved or non-measurable differences in costs or demand within that route.
- $f(\cdot)$ is a function of competitor variables. These are the explanatory variables of interest.
- D_t is a dummy for each time period (a month). The month dummies allows for an identification of cost shocks that affected all routes during the same time period.
- X_{it} is a vector of cost and demand controls added in certain specifications

We run a number of alternative specifications that essentially differ in the competitor variables included. We first test a set of specifications where a dummy variable for the other merging firm and for other rivals present in the route is included.

⁽⁵⁾ For example, Evans, Froeb & Werden (1993) run a fixed effects IV model on the data of Evans & Kessides (1992). They regress price on route HHIs. As instruments they use a one-year lag of the route HHI. The coefficient more than doubles relative to the fixed-effects results obtained without instrumenting.

It is common in applied work for the dependent variable to appear in logarithmic form, with one or more dummy variables appearing as independent variables. When the coefficient on a dummy variable suggests a small proportionate change in the level of the dependent variable, the coefficient can then be interpreted as the percentage difference in the dependent variable. For example if the coefficient on Ryanair's presence were to be -0.05, this would imply that the presence of Ryanair is associated with Aer Lingus charging on average 5% less than in routes where Ryanair is not operating.

Then we test an alternative set of specifications where the frequencies of the other merging firm and those of other rivals is included in logarithmic form (in addition to absence dummies⁽⁶⁾). This specification allows measuring the sensitivity of each firm's fares to the strength of its various rivals in the route. In the "frequency" specification, the coefficient of interest is that of the (log) of frequencies of the other merging party. This coefficient can be interpreted as the elasticity of fares with respect to the number of monthly frequencies that a rival offers in the route. For example, if the coefficient is -0.2, this means that a 1% increase in a rival's monthly frequencies leads to a 0.2% decrease in fares. It should be noted, however, this can not be compared to the estimated price effect given by the coefficient in the "presence" specifications. To estimate a comparable price effect from the "frequency" specification it is necessary to make assumptions regarding the competitive situation after the merger and make additional calculations. We applied for this purpose the same approach that was also followed by the US Federal Trade Commission in the Staples/Office Depot case where both the cross-section and fixed-effects approach were also used. In this case the regression specification was very similar to the Commission's proposed *frequency* specification⁽⁷⁾.

⁽⁶⁾ For each of the competitors a dummy of absence has been inserted in the specification. These dummies, take the value of one if respectively (i) Aer Lingus, (ii) other flag or (iii) non-flag carriers are absent in the route. These dummies allow for a correct introduction of the logarithm in the frequencies. When the number of frequencies is equal to zero, because the carrier is not present in the route the observation would be dropped given that the log of zero does not exist. By adding the dummy indicating absence, we ensure that the observation is properly included in the regression as one where the carrier was not present.

⁽⁷⁾ See Orley Ashenfelter & David Ashmore & Jonathan Baker & Suzanne Gleason & Daniel Hosken (2006), «Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in FTC v. Staples», *International Journal of the Economics of Business*, Taylor and Francis Journals, vol. 13(2), pages 265-279, July.

Whether focusing on *presence* of competitors or the strength of presence (i.e. *frequencies*) we start with the simplest possible specification (or baseline) and gradually include relevant controls, paying particular attention to the statistical robustness and economic significance of the explanatory variables of interest.

In all cases, we employ a "robust regression" technique that controls for the influence of extreme observations, i.e. outliers. In substance, this technique assigns less weight to observations that are farther apart from the mean respect to the others in the computation of the output. We consistently used panel fixed effect estimation for all the regressions presented. In the present case, the introduction of fixed effect can capture differences across routes affecting price that are not explicitly considered as regressors. An alternative approach known as "random-effects" imposes the assumption that the route effect is uncorrelated with each explanatory variable. This assumption is often not valid in practice. As mentioned above, fixed-effects models offer the advantage that the route effect also captures all time-invariant factors affecting price and likely to be correlated with the exogenous variables. Comparing the "fixed effects" and the "random effects" techniques can be a test of whether there is correlation between the α_i and the explanatory variables assuming that the explanatory variables and the error term are uncorrelated across time periods. Hausman first suggested this test⁽⁸⁾.

In order to test for the suitability of fixed-effects over random-effects in the present case, we use a Hausman test for all the regressions⁽⁹⁾. A large value of the Hausman test statistic leads to the rejection of the null hypothesis that the route fixed-effects are uncorrelated with included explanatory variables and to the conclusion that fixed-effects

⁽⁸⁾ Given a model and data in which fixed effects estimation would be appropriate, a *Hausman test* tests whether random effects estimation (i.e. with the α_i uncorrelated with the explanatory variables) would be almost as good. The *Hausman test* is a test of the null hypothesis that random effects would be consistent and efficient against the alternative hypothesis that random effects would be inconsistent. It is important to point out that if we believe that α_i is uncorrelated with the explanatory variables then the coefficients of interest can be consistently estimated by using a cross-section. Hence, implicitly, the *Hausman test* also provides an indication of the suitability of the fixed effects model over the cross-sectional approach.

⁽⁹⁾ The only drawback of the use a fixed effect model after a rejection of the null hypothesis in the *Hausman test* relies on the larger variance of our coefficient. Given that consistency is not at stake, and rejection concern very few cases, we have not taken into account a random effects model.

are present (that is routes differ significantly and these differences are correlated with the explanatory variables of interest — for example route distance might be correlated with the presence of Aer Lingus across routes). The replications of the test have confirmed the correctness of the fixed effect model in all relevant regressions ⁽¹⁰⁾.

2.4. Results from the Commission's fixed-effects regressions

Our data set covers the period January 2002 to December 2006. The results from fixed-effects regressions on Aer Lingus price indicate consistently that Ryanair exerts a competitive constraint on Aer Lingus' prices. In particular following hypothesis set out ex-ante are validated:

First, depending on the specification, the Ryanair's presence is associated with Aer Lingus charging around 7-8% lower prices when considering city-pairs reflecting the Commission's retained market definition and around 5% lower prices when considering airport-pairs. This effect is economically and statistically significant in all tested regressions. This result is also robust, correcting for the presence of outliers, heteroskedasticity and serial correlation. It is also highly robust to the use of alternative specifications including alternative demand and supply controls. Notably, in practically all cases the control variables in the different regressions have the expected signs and are statistically significant. The explanatory power of the regression is also high with R² consistently above 80%.

Second, comparing the coefficients of Ryanair with that of flag-carriers and non-flag carriers, as well carriers with relative presence at Dublin such as Aer Arann and CityJet, Ryanair's presence or number of frequencies have a much stronger economic impact (at least double) than that of any other type of carrier. In fact, in most cases the regressions indicate that the presence of other carriers has no economic or statistically significant effect on Aer Lingus fares.

Third, destination-based flag carriers exert only a very limited constraint on Aer Lingus. Destination-based non-flag carriers exert a higher constraint than flag based carriers. However, their constraint is around half or less than the constraint exerted by Ryanair on Aer Lingus retaining the Commission's market definition. Moreover flag carriers, for instance are only present on

8 of the 37 overlap routes upon which Aer Lingus and Ryanair competed in May 2007, and tend to be much smaller than either Ryanair or Aer Lingus where they are present (especially for point-to-point passengers). Thus, contrary to Ryanair's claim, it cannot be expected that the merged entity would be effectively constrained by flag or other non-flag carriers post-merger.

Fourth, measuring the strength of Ryanair's presence using number of frequencies in the route as a proxy provides further confirmation that Ryanair constrains Aer Lingus. It is possible to examine the price change in overlap market only or across all markets under various assumptions. For example one can focus on the price effect on the last month for which data is available or the price effect on average over the full sample period. Depending on the specification the price effect of the merger implied by the Commission's frequency regressions is around 5-6% (on average over all routes) or 10-12% (if only overlap routes are considered). This adds to the robustness of the results derived from the presence specifications. It is also worth noting that, as expected, Ryanair appears to impose a more significant constraint on Aer Lingus when it serves the same airport.

Next, we turn to describing our efforts in applying the fixed-effects procedure to test the influence of Aer Lingus on Ryanair prices, which has lead to very limited results. The Commission's analysis indicates, as claimed by Ryanair's economists that there is not sufficient variation, within a reasonable time period, in the presence of Aer Lingus in routes operated by Ryanair.

The *fixed-effects* regressions with Ryanair's prices as the dependent variable do not allow reaching conclusions with respect to the impact of Aer Lingus on Ryanair prices. This is because there are insufficient instances of Aer Lingus exiting or entering into a route where Ryanair was already present. In other words there is little variation in the presence of Aer Lingus on Ryanair routes. It should be emphasised, however, that this neither validates nor refutes the hypothesis that Aer Lingus exerts a competitive constraint on Ryanair's prices ⁽¹¹⁾. As a result the *fixed-effects* regression does not provide reliable estimates of the possible impact of Aer Lingus' presence on Ryanair prices. In contrast, there are many instances of Ryanair entering/exiting routes in which Aer Lingus was

⁽¹⁰⁾ For a relevant part of the frequency specifications, the standard *Hausman test* was not able to compute the matrix of the difference of the disturbance variances. In order to get around this problem, we have run the test as an f-test as presented in Wooldridge (2002), pp.290-291.

⁽¹¹⁾ In order to capture more events of Aer Lingus entering, the extensive data set has enabled the Commission to consider a longer time period, starting from April 1997. While in fact Aer Lingus' presence has a significant negative effect on Ryanair's prices in that regression, for a number of reasons — as set out in Annex 4 — the Commission does not give weight to this result.

already present. Hence the *fixed-effects* procedure is very well-suited to assess whether Ryanair's presence is negatively associated with Aer Lingus prices.

Finally, it should be noted that the effect of Ryanair on Aer Lingus prices is likely to be underestimated. The presence of Ryanair in Dublin exerts a potential competitive constraint on Aer Lingus. On routes out of Dublin where it is the only carrier, it can be expected that Aer Lingus sets prices which are lower than what it would charge if Ryanair had no Dublin base. Since the regression analysis considers only fares' overtime variations within each route and only captures price reductions subsequent to Ryanair's entry, this *potential competition* constraint does not show up in the empirical results.

3. The Customer Survey

The Commission's investigation indicated that Ryanair and Aer Lingus compete largely for the same pool of customers and competition takes place via a differentiated product offering in which a lower price reflects a lower quality product and a higher price reflects additional features. This implies that price is only one of various parameters of interest in the competitive assessment. For example, in the presence of Aer Lingus, Ryanair may not lower its fares but may be forced to increase the quality of its service or reduce the price of ancillary services. A regression analysis on fares is thus unlikely to capture the full extent to which the merging parties may exert a competitive constraint on each other. Moreover, on the basis of the available data the fixed-effects methodology lead to conclusive results only with respect to the impact of Ryanair on Aer Lingus prices.

In part to address these concerns the Commission took the initiative to conduct a passenger survey. The goal of the survey was to test (i.e. validate or refute) Ryanair's claim that the Merging Parties do not constrain each other because Ryanair serves customers that in the event of a price increase would choose not to fly rather than fly with Aer Lingus. A further advantage of the passenger survey is that it would not be appropriate to consider mainly the views of so-called time-sensitive passengers as was the case in for example the Air France/KLM and Lufthansa/Swiss transactions. It was important for the Commission to try to ascertain, to the extent possible within the constraints of the Commission's investigation, the views of individual customers directly.

The questionnaire was designed by the Commission, after consulting the parties on a draft, and implemented by a specialised external contractor

over a 10 day period. The Commission processed the responses and analysed the results.

The Commission proposed the contractor a sample of routes of short haul flights from Dublin to EU destinations divided into different categories. Category A included the routes where both carriers operated into the same airport. Category B included routes in which Aer Lingus and Ryanair operated into different airports. Finally, category C involved routes in which also other carriers operated. From that list of different routes the contractor chose four of each category in a way so as to ensure that it would be possible to minimise the number of days required to conduct the interviews in view of the scheduled departure dates and time of the relevant flight.

Given the tight deadlines and the need to collect a sufficiently large and representative sample of responses the questionnaire was intentionally short and all questions were multiple choice (that is, the questionnaire includes no open-ended questions). It takes between 5 and 15 minutes to fully answer the questionnaire. Importantly, no questions were asked that would allow the Commission or any party with access to the responses to trace the identity of the respondent. The fieldwork was done between the 1st and the 10th February and the data was sent to the European Commission the 13th February. In total 2674 questionnaires were collected.

Though initially supportive, Ryanair, afterwards raised several criticisms regarding how the customer survey was designed and conducted. In particular Ryanair argued that it was deficient since it was undertaken on a self-completion basis and questions were ambiguous so as to require knowledge on the part of the respondent that could not be assumed existed. This and related concerns are unfounded. First self-completion questionnaires are a standard technique to gather information from consumers in all sectors, including air travel. Second, all questions used simple and clear language and refer to the respondents own actions, perceptions and beliefs. The results we obtained and briefly summarise below are clear-cut and reliable given the absence of any significant source of systematic bias.

3.1. Results

Overall the customer survey indicates that customers consider Aer Lingus and Ryanair as the closest competitors in terms of product offering on routes to/from Ireland. In particular, when customers were asked which other airlines they have considered when planning their journey, the survey shows that overall the main alternative considered by both Ryanair and Aer Lingus

customers are the other party. For instance, table below summarises the (weighted ⁽¹²⁾) responses by carrier to question 8: *Which other airlines, if any, did you consider using for this route?*

The survey also showed that where both airlines fly into the same airport at the destination end, more than half Aer Lingus and Ryanair's passengers have considered the other

Did you consider?		Flying with Carrier					
		Ryanair		Aer Lingus		Other Carriers	
		Count	Column N %	Count	Column N %	Count	Column N %
Ryanair	No	1167	100.0%	575	65.5%	466	74.2%
	Yes	0	0.0%	304	34.5%	162	25.8%
Aer Lingus	No	695	59.6%	879	100.0%	306	48.7%
	Yes	472	40.4%	0	0.0%	322	51.3%
Other Carriers	No	1015	87.0%	802	91.2%	570	90.7%
	Yes	152	13.0%	77	8.8%	58	9.3%
None	No	699	59.9%	465	52.9%	520	82.7%
	Yes	467	40.1%	414	47.1%	108	17.3%

The table shows that the percentage of Aer Lingus passengers that considered Ryanair as an alternative is 34.5%, that is, slightly more than 1/3. It is significantly above the 8.8% of Aer Lingus passengers that considered any other carrier. Furthermore, when considering only Aer Lingus passengers that stated that they do not always travel with Aer Lingus the percentage that considered Ryanair increases to 62.3% (not reported).

The percentage of Ryanair passengers that considered Aer Lingus is even higher at 40.4%. In contrast only 13% of Ryanair passengers considered any carrier other than Aer Lingus.

Interestingly there is also certain symmetry in the responses by passengers of Ryanair and Aer Lingus. This further suggests that the competitive constraint that both carriers impose on each other is symmetric ⁽¹³⁾. This is relevant because, in contrast to for example the Commission's regression analysis that focuses on the impact of presence of one firm on the prices of the other, respondents to the survey were not asked whether they considered the other carrier on the basis of a particular dimension (e.g. price).

⁽¹²⁾ To weight the sample we used as an estimate for the population size at route level the weekly average number of passengers on that route (from Dublin Airport Authority data on yearly number of passengers). The table therefore reproduces the raw results correcting for the over-sampling or under-sampling in each route

⁽¹³⁾ Note also that passengers travelling with airlines other than the merging parties considered more often Aer Lingus than Ryanair. This is consistent with the hypothesis that Ryanair is less constrained by airlines other than Aer Lingus.

carrier ⁽¹⁴⁾. On routes where Aer Lingus and Ryanair compete with a third carrier around 40% of Ryanair's passengers considered Aer Lingus as an alternative, while around 17% considered any other competitor. Similarly, for Aer Lingus, 32.5% of its passengers considered Ryanair as an alternative whilst only 15.7% considered any other competitor. This response further reinforces the findings that the two companies are perceived by customers as the closest substitutes.

These results hold also when distinguishing between different customer groups (as business or leisure travellers) or between different reasons why passengers bought a ticket. A further indication is the number of Ryanair passengers that have selected Best price, Best time, Close Airport and Punctuality (the four most popular reasons) and whether they had considered Aer Lingus and other airlines (all aggregated). Of the 860 passengers that indicated they had chosen Ryanair because it offered the best price 44.4% considered Aer Lingus as an alternative, as opposed to 14.7% who considered carriers other than Aer Lingus. The same pattern is apparent whether the respondent's preference for Ryanair is due to the fact that it offered a good departure time, the destination airport was conveniently located or punctuality.

The results are similar when one looks at Aer Lingus customers. Aer Lingus passengers also seem to have a strong preference for Ryanair as an alternative again irrespective of the reason why they have selected Aer Lingus in the first place.

⁽¹⁴⁾ Results based on raw (i.e. unweighted) data.

4. Conclusion

The Commission's price regression analysis based on a fixed-effects technique confirms and complements findings relying on qualitative evidence that Ryanair and Aer Lingus are close competitors.

The results clearly indicate that Aer Lingus prices are currently constrained by competition from Ryanair. This finding alone implies that post-merger as predicted by standard "non-coordinated effects" analysis ⁽¹⁵⁾, both carriers would internalise the effects of setting higher fares on each other. In particular, the merged entity would have the incentive to set higher fares for Aer Lingus as most of the customers lost would be captured by Ryanair. The loss of post-merger competition on Aer Lingus is in itself a major cause for concern from the transaction.

Moreover both economic theory and qualitative evidence suggest that Ryanair might also be constrained on parameters of competition other than

price. A number of factors can affect the reciprocal influence of one firm on the other. For example, Ryanair may have a particularly strong effect on Aer Lingus' prices, due to its low-price strategy and its recent and aggressive entry into Aer Lingus routes out of Dublin. Conversely, Aer Lingus may have little impact on Ryanair's prices but a significant effect on its frequencies or load factors. Furthermore, Aer Lingus may also affect Ryanair's decisions regarding the expansion of its network out of Dublin. It may force Ryanair to increase advertising, and reduce prices of its ancillary services, which in certain routes may contribute to a very significant proportion of total profits on that route. Thus, it is possible that the constraints imposed on each other are asymmetric in nature but not in strength. Price regressions provide little insight into such effects. In contrast, the results of the passenger survey partially confirm this argument: overall, more than 1/3 of the customers of either merging party considered the other as an alternative.

⁽¹⁵⁾ See for example paragraph 24 in the Horizontal Merger Guidelines.

The Court of First Instance confirms clearance of the Apollo / Akzo Nobel IAR merger

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On 29 May 2006 the European Commission approved the acquisition by Hexion Specialty Chemicals ("Hexion", USA), owned by the investment fund Apollo, of Akzo Nobel's Inks and Adhesive Resins business ("IAR", the Netherlands). The transaction concerned in particular the market for resins used in the printing ink and adhesives industries.

The market investigation showed that the main impact of the transaction was in the market for rosin resins used for ink production. However, the Commission considered that the transaction would not be likely to raise serious doubts as to its compatibility with the single market and the EEA Agreement and cleared the transaction.

On 9 October 2006 three customers, Sun Chemical Group BV, Siegwirk Druckfarben AG and Flint Group Germany GmbH lodged an appeal before the Court of First Instance ("CFI") against the Commission's decision alleging that the Commission had failed to follow the Horizontal Merger Guidelines and that the decision was flawed by errors of law, fact and appraisal.

On 9 July 2007 the CFI dismissed the action of the complainants rejecting all their arguments and confirming in full the Commission's decision.

I. Introduction

a. The concentration

Hexion, solely controlled by the Apollo Group, produces and sells a range of thermosetting and specialty resins, including rosin resins ⁽²⁾, hydrocarbon resins, rosin-hydrocarbon hybrid resins ("hybrid resins"), alkyd resins, acrylic dispersions, acrylic resins and a number of other resins such as amino resins, epoxy resins, phenolic resins and polyester resins.

IAR primarily manufactures products based on rosin, including rosin resins, hybrid resins and other rosin products, with a focus on the printing inks and adhesives industries.

Hexion acquired, either directly or through wholly-owned subsidiaries, the various shares and assets that comprised the entirety of the IAR business.

b. Effects of the transaction and the arguments for clearance

The markets affected by the transaction

The transaction gave rise to various overlaps in different types of resins: rosin resins, hydrocarbon resins, hybrid resins, alkyd resins and acrylic dispersions. All the overlaps were however limited to one single application: production of inks. Within this application, the main impact of the transaction was in the market for rosin resins, in which the new entity would achieve relatively high market shares in the EEA.

Findings of the Commission

After the transaction, the new entity would acquire a significant market share in rosin resins for ink application becoming the market leader in the EEA.

However, the market investigation showed that the structure and dynamics of the market were such that neither coordinated nor unilateral anti-competitive effects were likely to arise following the transaction.

The rosin resins market is characterised by a high degree of heterogeneity with many different grades of resins, some of them customized to meet the customers' requirements. In addition, the market is characterised by the presence of various alternative competitors (three with significant market shares and a number of smaller ones) and the lack of symmetry in market shares. These *prima facie* characteristics of the market (lack of homogeneity and transparency, large number of players and asymmetry of the market structure) led the Commission to conclude that any coordinated behaviour as a result of the transaction would be highly unlikely.

Therefore, the Commission focussed its assessment on the possible unilateral effects that the transaction may bring about, verifying to what extent customers would be able to find alternative sources of supply should the new entity engage in price increases following the transaction.

⁽¹⁾ Directorate-General for Competition, unit B-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Rosin resins are produced from rosin, a naturally occurring resin derived from pine trees.

Firstly, the market investigation showed that the parties' competitors were able to produce the same range of rosin resins produced by the parties, and that they were considered as real supply alternatives by the customers. Secondly, the investigation also showed that these competitors had enough spare production capacity to cover a substantial increase of demand should customers want to run away from the parties in case of price increases.

Finally, the Commission also found that some strong customers, accounting for a large part of the rosin resins' demand for ink applications, were vertically integrated upstream, either via acquisitions of rosin resin producers or through building up in-house production. This vertical integration constituted a real threat to their suppliers and conferred them a significant buyer power.

On the basis of these findings, the Commission cleared the transaction.

II. The appeal: Arguments put forward by the complainants

On 9 October 2006 three customers, Sun Chemical Group BV, Siegwark Druckfarben AG and Flint Group Germany GmbH lodged an appeal before the CFI against the Commission's decision. In their appeal, the complainants alleged, among other issues, the following aspects of the decision:

- that the Commission had failed to follow the Horizontal Merger Guidelines as regards the assessment of (i) the coordinated effects, (ii) the non coordinated effects and (iii) the levels of concentration that would take place as a result of the proposed transaction, and
- that the Commission's decision was flawed by errors of law, fact and appraisal as regards the assessment of (i) the capacity in the market, which is limited by the lack of raw materials (rosin), (ii) the nature and extent of the vertical integration of the merged entity's customers and their countervailing buyer power.

III. Findings of the court

On 9 July 2007 the CFI dismissed the action of the complainants and rejected each and every complaint raised by them. The judgement confirmed that the Commission's decision followed the Horizontal Merger Guidelines correctly and that the final conclusions were appropriately substantiated.

With respect to the way in which the Commission followed the Horizontal Merger Guidelines, the CFI stated that the Commission enjoys a discretion enabling it to take or not to take account of certain factors and therefore the Guidelines do

not require an examination in every case of all the factors mentioned. In addition, the CFI indicated that from the obligation to state reasons it cannot be inferred that the Commission must provide reasons for all the matters of law and of fact which may be connected with the merger and/or raised during the administrative procedure which seem to it manifestly irrelevant or insignificant or of secondary importance.

The CFT therefore concluded that the assessment carried out by the Commission on the coordinated effects of the transaction was correct, stating that *"the Commission cannot be accused of failing to follow the Guidelines in considering, first, that coordinated anti-competitive behaviour had little chance of being adopted post-merger, and secondly, that an assessment of deterrent mechanisms and of reactions of third parties was not necessary"*.

As regards the assessment of market shares levels and market concentration, the CFI also stated that, when using the Herfindahl-Hirschman Index (HHI), exceeding the thresholds does not give rise to a presumption of existence of competition concerns and that, although it is a useful first indication of market structure, the Commission is not required to assess the HHI in every decision.

Regarding the Commission's assessment of the spare capacity, the CFI also indicated that the findings of the Commission confirmed that the market is characterised by excess capacity and that, in order to discourage any anticompetitive conduct, it is not necessary for the merged entity's customers to be able to transfer all their orders to other suppliers, but only a substantial part of the orders.

One of the main arguments raised by the applicants was that the market for raw materials (i.e. rosin) was short. Consequently, as the Commission did not take this factor into account, the spare capacity calculations made by the Commission were wrong since not all the spare capacity may be used due to the raw materials' limitation. The CFI however confirmed the Commission's conclusions, stating that:

- the lack of raw materials was raised only by one respondent to the market investigation (in particular by one of the applicants), whilst none of the rosin resin producers, who are best placed to detect this type of supply problems, raised this concern.
- the applicants failed to explain how anticompetitive effects could result from shortages of raw materials affecting all suppliers in the same way.

- competition could only be affected if the merged entity had preferential access to raw materials. The Commission investigation did not give any indication in this regard and the applicants failed to show it.

As regards the assessment of the buyer power enjoyed by some customers (including the applicants), the applicants argued that the Commission did not take into account that their in-house production only covered one type of rosin resin that could be used exclusively for the production of a limited range of inks. The CFT however supported the Commission's conclusion that the customers would still have the ability to exert pressure on their suppliers, either (i) by threatening them to stop purchasing this specific type of resin or (ii) by freeing-up the capacity of other suppliers that then can be used to produce

the rosin resins for which the customers want to switch supplier.

The CFI equally dismissed all other arguments alleging that the Commission's decision was flawed by errors of law, fact and appraisal.

IV. Conclusion

This case, dealt with by the CFI by way of expedited procedure in only nine months, confirms that the Commission, although bound by its own Guidelines, is neither required to assess in every case all the aspects described in the Guidelines nor to provide reasons for all the matters of law and of fact which may be connected with the merger or raised during the administrative procedure if such elements are manifestly irrelevant, insignificant or of secondary importance.

Universal / BMG: Market power of music publishers in view of evolutions in digital music publishing

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On 22 May 2007, the European Commission approved, subject to conditions, the acquisition by Universal Music Group Inc. ("Universal") of BMG Music Publishing ("BMG"). Both companies are active in the music publishing business.

An in-depth market investigation has shown that no competition concerns would arise from the merger where the copyrights are administered by the collecting societies who usually charge uniform tariffs for all songs. However, in the field of online rights (including rights for mobile applications), publishers have recently started to withdraw rights from this traditional collecting societies system which is likely to shift pricing power over these rights from the collecting societies to the publishers.

As a consequence, the market investigation found that the proposed acquisition could have raised competition concerns by combining two large catalogues of musical works. The transaction would have led to an unavoidable "must-have" repertoire for users of digital music rights, such as music downloading services or mobile ringtones. These competition concerns were removed by the parties' remedy to divest several successful catalogues.

I. Introduction

a. The notified transaction

Universal, a US-based company owned by the French company Vivendi, is a leading player in the music recording and music publishing business. The target business consists of the worldwide music publishing activities of BMG, a subsidiary of the German media company Bertelsmann.

On 6 September 2006 Vivendi and Universal signed a share purchase agreement with Bertelsmann AG and seven further companies within Bertelsmann for the acquisition of BMG. As a result of the transaction Universal acquired sole control of BMG.

Both parties are active in the music publishing business. The main activities of a music publisher comprise the discovery and promotion of new talented songwriters with a view to commercially exploiting their intellectual property rights by granting licences over these songs to the users of these musical works, such as record companies, online music services or broadcasters.

b. The product markets: exploitation of music publishing rights

Music publishers exploit copyrights for songs received from authors by granting licences to right-users. The right-users encompass all sectors where music is required (CDs, films, internet etc.). The users pay royalties for the use of these musical works. Publishing rights need to be distinguished from so-called "neighbouring rights" or "recording rights" which mainly protect the individual interpretation of a song by a performing artist.

Essentially because of their different usage, the following types of rights have been distinguished: Mechanical rights (for reproduction of a work in a sound recording, e.g. CDs); Performance rights (for commercial users such as broadcasters, concert halls, theatres, night clubs, restaurants etc.); Synchronisation rights (for commercial users such as advertising agencies or film companies, i.e. when the music is synchronised with the visual image); Print rights (for the reproduction of work in sheet music); and Online rights (*pars pro toto* for all digital rights) which are a combination of mechanical and performance rights for online and mobile applications, such as music downloading services and ringtones.

From a demand-side perspective there is clearly no substitutability between the different categories of rights since a user cannot switch between the licences for the different rights for a specific application. Also from a supply-side perspective, the market conditions differ significantly which points to separate markets. Further differences relate to the role of the collecting societies. Licensing of mechanical and performance rights is generally carried out by collecting societies while synchronization and print rights are generally licensed directly by the publishers.

⁽¹⁾ Directorate-General Competition, units C-5 and 02. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

c. The geographic markets

The geographic markets for mechanical and performance rights appear to be national due to the strictly country-specific activities of the collecting societies. As regards print and synchronisation rights, the scope of the licences is also to a large extent national. The geographic scope of online/digital rights (as a combination of mechanical and performance rights) is still largely national but may become larger as a consequence of recent and future developments. There was, however, no need to strictly define the geographic scope of any of the right categories as the competitive assessment remains unchanged under either a national or EEA-wide dimension.

II. The different systems of rights administration

As indicated above, the publishing rights identified as relevant product markets are administered in different ways. Moreover, the traditional system of collecting societies is undergoing significant changes in the field of online rights whose administration originally did not differ from the administration of mechanical and performance rights for traditional applications. The resulting different ways of rights administration are described in the following.

a. The traditional system of collecting societies

Mechanical and performance rights for the traditional (offline) applications are administered in the system of collecting societies. Collecting societies are organisations which were established to act on behalf of right owners in order to take over the administrative tasks connected to the licensing of publishing rights. Authors usually become members of the collecting society in their country of residence and thereby entitle those to administer their mechanical and performance rights, including online rights. It is then the collecting societies' task to grant licences, collect the royalties from the users and monitor the use of music. For these services, the collecting society retains a percentage of the collected royalties as commission fee. The net collected royalties are shared between the authors and their publishers.

In order to secure licensing and collecting of royalties also from users abroad, the collecting societies co-operate worldwide on the basis of so-called "reciprocal representation agreements". These agreements give each of them the right to not only license the repertoire of their own members but also the repertoire of all associated collecting societies. On the basis of the reciprocal agree-

ments each collecting society, however, limits the geographic scope of its licences for the complete repertoire administered, including both the works of the own members as well as the other collecting societies' works, to its own country. At the same time each collecting society collects royalties from users in its own country not only for the own members but also for the authors and publishers abroad.

On this basis, collecting societies are normally considered dominant in their respective countries. They are for this reason bound by non-discrimination obligations and are not allowed to refuse licences. As a consequence, they in most cases charge a uniform price for the whole repertoire (only differing per category of use).

So far, online rights have been managed in the same way. However, recent changes occurred in this respect due to the publishers' tendency to withdraw these rights from the traditional collecting societies system.

b. Withdrawal of rights from the traditional system

Several publishers have recently started to withdraw a part of their online rights from the traditional system of collecting societies in order to give the rights to one or a few selected collecting societies for the EEA-wide or even worldwide administration. These initiatives have followed the Commission's Recommendation with respect to online rights ⁽²⁾ which re-affirms that right-holders should have the right to entrust the management of online rights to a collective rights manager of their choice.

The initiatives mainly relate to Anglo-American works and the mechanical part of the online rights. This results from the differences in the administration of rights and control over rights: Authors generally do not transfer their rights to the publishers and therefore keep control over their rights. However, this does not apply for Anglo-American mechanical rights. Authors in Anglo-American countries normally transfer their mechanical rights fully to their publishers. As a consequence, the publishers may decide independently from the authors about a withdrawal of these rights from the traditional collecting societies system. For the other rights (Continental European works, performance rights), generally, the approval of the authors would be necessary for such a decision.

⁽²⁾ Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC), OJ L 276, p.54.

The most advanced initiative in this respect is the creation of the CELAS joint venture by the German collecting society GEMA and the British collecting society MCPS-PRS Alliance. CELAS administers EMI's Anglo-American mechanical rights for online applications.

c. Conclusion on the systems or rights administration

From this, several systems of rights administration emerge:

- (i) *direct licensing*: Publishers grant themselves licences to the music users for synchronization and print rights (see section III).
- (ii) *the traditional collecting societies system*: Collecting societies administer the rights and decide on a uniform tariff for all works. Mechanical and performance rights for the traditional (offline) applications are administered in this system (see section IV).
- (iii) *withdrawal*: By withdrawing rights from the traditional collecting societies system the publishers transfer these rights to one selected collecting society or several. This system so far only applies to online rights, and more specifically: only to the mechanical rights part of online rights for Anglo-American works (see section V).

III. Synchronisation and Print Rights

Synchronisation rights are purchased in order to synchronize a musical work with a visual image for incorporation in an audio-visual work such as a film, TV program or TV advertisement. They are generally directly commercialised by the publishers to the final user. Synchronisation customers have the specific feature in the music industry that they do not need to have access to the complete music repertoire unlike other customers such as radios or online music providers. Conversely, they need only one or a few songs.

In particular, synchronisation customers confirmed that the different musical works are largely substitutable for their purposes and that when the financial conditions offered for one work do not meet their expectations, they do not have problems identifying another musical work for which acceptable conditions can be agreed upon. Therefore, although the merger strengthens the position of Universal/BMG on the synchronisation market, now on a par with EMI, the enhanced size of Universal's catalogue does not give rise to competition concerns because a sufficient number of alternative publishers with a vast number of songs remain available.

Print rights are purchased for the reproduction of works in sheet music. Universal is merely active in this market and the merger will only lead to a marginal overlap.

IV. Mechanical and Performance Rights

After the merger, the parties would acquire a leading position in a number of EEA-countries in relation to mechanical and performance rights. The market investigation has, however, shown that the merger would not lead to competition concerns in the markets for mechanical and performance rights due to the strong position of the collecting societies which prevents independent pricing on the part of the publishers. The pricing decisions in this system are made by the collecting societies. Due to their dominant positions, the collecting societies are regularly obliged to charge non-discriminatory tariffs. While significant changes to the rights administration are taking place for online rights (in particular withdrawal of rights) leading to a weaker role of the collecting societies, no such developments currently appear likely for mechanical and performance rights for traditional applications.

V. Online Rights

The merger raised serious doubts in the market for online rights in Austria, the Czech Republic, Germany, Poland and the United Kingdom as well as on an EEA-wide level. In these territories, the combined catalogues of Universal and BMG would have (co-)controlled the majority of the chart hits which are of particular importance for online and mobile music providers. As indicated above, online rights are composed of mechanical and performance rights for online and mobile applications. The competition concerns mainly relate to the mechanical rights part of the online rights and only to Anglo-American repertoire, as only this part of the repertoire appears likely to be withdrawn from the collecting societies system. However, a price increase in this segment would have had an appreciable effect on the overall market for online rights.

a. Independence of pricing

The withdrawal shifts pricing power to the publishers who gain pricing independence with respect to the withdrawn rights. Collecting societies are likely to adopt for the withdrawn rights a role as agents and service providers for the individual publisher and will not anymore act in the traditional sphere of the usual membership agreement and collecting societies' statutes. The non-discrimination rules or other national regulations in this respect are unlikely to fully apply for collecting societies acting as agents / service providers for individual publishers.

b. Increase in market power

In order to offer a title, an online music provider must acquire licences for all co-publishing rights (a majority of chart albums are jointly published by several publishers) and recording rights controlling this title. As a consequence, a music title is controlled by a music company when this music company is either one of the publishers or the record company of this specific title.

The Commission analysed specifically the top 100 charts in EEA countries. At the EEA level and in the five mentioned Member States, Universal/BMG would control post merger 50% of all chart albums, either via publishing or recording rights, up from 40% for Universal alone pre-merger. This implies that an online music provider could hardly develop a music web site without the agreement of Universal/BMG, or would alternatively have to abandon half of the overall relevant music repertoire, seriously undermining its viability. Other majors also control a significant share of the total music repertoire, however currently not as much as to be considered as “must-have” partners.

c. Profitability of a price increase

The market investigation showed that a price increase was likely to be profitable for Universal. This is mainly due to the limited substitutability of music and the prevailing business models of the online and mobile music providers. It was therefore concluded that, post-merger, Universal would have both the ability and the incentive to increase prices for its repertoire.

VI. Remedies

a. Description of the proposed remedies

Universal submitted remedies on 15 March 2007 which have been twice improved in the light of the results of the market tests and the Commission's comments. The Final Remedies Package comprises, amongst other catalogues, the entire catalogues of Zomba Music Publishers Ltd (“Zomba UK”), Rondor Music (London) Ltd (“Rondor UK”), and an EEA-wide licence of the catalogue of Zomba Enterprise Inc. (“Zomba US”) ⁽³⁾.

It is noteworthy that, in order to avoid a copyright split and to ensure the viability of the Divestment Businesses, the Remedies are not confined to online rights but include the entire catalogues

for all applications, i.e. mechanical, performance, synchronisation, print and online applications.

The combined EEA-wide revenues of the Divestment Businesses exceed € 30 million and represent more than one third of BMG's EEA revenues with Anglo-American repertoire.

b. Assessment of the remedies

The market tests confirmed the divestiture of catalogues as an appropriate remedy to remove competition concerns in music publishing markets. The Remedies Package has the characteristics of a viable commitment as reflected by the market test. For instance, the divested catalogues are a good mixture of successful back catalogue and recent hits and of Anglo repertoire and U.S. American repertoire. In most of the divested titles, Universal will retain neither a recording nor any co-publishing right and will thus no more be able to leverage its control in negotiation with online and mobile music providers.

The catalogues include currently successful authors like Linkin Park, R. Kelly, Jamie T., Justin Timberlake, Kelly Clarkson and Kaiser Chiefs. These authors recently hit the charts several times and in many Member States (including those where competition concerns were found) and therefore have the high potential to deliver more hits in the future. In analysing the future potential of the divested catalogues the Commission also analysed the number of newly signed authors and the advance payments made to them as an indicator for the expected success.

In the light of that bundle of criteria the Commission concluded that the Final Remedies Package removes the serious doubts raised by the notified transaction as to its compatibility with the Common Market and the EEA Agreement.

VII. Conclusion

Changing market conditions may lead to a fundamental shift in market power between the different groups of players. To assess the merger between Universal and BMG in the publishing business, the Commission's analysis took into account the prospective developments and the resulting likely shifts of market power in the music publishing markets. The case has shown that even against the background of dramatic changes in the market, instruments for the analysis of the likely impacts of the merger can be found, such as the used chart analysis, which allow for a sound competition assessment of the transaction. The final remedies package addresses the identified competition concerns and thereby fosters growth and competition in the online music markets.

⁽³⁾ The other catalogues are 19 Music which includes many *Spice Girls* songs, 19 Songs and the BBC catalogue, including the *Teletubbies* which have been successful as mobile ringtones. For the territories outside the EEA, Universal will act as a sub-publisher of the Divestment Businesses.

Transparency system for large regional investment projects

Leen DE VREESE ⁽¹⁾

The Multisectoral Framework on regional aid for large investment projects ⁽²⁾ (hereafter 'MSF 2002') entered into force on 1 January 2003 for the motor vehicle ⁽³⁾ and the synthetic fibres sectors, and in 2004 for the other economic sectors ⁽⁴⁾. In 2005, the Commission decided to integrate the MSF 2002 in the new guidelines for national regional aid for the period 2007-2013 ⁽⁵⁾ (hereafter 'RAG 2007-2013'). The MSF 2002 introduced a specific information and screening system for the control of non-notifiable ⁽⁶⁾ cases of regional aid granted to large investment projects (the so-called 'transparency mechanism'), which is maintained in the RAG 2007-2013, applicable for regional aid granted as from 1 January 2007 ⁽⁷⁾.

A 'large investment project' is an 'initial investment' ⁽⁸⁾ with an eligible expenditure above € 50 million.

Purpose of the multisectoral framework/ specific rules for large investment projects under RAG 2007-2013

Reduce the volume of aid

The main purpose of the multisectoral framework was to reduce the volume of regional aid. Until 2004, under the MSF 1998, a different notification threshold ⁽⁹⁾ and different approval requirements applied for regional aid to large investment projects. With the introduction of the MSF 2002, the Commission imposed a more severe reduction of aid to large investment projects. Member States accepted fundamental changes and a more restrictive approach for aid to large investments, provided this meant a substantial reduction of the number of notifications. By accepting a higher notification threshold, the Commission could ensure a more effective scaling down system for aid granted to large investments (compared to the MSF 1998), and at the same time maintain control by introducing the transparency mechanism for non-notifiable regional aid.

New notification threshold

Instead of being tied to the investment volume, under the MSF 2002 and the RAG 2007-2013, the notification requirement is now tied to the amount of aid to be granted, and the threshold varies depending on the regional aid ceiling (the ceiling in force for large enterprises in the approved regional aid map on the date the aid has been granted). Regional investment aid for large investment projects is subject to an adjusted regional aid ceiling, on the basis of the following scale ⁽¹⁰⁾:

⁽¹⁾ Directorate-General for Competition, unit H-1. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ OJ C 70, 19.3.2002, p. 8, as amended (OJ C 263, 1.11.2003, p. 3).

⁽³⁾ As defined in annex C to the MSF 2002 (as amended). The motor vehicle sector was subject to the specific rules of point 42 of the MSF 2002.

⁽⁴⁾ See also section 1 of the MSF 2002. Excluded sectors are the synthetic fibres sector. The agriculture, fisheries and transport sectors, and the coal industry are subject to specific State aid rules.

⁽⁵⁾ OJ C 54, 4.3.2006, p. 13.

⁽⁶⁾ For aid which requires notification, the monitoring of regional aid for large investment projects is normally ensured by specific reporting obligations included in the Commission decision. A separate monitoring activity is carried out for aid granted under the former Multisectoral Framework on regional aid for large investment projects 1998 (OJ C 107, 7.4.1998, p. 7, hereafter 'MSF 1998'), in accordance with point 6.2 of this framework.

⁽⁷⁾ The current transparency system applies to all sectors except to those excluded in section 2 of the RAG 2007-2013. Under the RAG 2007-2013, the motor vehicle sector is assimilated to the other economic sectors. Excluded sectors are steel, synthetic fibres, and the production of agricultural products listed in Annex I to the Treaty. Special rules apply to the fisheries sector, coal, transport and shipbuilding.

⁽⁸⁾ As defined by the RAG 2007-2013, and previously by the former guidelines for the period 2000-2006 (OJ C 74, 10.3.1998, p. 9, hereafter 'RAG 1998').

⁽⁹⁾ Point 2.1 of the MSF 1998.

⁽¹⁰⁾ Points 21 and 22 of the MSF 2002, respectively paragraph 67 of the RAG 2007-2013. Under the specific rules of the MSF 2002, the motor vehicle sector is subject to a more severe reduction: for aid amounts exceeding € 5 million, regional aid to large investment projects in this sector must be limited to 30% of the full (unadjusted) regional aid ceiling.

The starting point for the calculation of the reduced aid ceiling is always the maximum aid intensity allowed for aid for large enterprises. Under the MSF 2002, the aid intensity could be higher when an SME bonus had been awarded or if the conditions for the granting of a cohesion bonus were fulfilled (points 25 and 26 of the MSF 2002). Under the RAG 2007-2013, the cohesion bonus is abolished, and no SME bonuses may be granted to large investment projects.

- eligible expenditure up to € 50 million: 100% of regional ceiling;
- for the part between € 50 million and € 100 million: 50% of regional ceiling;
- for the part exceeding € 100 million: 34% of regional ceiling.

Member States are required to notify individually to the Commission any aid to be awarded to investment projects under an existing aid scheme (in the meaning of the procedural regulation ⁽¹¹⁾) if the aid proposed from all sources is more than the maximum allowable amount of aid that an investment with eligible expenditure of € 100 million can receive under the above scaling down system ⁽¹²⁾. Aid exceeding this threshold is submitted by the Commission to an economic assessment taking into account the sectoral and market power effects of the aid measure ⁽¹³⁾.

Transparency mechanism for non-notifiable large investment projects

Point 36 of the MSF 2002 (paragraph 65 of the RAG 2007-2013) installed a system for ex-post monitoring of state aid granted to non-notifiable large investment projects, also called the ‘transparency mechanism’. The non-notifiable large investment projects are projects for which the aid amount does not exceed the notification threshold, i.e. 75% of the maximum amount of aid an investment with eligible expenditure of € 100 million could receive, applying the standard

aid ceiling in force for large enterprises in the approved regional aid map on the date the aid has been granted ⁽¹⁴⁾.

Under the transparency mechanism, whenever regional aid is granted on the basis of existing aid schemes ⁽¹⁵⁾ for non-notifiable large investment projects, Member States must, within 20 working days starting from the granting of the aid by the competent authority, provide the Commission with the information requested in the standard form laid down in Annex III ⁽¹⁶⁾ to the MSF 2002, respectively the RAG 2007-2013 ⁽¹⁷⁾. Summary information is then published on the DG Competition website (http://ec.europa.eu/competition/index_en.html) ⁽¹⁸⁾.

Additional to this more ‘systematic’ monitoring, the Commission can of course always request information on a particular case (*ex officio*, on the basis of a complaint...). Member States are obliged to maintain detailed records regarding the granting of aid for all large investment projects, and such records must be maintained for 10 years from the date on which the aid was granted ⁽¹⁹⁾.

Objectives of the transparency system

The objective of the transparency system is to reduce the administrative burden put on Member States, by reducing the number of notifications and installing a much lighter administrative procedure, but at the same time to ensure transparency and effective control of state aid to large regional investment projects. The internet publication of the summary information gives third parties a basis to comment and allows potential complainants to inform the Commission on aid received by competitors not appearing in the published lists.

⁽¹¹⁾ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

⁽¹²⁾ Point 24 of the MSF 2002, respectively paragraph 64 of the RAG 2007-2013. Point 24 of the MSF 2002 however does not apply to the motor vehicle sector. Under the MSF 2002, for aid granted before 2007, in this sector, only individual *ad hoc* aid had to be notified and the transparency system applied to all regional aid for large investment projects which was granted under existing aid schemes.

⁽¹³⁾ Point 24(a) and (b) of the MSF 2002, respectively paragraph 68 of the RAG 2007-2013. Under the MSF 2002, no aid (above the maximum aid for an investment with eligible expenditure of € 100 million) could be given if the market share of the beneficiary exceeded 25% or if the project increased the capacity on a market in relative decline with more than 5%. Under the new rules, these thresholds are used to trigger an in-depth assessment where several factors can be taken into account and used in a balancing test. The aid can be allowed if the incentive effect is clear and if the benefits of the aid outweigh the distortion of competition and effect on trade of the aid.

⁽¹⁴⁾ Under the MSF 2002, in the motor vehicle sector, the transparency system applied to all regional aid for large investment projects which was granted under existing aid schemes (see also footnote 12).

⁽¹⁵⁾ Individual aid granted outside approved schemes (*ad hoc* aid) always has to be notified to the Commission.

⁽¹⁶⁾ The standardized reporting form is also available in Excel format on the DG Competition website: http://ec.europa.eu/competition/state_aid/legislation/forms.cfm

⁽¹⁷⁾ The information sheets are registered at the Commission with a code ‘MF’ that is followed by a number (e.g. MF 45/2006, for case number 45 registered in the year 2006).

⁽¹⁸⁾ Unlike for aid granted in accordance with block exemption regulations, the information is not to be published in the Official Journal.

⁽¹⁹⁾ Point 37 of the MSF 2002, respectively paragraph 66 of the RAG 2007-2013.

Screening of transparency cases

Once a Member State has sent the information to the Commission, DG Competition verifies the case and checks whether the aid complies with the applicable rules and the relevant Commission decisions on the applied aid scheme(s) and commitments accepted by the Member state under relevant appropriate measures' exercises.

DG Competition will check the following:

- 1) Is the information given in the information sheet complete? If necessary, additional information or clarification will be requested from the Member State.
- 2) Does the case fall under the transparency procedure for regional aid to large investment projects?
 - a) Do the eligible costs exceed € 50 million ⁽²⁰⁾?
 - b) Is the case a case of application of one or several existing aid schemes within their period of validity and does it not require notification pursuant to the notification requirement laid down in Article 88(3) of the EC Treaty for any new aid?
 - c) Are the product(s) or services not belonging to sectors excluded from regional aid?
 - d) Does the total amount of aid exceed the individual notification threshold ⁽²¹⁾? If so, the Commission will inform the Member State that the transparency mechanism does not apply, and transfer the case to the register of NN-cases (non-notified aid), for further investigation.
- 3) Are all conditions of the applied aid scheme(s) respected (including those resulting from appropriate measures pursuant to Article 88(1) of the EC Treaty ⁽²²⁾)?
 - a) Are the eligible costs indicated in the information sheet in line with the applied aid scheme?
 - b) Is the aid given (gross grant equivalent) under the individual scheme(s) applied in line with the aid intensity ceiling(s) allowed under the individual scheme(s), taking into account that this aid intensity has to abide for all sectors with the reduced aid intensity ceiling that applies under point 21 of the MSF 2002, respectively paragraph 67 of the RAG 2007-2013?

- c) Is the total amount of aid resulting from the combination of several aid schemes in line with the cumulation rules ⁽²³⁾ and with the reduced aid intensity ceiling that applies under point 21 of the MSF 2002, respectively paragraph 67 of the RAG 2007-2013?
- d) Are the following conditions attached to the payment or the award of the aid?
 - i) The investment or the employment created has to be maintained in the region for a minimum period of five years after its completion (three years for SMEs).
 - ii) The aid recipient's own contribution to the financing of the investment project is at least 25% of the eligible costs.
 - iii) The aid has been applied for by the beneficiary before the investment project was started.
 - iv) Following the entry into force of the RAG 2007-2013, the Commission also verifies that the authority responsible for administering the aid scheme has subsequently confirmed in writing that the project in principle meets the conditions of eligibility laid down by the scheme, or the aid was awarded on the basis of legal provisions giving the beneficiary the legal right to aid according to objective criteria and without further exercise of discretion by the Member State.

Green-lighting of transparency cases

When no problems arise from this screening, the summary information is made available to the public through the DG Competition website (http://ec.europa.eu/competition/index_en.html).

If this verification does not permit to confirm the compliance, the case is transferred to the register of CP-cases (complaints and presumed cases of notifiable aid) and its assessment continued under the standard procedures applicable to these cases. If the CP-examination does not confirm the initial doubts, the CP-case is closed, and the case is retransferred to the MF-register and green-lighted for publication.

⁽²⁰⁾ Present value at the date of granting.

⁽²¹⁾ Point 24 of the MSF 2002, respectively paragraph 64 of the RAG 2007-2013.

⁽²²⁾ For aid granted under existing aid schemes in force before 2007.

⁽²³⁾ Points 4.18 to 4.21 of the RAG 1998, respectively section 4.4 of the RAG 2007-2013.

If there is clear evidence that the applicable rules have not been respected, the case is registered as NN-case, and its assessment continued under the standard rules for unlawful aid.

State of play end August 2007

At the time of writing (end August 2007), since the introduction of the transparency mechanism in 2003, the Commission received some 150 standard information sheets, reporting a total aid amount close to € 2.9 billion, for a total eligible investment cost of some € 15 billion, with an average aid intensity of about 20%. Amounts of aid granted range from € 1 million to € 70 million.

The table below gives an idea of the evolution of the system over the years of its applicability.

In 2003, the transparency system only applied to the motor vehicle sector. Until end 2006, in this sector, regional aid granted under existing aid schemes was exempted from individual notification. It is therefore not surprising that more than 20% of the transparency cases relating to aid granted before 2007 concern the manufacture of motor vehicles or parts and accessories for motor vehicles and their engines ⁽²⁴⁾. These cases represent a total aid amount of approximately € 780 million (about 27% of the total aid granted for the 150 transparency cases). The prevalence of cases in this sector in the start years of the transparency mechanism is also an explanation for the higher average aid amounts per case in the years 2003-2004, as these cases were exempted from notification, and very large investments are not unusual in this capital-intensive sector. For most of the car sector cases, the eligible expenses exceed € 100 million (but aid is limited to 30% of the standard regional aid ceiling).

There are also 32 cases outside the car sector for which the eligible expenses exceed € 100 million. Aid for these projects could fall under the transparency system because the aid amount was below the notification threshold (75% of the maximum amount of aid an investment with eligible expenditure of € 100 million could receive, applying the standard aid ceiling). For 13 of these cases, Member States granted the maximum aid just below the notification threshold.

Outside the motor vehicle sector, the main sectors concerned are:

- manufacture of electrical, optical and medical equipment (22 cases, of which 7 related to the production of solar wafers, cells and/or modules);
- manufacture of chemicals (18 cases);
- energy sector (electricity, gas, coke, petroleum, biofuels: 17 cases);
- wood and paper sector (15 cases).

The table reflects the normal 'business cycle' related to the introduction of new rules. As the MSF 2002 implied a significant reduction of the admissible aid intensities for regional aid to large investment projects, and Member States were not familiar with these new rules, a large number of cases were notified before 2003-2004 (under the MSF 1998), which explains the 'slow' start of the transparency system. A similar attitude is observed in the context of the new RAG 2007-2013: Member States granted aid to a large number of regional investment projects just before the expiry of the MSF 2002 (54 transparency sheets submitted to the Commission in 2006, and 49 still based on the MSF 2002 submitted in 2007).

Submission year	Number of cases	Number of cases in car sector	Total aid amount (in €)	Average aid per case (in €)
2003	1*	1	29.145.135	29.145.135
2004	14*	10	398.994.821	28.499.630
2005	20	5	346.372.518	17.318.626
2006	54	5	901.233.154	16.689.503
2007 (to end Aug)	61**	10***	1.181.301.688	19.365.601
Total	150	31	2.857.047.316	19.046.982
* Not included: one case which was transferred to the NN-register because it related to ad hoc aid.				
** State of play end August 2007. Of these 61 information sheets, 49 refer to aid granted before end 2006 (on the basis of the RAG 1998 and the MSF 2002).				
*** All but one of these cases refer to aid granted before end 2006 (on the basis of the RAG 1998 and the MSF 2002).				

⁽²⁴⁾ Prodcom codes 34.30 and 34.10.

The following table gives an overview of the situation per Member State. The largest numbers of cases are submitted by Spain, Germany and Hungary (together 83 of the 150 cases, for a total aid of about € 1.7 billion). Spain and Italy total-

ize half of the car sector cases. The largest average aid amounts are observed in Member States which have the poorest regions and hence higher standard regional aid ceilings.

Member State	Number of cases	Number of cases in car sector	Total aid amount (in €)	% of aid per Member State	Average aid per case (in €)
AT	1	1	14.080.000	0,49	14.080.000
BE	5	0	49.489.000	1,73	9.897.800
CZ	11	3	344.652.000	12,06	31.332.000
DE	29	1	645.107.348	22,58	22.245.081
ES	30	10	510.127.467	17,86	17.004.249
FR	5	0	46.497.095	1,63	9.299.419
HU	24	2	535.411.748	18,74	22.308.823
IE	11	0	92.120.456	3,22	8.374.587
IT	6	6	167.643.000	5,87	27.940.500
NL	1	0	8.762.000	0,31	8.762.000
PL	7	0	38.609.277	1,35	5.515.611
PT	10	2	289.397.356	10,13	28.939.736
SE	1	1	4.910.000	0,17	4.910.000
UK	9	5	110.240.569	3,86	12.248.952
Total	150	31	2.857.047.316	100,00	19.046.982

Conclusion

Did the transparency system meet its objectives?

One of the objectives of the introduction of the transparency system was to reduce the administrative burden put on Member States. Under the former MSF 1998, most of the actual transparency cases would have required notification, which means completing much more detailed notification forms than the summary information sheet requested under the transparency mechanism, and a longer approval procedure. The reaction time in case of anomalies is faster: where the screening shows errors, Member States can easily proceed to auto-correction.

The system also has an effect on the workload within the Commission. Compared to the procedure resulting in the adoption of a Commission decision, the screening of a transparency case is a much lighter process. This allows the Commission to concentrate on more important and potentially more distortive cases of regional aid to large investment projects.

As for the objective 'transparency', the publication of the summary information on the DG Competition website indeed sometimes leads to reactions from competitors, sectoral bodies or other stakeholders, varying from questions related to the respect of the aid amount/intensity or sectoral aspects, to information or complaints on aid granted to projects which do not appear in the green-lighted lists.

Further development of the transparency system?

The transparency system for aid to large investment projects revealed to be an effective tool for the monitoring of State aid, at the same time allowing a substantial reduction of the number of notifications. This is why the new Community Framework for State aid for Research, Development and Innovation ⁽²⁵⁾ in its point 10.1.3 has introduced a very similar system of information sheets for large R&D&I projects involving aid above € 3 million but below the threshold for individual notification.

⁽²⁵⁾ OJ C 323, 30.12.2006, p. 1.

Facing the challenges of globalisation: aid to outward foreign direct investment projects (cases Cordex, Orfama and Djebel)

Graça DA COSTA ⁽¹⁾

Introduction

State support to outward foreign direct investment projects (FDI) may fall under EU State aid rules and be considered incompatible with the common market. This is notably the case if it is not proven that the aid is necessary for its recipients to carry out the outward FDI projects at stake, and that its positive effects for the internationalization of the EU industry concerned outweigh its negative effects on competition and trade in the EU. In three recent decisions concerning aid to outward FDI, *Cordex* ⁽²⁾, *Orfama* ⁽³⁾ and *Djebel* ⁽⁴⁾, the Commission concluded that the aid did not fulfil these criteria and could thus not be approved.

The issue of aid to outward FDI arises in the context of globalisation. As barriers to markets fall, companies seek to internationalize in order to become more competitive in both the domestic and international markets. A number of Member States have thus put in place national aid schemes for encouraging the internationalization of their enterprises.

Since the late 90's, however, the Commission has made it clear that aid to outward FDI projects may affect competition and trade on the EU market. In a number of decisions ⁽⁵⁾ the Commission acknowledged the importance of foreign direct investment for strengthening links with third countries and for diversifying and internationalizing the European industry, however, the

Commission also noted that these factors should be balanced against any negative impact of the aid on the EU market. The Commission noted in this context that aid for foreign direct investment is likely to strengthen the beneficiary's overall financial and strategic position and thus affect its relative position to competitors on the EU market ⁽⁶⁾.

The three recent decisions concerning *Cordex*, *Orfama* and *Djebel* confirm this policy and follow the objectives contained in the State Aid Action Plan, whereby aid cannot be authorized unless it is proven that the aid is justified by a Community interest (e.g. a market failure), that the aid is necessary and proportionate and that the positive effects of the aid for the internationalization of the EU industry concerned outweigh its negative effects on competition and trade in the EU. In all three cases the Commission found that the aid was not necessary for the recipients to carry out the projects concerned and was likely to have a significant impact on the EU market. In particular, the aid would likely strengthen the position of the beneficiaries on the EU market to the detriment of competitors not receiving aid. Therefore, the aid only had a distortion effect on competition without contributing to the development of the economic activities concerned in the EU and could not be authorized.

The following examines the criteria used by the Commission for assessing aid to outward foreign direct investment projects and explains how these criteria applied to the three recent cases mentioned above.

State aid rules apply in principle to aid to outward FDI

Since its early decisions the Commission acknowledged that aid financing a FDI project of a company *"at least partially also strengthens its position on the home market vis-à-vis enterprises which do not receive aid to carry out those activities. Moreover, enterprises located in the European Economic Area may also compete with each other for investment abroad. Therefore, any aid exceeding the de minimis threshold must be considered to distort"*

⁽¹⁾ Directorate-General for Competition, unit E-3. The content of this Article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Case C 36/2004, decision of 21.2.2007, (OJ L 156 of 16.06.2007, p. 23)

⁽³⁾ Case C 41/2004, decision of 07.3.2007, (OJ L 183, of 13.7.2007, p. 46)

⁽⁴⁾ Case C 04/2006, decision of 10.5.2007, (OJ L 219, of 24.8.2007, p. 30)

⁽⁵⁾ Decision concerning guarantees of the Land Brandenburg (Germany) for investment projects in Poland, (OJ L 102, 19/04/1997, p. 36); decision of 5 June 1996 concerning aid that the Republic of Austria intends to grant under the ERP internationalization scheme, (OJ L 96, 11/04/1997, p. 15); decision of 5 June 1996 concerning aid that the Republic of Austria intends to grant pursuant to the ERP Eastern Europe programme, (OJ L 96, 11/04/1997, p. 23).

⁽⁶⁾ See Case C 77/99-Austrian Lift GmbH-Doppelmayr (OJ L 142, 5.6.1999, p. 32).

or at least threaten to distort competition between EEA enterprises” (7). The same holds true for the effects on trade.

The aid can affect intra-Community trade in two ways:

- The goods are directed to the foreign local market and are not exported to the Community but the beneficiary of the aid reinforces its position in the EU and thereby gains and advantage vis-à-vis competitors that do not receive aid;
- The goods produced abroad following the foreign direct investment project are exported to the EU and compete directly with Community goods.

The EU Court Justice has upheld the Commission’s position on this subject. The Court noted in particular that “(...)having regard to the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community (...)” (8). It is true that more recently, the Court of First Instance annulled a decision concerning aid granted by Italy for the internationalization of activities of an Italian company (WAM) for lack of motivation on the effect on trade in the EU (9). However, this judgement is linked to the specificities of the case and it appears that the Court did not intend to raise the standard of proof concerning the impact on competition and trade of aid measures concerning activities outside the EU. The Commission has filed an appeal, which is pending (10).

When can the aid be considered compatible?

The Commission in principle considers positively aid to outward FDI that pursues a clearly identified Community objective and complies with the conditions of existing guidelines or frameworks. This is the case of aid to small and medium sized enterprises (SME). SME play an important role in the economic and social life of Europe and there are market imperfections impeding their development. The market failures impeding the development of SME being (at least) the same, whether their activities take place in Europe or abroad, aid to SME is justified in both cases. The Commission

has thus approved a number of national schemes concerning aid to outward FDI investments of SME on the basis of the “SME Guidelines” (11).

Criteria for approving aid to large companies on FDI projects

In the absence of specific guidelines allowing it to assess aid to FDI projects of large enterprises the Commission bases its assessment directly on Article 87(3) (c) of the EC Treaty. This exempts aid that facilitates the development of certain economic activities if it does not adversely affect trading conditions to an extent contrary to the common interest.

The number of cases of aid to large enterprises for FDI projects has, however, been very limited. The Commission has so far only received 5 individual notifications (12). With the exception of the Vila Galé case, where the Commission authorized aid for an investment for a hotel in Brazil, based on the weak position of the beneficiary on the market and the fact that it was its first internationalization experience, a strict approach has been followed in all other cases. Thus, in the LiftgmbH case, which concerned an investment by a ropeway-producer in China, the Commission took a negative decision based on the lack of incentive effect of the aid. The Doppelmayr group, in which LiftgmbH was integrated, was already present in several markets, including China, where it had started production of ropeways in rented facilities prior to applying for the aid. It was therefore not demonstrated that the aid was necessary to further the internationalization process of the Doppelmayr group.

The approach followed in Cordex, Orfama and Djebel

A similar approach was followed in the three decisions concerning investments by Portuguese companies in Brazil (*Cordex* and *Djebel*) and Poland (*Orfama*). In these cases the Commission examined in particular, whether the aid was necessary in view of the international competitiveness of the EU industry concerned and/ or in view of the risks involved for investment projects in certain third countries, and assessed the balance between the negative and positive aspects of the aid in the EU.

(7) See para. 23 of the decision concerning the Austrian ERP internationalization scheme and para. 21 of the decision concerning the ERP Eastern Europe programme.

(8) Case C-142/87, “Tubemeuse”, ECR 1990, I-959, para. 35

(9) Joint Cases T-304/04 et T-316/04, not yet published.

(10) Case C-494/06 P.

(11) These schemes are mentioned in footnote 4 above, to which should be added decision N 96/99, concerning fiscal aid for internationalization projects of Portuguese companies (OJ C 375 of 24.12.1999, p.4). These decisions authorize aid to FDI projects of SME but request individual notification for aid to large enterprises.

(12) C 77/1997, LiftgmbH, (OJ L 142 of 5.6.1999, p 32), C 47/02, Vila Galé (OJ L 61 of 27.2.2004, p.76), C 36/2004, Cordex, C 41/2004, Orfama, and C 04/2006, Djebel (footnotes 2-4 above).

Cordex

Cordex is a producer of ropes and twines that invested in a new production unit in Brazil (*Cordebras Lda*) for producing baler twine (sisal). Portugal notified to the Commission its intention to grant Cordex a fiscal incentive amounting to EUR 401,795. However, the Commission found that other producers competing with Cordex had also invested in Brazil and, in particular, one other Portuguese producer had conducted a similar investment in Brazil without requesting State aid. Cordex had completed the project with own resources and by resorting to commercial loans. There was, thus, no evidence of any general market deficiency associated with this type of project that would prevent Cordex or its competitors from investing in Brazil without State support. In addition, the aid was likely to have a significant impact on the EU market, given that a great proportion of the Brazilian product would be imported in the EU. On the basis of the above there was no evidence suggesting that granting aid to Cordex in respect of its investment in Brazil could help to improve the competitiveness of the European industry concerned. The aid would likely strengthen the position of Cordex on the EU market but to the detriment of competitors not receiving aid.

Orfama

Orfama is a producer of fashion knitwear. The project concerned the acquisition by Orfama of two companies, also involved in the clothing and knitwear business, located in Poland. Portugal notified to the Commission its intention to grant Orfama a fiscal incentive of EUR 921,752. However, as in the case of Cordex, the Commission found that the aid had no incentive effect for the company to carry out the project. Orfama concluded the project even before applying for aid, thus not complying with the “incentive effect” criteria normally required by State aid rules ⁽¹³⁾. In addition, Orfama had already started producing garments under a subcontracting regime with these companies several years before acquiring the companies, so it was familiar with both the Polish and neigh-

bouring markets as well as with the functioning of these companies. The investment was essentially a financial operation that consolidated a previously existing commercial relationship and it was not demonstrated that the aid was necessary to compensate for any specific risks associated with the project.

Djebel

The Djebel case also concerned an investment for a hotel in Brazil. However contrary to the Vila Galé case (see above) this was not the first internationalization of the beneficiary, which is part of a group (the Pestana group) that has a significant position in the Portuguese market. Portugal notified aid amounting to EUR € 574 466 to help finance the project. However, the investment took place in 1999 and the request for aid was only submitted in 2000. Portugal only notified the aid in 2005. Any aid granted now for an investment that took place several years ago was unlikely to have any practical link with the investment anymore. The beneficiary had in the meantime expanded its activities. There was therefore no reason to believe that the aid was necessary for the beneficiary to carry out the project or that the aid would contribute to the international competitiveness of the EU tourism industry. The aid would favour its beneficiary vis-à-vis its competitors without counter positive effects for the EU.

Conclusion

In assessing aid to outward FDI projects the Commission examines whether the positive effects of the aid outweigh its negative effects on competition and trade in the EU. With the exception of Vila Galé, the Commission has taken a strict approach on aid to support FDI by large companies in so far as it could not be proven that the aid was necessary to facilitate the development of certain economic activities without adversely affect trading conditions in the sense of Article 87(3) (c) Treaty. However, where the aid to outward FDI is justified by a clear Community interest, such as the development of SME, the Commission has taken a positive approach.

⁽¹³⁾ See para. 38 of the Guidelines on National regional Aid for 2007-2013: «It is important to ensure that regional aid produces a real incentive effect to undertake investments which would not otherwise be made (...) Therefore aid may only be granted (...) if the beneficiary has submitted an application for aid (...) before the start of work on the project (OJ L 54 of 4.3.2006, p.13).

Soutien de l'agence française de l'innovation industrielle au programme TVMSL: deuxième aide individuelle approuvée en application du nouvel encadrement communautaire des aides d'État à la recherche, au développement et à l'innovation

Jean-Charles DJELALIAN et Isabelle NEALE-BESSON ⁽¹⁾

Deux articles parus dans la première et la deuxième éditions du 2007 de la *Competition Policy Newsletter* présentaient respectivement le nouvel encadrement communautaire des aides d'État à la recherche, au développement et à l'innovation (l'encadrement R&D&I) ⁽²⁾ applicable depuis le 1^{er} janvier 2007 et la première décision individuelle prise sous cet encadrement, à savoir le soutien de l'Agence française de l'innovation industrielle au programme «NeoVal». Le 10 mai 2007, la Commission a approuvé une deuxième aide individuelle sous cet encadrement; celle-ci avait été notifiée par la France le 21 décembre 2006. Tout comme NeoVal, il s'agit d'une aide attribuée dans le cadre du régime de soutien de l'Agence de l'innovation industrielle, approuvé par la Commission le 19 juillet 2006 ⁽³⁾.

Le programme de R&D TVMSL (pour télévision mobile sans limite) vise à améliorer la diffusion de la télévision sur téléphones mobiles. La solution proposée se distinguera de celles existantes par le nombre de chaînes disponibles, par la qualité de la réception, en particulier à l'intérieur des bâtiments et par une couverture géographique étendue. Le recours à un satellite permettra en effet d'atteindre des zones non couvertes actuellement. Les travaux de R&D s'étendront sur trois ans et la solution issue de TVMSL devrait être disponible courant 2009. Le programme, coordonné par la filiale française d'Alcatel-Lucent, réunit trois organismes publics de recherche et sept entreprises relevant de divers secteurs d'activités (satellite, infrastructure de réseaux terrestres, téléphonie mobile et semi-conducteurs), tous implantés en France. Le coût total du programme s'élève à 98,4 millions d'euros et le soutien proposé par l'Agence de l'innovation industrielle représente 37,5 millions d'euros. Il est composé de 16,0 millions d'euros de subventions et de 21,5 millions

d'euros d'avances récupérables par la France uniquement en cas de succès du projet.

Conformément au point 7.1 de l'encadrement R&D&I ⁽⁴⁾, le cas fait l'objet d'un examen approfondi. Dans le cadre de cet examen, la Commission met en balance les effets positifs et négatifs de l'aide décrits respectivement aux points 7.3 et 7.4 de l'encadrement. D'un côté, la Commission doit examiner si l'aide remédie à une défaillance du marché clairement identifiée, si elle est un moyen d'action adapté et si elle est nécessaire et proportionnée. De l'autre, elle doit analyser les distorsions de concurrence et des échanges sur les marchés affectés. L'examen de l'aide proposée pour le programme TVMSL a soulevé des questions méthodologiques sur la définition du périmètre de l'examen approfondi, sur l'identification des défaillances de marché et sur l'évaluation de l'ampleur des distorsions induites. L'approche suivie par la Commission pour aborder ces questions est développée ci-après.

1. Périmètre de l'examen approfondi

Les coûts éligibles du programme TVMSL étant composés à 63% par des activités de développement expérimental, seuls les bénéficiaires recevant plus de 7,5 millions d'euros doivent faire l'objet d'un examen approfondi par la Commission. Dans le cas d'espèce, Alcatel-Lucent qui recevra 19,9 millions d'euros d'aide est l'unique partenaire à dépasser ce seuil. La Commission s'est interrogée sur la nécessité d'intégrer dans le champ de son examen approfondi Thales Alenia Space qui reçoit 5,7 millions d'euros d'aide. En effet, 67% du capital d'Alcatel Alenia Space (AAS), aujourd'hui nommée Thales Alenia Space (TAS), appartenait au groupe Alcatel ⁽⁵⁾ lorsque le programme TVMSL a été conçu.

⁽¹⁾ Direction générale de la concurrence unités H-2 et TF. Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leurs auteurs.

⁽²⁾ JO C 323 du 30.12.2006, p. 1.

⁽³⁾ Lettre SG(2006)D/204076 du 20.7.2006; JO C 218 du 9.9.2006, p. 9. Voir l'édition d'automne 2006 (n° 3) de la *Competition Policy Newsletter* à ce sujet.

⁽⁴⁾ Le point 7.1 prévoit que les aides aux projets de R&D, d'un montant supérieur à un certain seuil qui dépend de la nature des activités menées, doivent faire l'objet d'un examen approfondi. Si le projet consiste à titre principal en de la recherche fondamentale, le seuil s'élève à 20 millions d'euros par entreprise et par projet; si le projet consiste à titre principal en de la recherche industrielle, le seuil s'élève à 10 millions d'euros par entreprise et par projet; pour tous les autres projets, le seuil s'élève à 7,5 millions d'euros par entreprise et par projet.

⁽⁵⁾ La fusion entre Alcatel et Lucent a été approuvée par la

S'agissant tout d'abord de l'analyse par la Commission de l'effet incitatif de l'aide, qui vise à vérifier qu'Alcatel-Lucent ne conduirait pas le programme TVMSL sans aide, il est nécessaire de considérer l'entreprise dans sa configuration initiale, avant sa décision de mener le programme. En outre, les autorités françaises ont remis à la Commission le compte-rendu du Comité exécutif d'Alcatel réuni le 27 septembre 2005 où il a été décidé d'étudier la faisabilité du programme TVMSL et d'obtenir un soutien externe. Ce document mentionne les bénéfices de TVMSL pour les activités terrestres et satellites d'Alcatel. À ce titre, la Commission ne peut exclure que la décision d'Alcatel-Lucent de lancer TVMSL n'ait été influencée par les perspectives du programme pour les activités satellites. En outre, et à la différence d'Alcatel-Lucent, la diffusion de la télévision est stratégique pour AAS: l'entreprise a par exemple déjà participé à plusieurs projets de R&D portant sur la même thématique et les revenus qui seront générés par TVMSL sont significatifs en comparaison avec le chiffre d'affaires d'AAS.

Il est néanmoins discutable d'inclure les activités satellites dans les paramètres de la décision d'Alcatel-Lucent de mener le programme TVMSL dans la mesure où, à la date de la cession des parts détenues par Alcatel dans AAS ⁽⁶⁾, le programme n'avait pas été sélectionné par l'Agence de l'innovation industrielle ⁽⁷⁾ et il n'avait pas démarré ⁽⁸⁾. En outre, il n'est pas évident qu'Alcatel-Lucent bénéficiera effectivement de l'aide accordée à TAS. Néanmoins, la Commission a par précaution considéré les activités terrestres et satellites conjointement, afin d'analyser les opportunités et les risques du programme TVMSL et de conclure sur l'effet incitatif de l'aide octroyée à Alcatel-Lucent.

S'agissant ensuite de l'impact sur la concurrence et les échanges, la Commission n'est pas tenue de réaliser cette analyse pour l'aide reçue par TAS car le point 7.4 de l'encadrement R&D&I indique que l'analyse de la distorsion est prospective et, au moment de la décision de la Commission, Alcatel-Lucent ne contrôlait plus TAS. La Commission a cependant vérifié par précaution encore, que l'aide octroyée à TAS avait un impact limité sur les marchés affectés.

2. Défaillance de marché

L'encadrement R&D&I indique que les aides d'État peuvent se révéler nécessaires pour renforcer la R&D dans l'économie uniquement dans la mesure où le marché seul ne génère pas un résultat optimal. L'encadrement R&D&I établit que certaines défaillances de marché entravent le niveau global de R&D dans la Communauté mais que toutes les entreprises ne sont pas confrontées de la même façon auxdites défaillances. Pour les aides soumises à un examen approfondi, les défaillances de marché spécifiques rencontrées par les bénéficiaires doivent être établies. Dans le cas d'espèce, les autorités françaises ont identifié plusieurs défaillances de marché faisant obstacle à la réalisation du programme TVMSL.

Prima facie, l'existence d'une défaillance de marché spécifique au programme est contestable car la télévision mobile sans limite est déjà une réalité. En effet, si les technologies existantes et adaptées aux marchés européens souffrent de limitations techniques empêchant une bonne couverture, une solution combinant satellite et réseau terrestre comme TVMSL est déjà disponible au Japon et en Corée du Sud. Cependant, cette solution propriétaire est basée sur un format de modulation particulier et elle utilise une bande de fréquence et une bande passante qui ne sont pas adaptées au plan de fréquences européen (la solution TVMSL reposera sur un standard ouvert et une technologie différente, elle fonctionnera sur une autre bande de fréquence). La Commission a noté que la solution existante n'avait pas été adaptée par ses propriétaires ou par d'autres entreprises pour pénétrer les marchés européens. La Commission a estimé que cette attitude pouvait être la conséquence de défaillances de marché spécifiques à l'Europe que rencontraient aussi les partenaires du programme TVMSL. L'Europe n'est en effet pas comparable au Japon et à la Corée du Sud dans la mesure où les services de diffusion de télévision sont fragmentés entre les États membres du fait de la multiplicité des langues et des plans de fréquences.

Aussi, malgré l'existence de services similaires ailleurs dans le monde, la Commission a conclu que le programme TVMSL pouvait souffrir de défaillances de marché spécifiques à l'Europe. L'examen a montré que le marché européen de la télévision mobile était encore émergent et ne suscitait pas spontanément les partenariats nécessaires pour réaliser la télévision mobile sans limite. L'aide permet donc de répondre aux défaillances de marché qui font entrave à la mise en place rapide d'une coordination structurée entre constructeurs de satellites, d'infrastructures de réseaux terrestres, de téléphones mobiles et de semi-conducteurs.

Commission le 24 juillet 2006 (cas M.4214 — Alcatel / Lucent Technologies).

⁽⁶⁾ Le Conseil d'administration de Thales a décidé d'acquiescer les parts d'Alcatel-Lucent dans AAS le 4 avril 2006. La fusion a été approuvée par la Commission le 4 avril 2007 (cas M. 4403 — Thales / Finmeccanica / AAS / Telespazio).

⁽⁷⁾ Le programme TVMSL a été sélectionné par l'Agence de l'innovation industrielle le 19 avril 2006.

⁽⁸⁾ Le programme a été lancé le 1^{er} mai 2006.

3. Distorsion de la concurrence et des échanges

L'aide reçue par Alcatel-Lucent va financer le développement des répéteurs constituant le réseau terrestre de la solution TVMSL. Ces produits relèvent du marché des infrastructures de diffusion hertzienne de télévision mobile. Il n'a pas été nécessaire que la Commission se prononce sur la dimension géographique de ce marché car son analyse a montré que l'aide pouvait être déclarée compatible, qu'elle soit nationale ou européenne.

Plusieurs études annoncent un succès important pour la télévision mobile avec des revenus mondiaux compris entre 10 et 30 milliards d'euros dès 2010 dont 1 milliard d'euros pourrait revenir aux fournisseurs d'infrastructures. Selon des prévisions de déploiement des différentes technologies dans cinq États membres (Allemagne, Espagne, France, Italie, Royaume-Uni) remises par les autorités françaises, les infrastructures issues de TVMSL représenteraient dès 2010 globalement 68% des infrastructures de diffusion hertzienne de télévision mobile installées dans ces cinq États membres et Alcatel-Lucent pourrait fournir 40 à 50% de ces infrastructures. Sur le segment des répéteurs DVB-SH proprement dit, les autorités françaises prévoient que la part d'Alcatel-Lucent sur les équipements commercialisés chaque année en Europe serait initialement de 60 à 80% en 2008, cette part diminuant progressivement pour atteindre 30 à 50% en 2015. Alcatel-Lucent prévoit donc de gagner une part de marché significative grâce à l'aide. Cependant, sur des marchés émergents qui enregistrent un développement rapide, une importante part de marché n'est pas forcément révélatrice d'entraves au fonctionnement concurrentiel des marchés. Le point 7.4 de l'encadrement R&D&I indique que les aides à la R&D peuvent fausser la concurrence et les échanges de trois manières distinctes:

1. elles peuvent fausser les incitants dynamiques des opérateurs à investir;
2. elles peuvent créer ou maintenir des positions de pouvoir de marché;
3. elles peuvent perpétuer une structure de marché inefficace.

S'agissant de la distorsion des incitants dynamiques, la Commission a estimé que les concurrents d'Alcatel-Lucent devraient maintenir ou même augmenter leurs plans d'investissement dans les marchés affectés par l'aide. En effet, la solution issue de TVMSL sera introduite en complément des services déjà proposés qui répondront aux premières demandes du marché. Elle permettra de couvrir des zones géographiques moins

denses et elle offrira des chaînes supplémentaires. Par conséquent, TVMSL devrait conduire à une augmentation de la taille des marchés.

Par ailleurs, la Commission a considéré qu'Alcatel-Lucent ne devrait pas acquérir de pouvoir de marché et ce malgré les prévisions de parts de marché. D'une part, actuellement, Alcatel-Lucent n'est pas actif sur les marchés affectés par l'aide. Il s'agit donc d'un nouvel entrant et ses concurrents bénéficieront d'un avantage temporel leur permettant d'être établis lorsqu'Alcatel-Lucent commencera à commercialiser sa solution. D'autre part, les produits issus de TVMSL seront conformes au standard DVB-SH⁽⁹⁾. Ce standard a été développé par les partenaires du programme pendant les dix premiers mois de TVMSL. Il s'agit d'une évolution du DVB-H⁽¹⁰⁾, standard utilisé par des solutions en cours de déploiement en Europe. Le nouveau standard a été approuvé par le forum DVB⁽¹¹⁾ le 14 février 2007 et depuis, il est accessible à tous les acteurs du marché. Comme tous les membres du forum DVB, Alcatel-Lucent s'est engagé à accorder à toute partie tierce, dans des termes justes, raisonnables et non discriminatoires des licences pour les éventuels droits de propriété intellectuelle nécessaires pour la mise en œuvre des spécifications agréées. En conséquence, Alcatel-Lucent ne détiendra pas de brevet fondamental opposable au standard DVB-SH et il ne sera pas en mesure de construire des barrières à l'entrée des marchés visés. Les autorités françaises prévoient d'ailleurs que dès 2008, avant même l'issue du programme TVMSL, au moins 20% des répéteurs DVB-SH commercialisés en Europe seront vendus par des concurrents d'Alcatel-Lucent.

Enfin, la Commission a constaté que l'aide n'entretenait pas de structures de marché inefficaces.

Elle a donc conclu que l'aide au programme de R&D TVMSL ne serait pas de nature à perturber le fonctionnement concurrentiel des marchés affectés dans une proportion contraire à l'intérêt commun.

⁽⁹⁾ DVB est l'acronyme de «Digital Video Broadcasting»; SH signifie «Satellites to Handhelds».

⁽¹⁰⁾ Pour «Handheld DVB». Le DVB-SH utilise la bande S (bande de fréquence de 2,2 GHz) alors que le DVB-H utilise la bande UHF (bande de fréquence entre 470 et 830 MHz).

⁽¹¹⁾ Le forum DVB est un consortium coordonné par l'industrie qui élabore des standards de portée mondiale pour la transmission de la télévision et des données numériques.

State aid aspects of the EU Emission Trading Scheme: the second trading period

Anne Theo SEINEN ⁽¹⁾

1. The second trading period for EU-ETS

The first trading period of the EU Emission Trading Scheme ⁽²⁾ runs from 1.1.2005 to 31.12.2007. Competition Policy Newsletter of Spring 2005, p.16, explained the system and commented on the State aid aspects. Cornerstones of the implementation are the so-called National Allocation Plans (NAPs). These plans establish the total number of emission allowances Member States plan to allocate and the methods of allocating them to the different installations involved. They must ensure scarcity in the market, which is necessary to make the system function and to achieve the objectives of reducing emissions. They must also ensure a non-distortive distribution. In Spring 2006, the verified emission data made clear that many of the NAPs for the first trading period failed on the first objective: emissions turned out to be significantly lower than originally expected and the price of CO₂ allowances plummeted to levels of just a few cents.

Member States had to notify the NAPs for the second trading period, 2008-2012, by 30 June 2006. Although many NAPs arrived much later, the Commission has now adopted decisions on all of them. This article comments on the experiences gained.

2. Existence of State aid

As in the first trading period, the Commission assesses the State aid aspects of the NAPs in the context of the assessment under the emission trading Directive. The decisions, therefore, contain preliminary views on the aid, clarifying whether such aid would be likely to be found compatible or not ⁽³⁾.

Allocating allowances for free, or at prices below the market price, constitutes State aid. It is straightforward to identify the advantage, distortion and effect on trade. As regards selectivity and imputability to the State one may note that companies falling within the scope of Directive 2003/87/EC by definition find themselves in a different legal situation than other companies, so treating these groups of companies differently is somehow natural. However, both sectors within and outside the scope of Directive 2003/87/EC are subject to climate change policy. Furthermore, the Directive leaves a wide margin of discretion to the Member States to draft the allocation rules with selective application between different installations, and indeed all NAPs contain such rules. Moreover, Member States may propose opting-in additional sectors and gases.

Involvement of State resources may also require some further explanation. For the first and second trading period, the Directive obliges Member States to allocate at least 95% and 90% of the allowances for free. The Member State is not allowed to sell these allowances and obtain revenues by doing so. In the first trading period, only Denmark, decided to auction the maximum 5%, all other Member States auctioned less than 5% and thereby foregoing State revenues. In the second trading period, no Member State intends to auction the maximum 10% ⁽⁴⁾, but in any event the presence of State resources does no longer depend on this. In the second trading period each allowance must be backed by an Assigned Amount Unit (AAU) and Member States have the possibility to trade such AAUs with other parties to the Kyoto protocol. Therefore, by allocating allowances to the companies covered by the EU ETS, the Member State foregoes the revenues it could have obtained by selling the AAUs.

The current price of 2nd phase allowances amounts to around € 20. With a total annual number of some 2 billion allowances, the total value of the aid amounts to around € 44 billion per year.

3. Assessment rules

Annex III to the Directive 2003/87/EC contains criteria for the NAPs and for the assessment of

⁽¹⁾ Formerly Directorate-General for Competition. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the author.

⁽²⁾ Introduced by Directive 2003/87/EC of the European Parliament and the Council of 13 October 2003, OJ L 275, 25.10.2003, p.32.

⁽³⁾ In its order of 30 April 2007 in case T-387/04 *Energie Baden Wuerttemberg AG vs Commission*, the Tribunal of First Instance confirmed that Directive 2003/87/EC requires the Commission to make only a prima-facie assessment of the State aid aspects of the NAP and therefore the preliminary views on these aspects cannot be understood as a final position.

⁽⁴⁾ Only Poland intended to auction close to 10% of the allowances.

State aid aspects, most relevant is criterion 5, which stipulates that *“the plan shall not discriminate between companies or sectors in such a way as to unduly favour certain undertakings or activities in accordance with the requirements of the Treaty, in particular Articles 87 and 88 thereof.”* In the January 2004 guidance on the implementation of the allocation criteria, the Commission confirmed that *“the normal State aid rules will apply”*. In December 2005, the Commission published further guidance ⁽⁵⁾, emphasising the need of simpler allocation rules and adding more specific comments on the use of first phase emission data, benchmarking and auctioning. Finally, in November 2006, together with its decisions on the first 10 NAPs, the Commission also adopted a Communication setting out its assessment of these NAPs.

Despite these documents, Member States have a wide margin of discretion in drafting their NAPs, and this has led to widely different allocation rules.

In the 2001 Community guidelines on State aid for environmental protection ⁽⁶⁾, point 71, the Commission took the view that some of the means adopted by the Member States to comply with the objectives of the Kyoto Protocol could constitute State aid, but it was still too early to lay down the conditions for authorising any such aid. The 2001 guidelines expire by the end of 2007 and in May 2007 the Commission published a first draft of the new guidelines containing a section also on tradable permit schemes. The rules in this section are rather general in nature as they concern not only the NAPs under the Emission Trading Directive, but also other trading schemes that may already exist or may be developed in the future. These rules are still under discussion and in the absence of definitive specific rules, the State aid assessment is to be based on Article 87(3)(c) directly. In the following, the main criteria used by the Commission in its preliminary assessment are explained.

Article 87(3)(c) specifies that *“may be considered compatible with the common market aid to facilitate the development of certain economic activities (...), where such aid does not adversely affect trading conditions to an extent contrary to the common interest.”* The Common interest fundamentally lies in achieving reductions of emissions by a well functioning emission trading scheme. **The first criterion** is therefore that the overall allocation level (the “cap”) must ensure scarcity in the market and must lead to reductions compared to otherwise expected emissions. In terms of the Directive, criterion 3 of Annex III, the cap

“shall be consistent with the potential, including the technological potential of activities covered by this scheme to reduce emissions.” In order to avoid over-allocation and unequal treatment of Member States, the Commission based its assessment on macro-economic modelling of the business as usual scenario, taking into account the Member States’ and the Commission’s policies to reduce emissions. Only the caps notified by Denmark, Spain, Ireland, Italy, Portugal, Slovenia and the UK passed this test. In all other cases, the Commission rejected the notified cap under said criterion 3 and explained its preliminary view that it cannot exclude that any aid involved would be found incompatible with the common market should it be assessed in accordance with Article 87 and 88 of the Treaty.

The common interest must be sufficiently large in order to outweigh the distortions and therefore **the second criterion** is that the caps, in conformity with criteria 1 and 2 of Annex III to the Directive, must enable the Member State concerned to achieve its Kyoto-target. On this account, the Commission imposed lower caps for Spain, Portugal, Ireland and Italy, who had failed to sufficiently substantiate the reductions of emissions to be expected from other national policies and measures ⁽⁷⁾. As above, in these cases the Commission could not exclude that any aid involved would be found incompatible with the common market should it be assessed in accordance with Article 87 and 88 of the Treaty.

In principle, there must be a common interest in the allocations to each individual company concerned. State aid to one company can only be justified by a counterpart made by the beneficiary itself, not by any counterpart made by another company. Therefore, **the third criterion** is that allocations at individual level should not exceed expected needs based on a “business as usual scenario”, or at least that the risk of such “over-allocation” at individual level should be sufficiently low.

While the objectives of the EU-ETS may justify a certain level of aid, they don’t necessarily justify distortions of competition that can derive from discriminatory allocation rules. Allocations should be based on general, non-discriminatory rules, as much as possible. In other words, **the fourth criterion** is that the allocation methodology shall not favour certain undertakings or activities, unless this is justified by the environmental

⁽⁵⁾ COM (2005) 703 final of 22.12.2005.

⁽⁶⁾ OJ C37 of 3.2.2001, p.3.

⁽⁷⁾ Following the Commission’s decision, Ireland notified an amendment providing additional substantiation of certain policies to reduce CO₂ emissions. In the subsequent decision, the Commission set the cap indeed at a somewhat higher level compared to its original decision.

logic of the system itself or where such rules are necessary for consistency with duly justified environmental policies.

4. Acceptable allocation methods and their limits

Allocation according to expected needs

All Member States decided to base the distribution of allowances in the first place on “expected needs”. In order to do so, several Member States used estimates of expected needs at installation level. The main problem of this approach lies in the very nature of the assessment to be made: it relies significantly on installation specific factors, in particular planned growth of output, which are difficult to verify in an objective manner. As a minimum (and not necessarily sufficient) condition, the Commission systematically asked such allocations to be assessed by experts that are independent from the beneficiaries. The Commission also asked the Member States to provide a sample of calculations showing the absence of over-allocation. In the cases of Belgium, Estonia, Lithuania, Luxemburg, Latvia and Slovakia, due to the lack of sufficient safeguards, the Commission could, however, not exclude that the proposed allocation methodology would lead to undue and discriminatory advantages to certain installations.

Instead of relying on individual estimates, many Member States based allocations on historical emissions. Usually, the historical data is used to distribute ‘sector totals’ which are established in another, non-discriminatory way. In fact, in its 2005 Communication, the Commission has pleaded for such general rules, since they are relatively objective and straightforward. Also when using such rules, however, there should be sufficient safeguards for minimising the risk of over-allocation to individual beneficiaries. Additional safeguards are particularly important in case years with the lowest levels of emissions are excluded from the time range. Important elements in this respect are the assumptions for economic growth, the share of growth that is expected to be absorbed by the existing installations and the presence of a compliance factor that reduces allowances in a general way. Risks of overallocation were identified for the NAPs of the Netherlands and Poland.

The principle of avoiding over-allocation also applies to allocations to new entrants. In fact, in its guidance documents, the Commission recommended to allocate to new entrants below their expected needs, in order to preserve an incentive to invest in the least emitting technologies. However, only few Member States followed this recommendation and in most of these cases it was

followed only for new entrants in the power generating sector. From a State aid point of view, the Commission only asked Member States to confirm that allocations from new entrants reserves will not exceed levels that can be achieved by using best available techniques (BAT) ⁽⁸⁾. In a number of cases, the Commission formulated doubts in the recitals of the Decision because of the absence of such confirmation.

An alternative to allocations based on expected needs consists in basing allocations on benchmarks, i.e. fixed emission levels per quantity of output. No Member State bases all its allocations on benchmarks, a few applied benchmarking only to the energy sector. Also in these cases, the Commission verified that the allocations would not exceed expected needs. Italy and Slovenia provided original examples of the use of benchmarks in other sectors like cement, electric furnace steel, glass as well as pulp and paper. Again, for all these cases the Commission required to avoid over-allocation, and in the case of Italy the Commission formulated doubts in this respect.

Other general allocation principles

Most Member States with tight Kyoto-targets seek to impose the burden on installations with the largest potential to reduce emissions. The use of historical data and benchmarking addresses this wish to some extent, but many Member States proposed additional discriminatory rules. Austria, Belgium and the Netherlands, e.g., applied a “reduction potential factor” based on individual assessments of the potential to reduce emissions. Others distinguished between process emissions and combustion emissions. Process emissions are intrinsically linked to the production process and can not be reduced beyond certain levels determined by physical laws. Denmark, Greece and Sweden therefore applied a “compliance factor” close to one to process emissions and imposed a stricter compliance factor on combustion emissions.

⁽⁸⁾ Article 2 of Council Directive No 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC-Directive), OJ L 257 of 10.10.1996, p.26, defines BAT. The techniques shall be «most effective in achieving a high general level of protection of the environment as a whole» and the definition refers to «economically and technically viable conditions taking into consideration the costs and advantages». The Commission is aware that with the introduction of the emission trading system, CO₂ emissions do no longer fall within the scope of the IPPC-Directive. In addition, emissions levels of BAT may still be significantly higher than those that can be obtained by the «world's best techniques».

Several Member States provided for “bonuses” for early action and/or using clean technology, e.g. using biomass or combined heat and power installations. Using historical emissions could be perceived to “punish” such installations. For Austria, the Czech Republic, Estonia, Italy and Poland, however, these bonuses (potentially) lead to allocation beyond expected needs, since they come in addition to allocations at a level at, or close to, the level that covers expected needs. Despite its generally favourable stance towards “early action”, the Commission rejected the over-allocation resulting from the bonuses, or raised a doubt on potential over-allocation, explaining its preliminary view on the incompatibility of the aid involved.

In a number of circumstances, specific methods were justified given other environmental objectives. Higher standards for refinery products, e.g., will lead to increased emissions per output. The Commission did not object to allocations accommodating such expected increases. The Commission did, however, not find similar justification for favourable treatment of Spanish power plants that made investments in order to reduce their SO₂ and NO_x levels. Such allocations would not serve the objectives of Directive 2003/87/EC or Directive 2001/80/EC⁽⁹⁾, since the investments would be required in any event. The allocations would not lead to any improvement beyond the relevant Community standard in this respect. In its decision, the Commission therefore explained its preliminary view on the potential incompatibility of any aid involved.

Finally, the Commission also accepted negative discrimination of one group of companies, normally the power generating sector. Disfavouring one sector does not necessarily mean selectively favouring all other sectors, even if the disfavoured sector covers the lion’s share of total emissions. So the Commission did not reject NAPs with strict compliance factors for the power generating sector, while allocating up to expected needs to other sectors.

5. Rejected allocation rules

On the basis of State aid concerns and pursuant to criterion 5, the Commission rejected a number of allocation rules, explaining its preliminary view on the incompatibility of the aid involved. For some other rules, the Commission explained in the recitals of the decision why incompatibility could not be excluded.

Long term allocation guarantees

Three Member States intended to give allocation guarantees to new installations, typically promising allocation up to BAT-levels for a period beyond the trading period concerned. In the case of Germany, it would have meant that the compliance factor (0.9875 for industry and 0.85 for the power generating sector) would not apply to new installations for a period of 14 years. The wording in the Czech legislation and in the Hungarian NAP was comparable, concerning periods of up to 15 and 6 years respectively. The main argument brought forward was that new efficient electricity production would replace old plants with high emissions and thereby contribute significantly to the EU objectives. Future allocations are, however, a major factor for investment decisions. The advantages of the guarantees were unknown since the allocation rules for subsequent trading periods are still unknown, but it was clear that they could have been very significant. The guarantees could easily have led to a “subsidy race” and in particular the Member States bordering Germany raised serious concerns. Long term guarantees, in addition, would make it more difficult to set lower caps in subsequent periods, since the burden would have to be spread over fewer installations. Finally, significant replacement investment is to be expected also without the guarantees. For all these reasons, the Commission rejected the application of any guarantees that may have been granted in the first period and expressed its preliminary view that aid involved in guarantees to be granted during the second trading period is likely to be incompatible⁽¹⁰⁾.

Preferential rules for certain sectors

As discussed above, negative discrimination of one sector has been allowed. Further sectoral differentiation, however, easily creates selective advantages that are incompatible with the State aid rules. On such grounds, the Commission rejected sectoral differentiation in the case of Austria. In addition to a ‘Potentialfactor’ that takes into account the potential to reduce emissions, compliance factors were differentiated by sector. The most favourable ones concerned steel, refineries and district heating. For the first two, there is only one company per sector.

⁽¹⁰⁾ Decisions under Directive 2003/87/EC concern only the allowances to be allocated during the second trading period. The preliminary view under the State aid rules, in contrast, concerns the aid in the guarantees for the entire period for which the guarantees would be applicable. Only in the case of Germany, earlier guarantees could have affected allocations for the second trading period.

⁽⁹⁾ OJ L 309 of 27.11.2001, p.1.

Another example concerns Italy. The unique approach in the Italian NAP consisted in freezing sector allocations at levels fixed for the first trading period. There were, however, two main exceptions, steel and cement, which received higher allocations, be it that part of the increase would be “allocated for payment” with prices set “by reference to the market price”. The Italian authorities referred to expected growth figures, but it was clear that growth was not taken into account in a consistent way. The overall picture was somewhat blurred and the Commission therefore expressed its preliminary view as regards the potential incompatibility of aid involved in the sector allocation.

Discrimination within the power generating sector

A major policy question for many Member States was whether or not to accommodate the higher emissions of power plants using coal and lignite. Most have chosen to do so, e.g. by relying on historical emissions or by applying fuel specific benchmarks, and the Commission has not rejected such approaches. Some Member States, however, notified further discrimination. Spain, e.g., notified allocation methods with a preferential treatment of power generated from domestic coal. Due to the complexity of the rules, the advantage resulting from the method was not entirely clear. The decision explains that it cannot be excluded that aid involved may be found incompatible should it be assessed under the State aid rules.

The other example concerns Italy, where allocations were generally based on benchmarks, but were further differentiated by applying different “trend factors” and “operating hours” according to the fuel use and use of CHP or not. The factors did not reflect expectations but policy objectives, e.g. the complete phase out of oil fuelled power plants, even though the use of oil generates fewer emissions than the use of coal. In addition, installations benefiting of incentives provided by the so-called “CIP 6/92 agreement”, would also see their allocations set at very low levels. As it was not clear to which extent the differentiation could be justified by environmental considerations and whether undue advantages to certain installations were excluded, the Commission explained in the recitals that it could not exclude incompatibility of State aid involved.

In the case of Sweden, allocations to existing power plants were based on historic emissions, but new installations in the sector were granted allocations from the new entrants’ reserve only if they are to operate highly-efficient co-generation

installations. Since this approach is consistent with the objective to reduce emissions, it was not rejected.

Separate reserves

All Member States create so-called “New Entrants Reserves” (NERs) in order to be able to allocate allowances to new installations. Ireland notified the creation of separate reserves for power generation, cement and other sectors, and allocations from these reserves were to be bound by different ceilings. The Commission, however, rejected this, since it could lead to favourable treatment of certain sectors, in particular in case of early depletion of the general reserve.

Allocation based on electricity purchases

Although allowances are granted for free, companies would naturally seek to raise their prices in order to reflect the “opportunity cost” of not selling the allowances. Where they succeed, this leads to so-called “windfall profits”. There is significant evidence that significant windfall profits have arisen in the power generating sector to the expense of businesses paying the higher electricity prices, in particular the energy intensive industry. In this context, the Dutch NAP provided for a 15% “windfall profits cut” on allocations to power installations otherwise determined on the basis of historical emissions. One third of the reduction would be redistributed over other installations proportional to their electricity purchases. The Commission, however, found no environmental justification and expected rather negative environmental effects from such a bonus on electricity consumption. The advantages would be largest for installations in industries which are characterised by strong international competition and therefore the Commission rejected this allocation method.

Banking

Banking of allowances means that unused allowances valid in one trading period are exchanged for new allowances valid in the next. This may provide an incentive to reduce total emissions during the trading period below the sum of the overall caps set for that trading period. Directive 2003/87/EC obliges Member States to allow banking as from the second trading period, but it is optional to bank allowances from the first to the second trading period. Only France and Poland intended to allow banking, but France withdrew its intention. In its Communication of November 2006, the Commission made clear that banking can be allowed only subject to two conditions. First, only allowances that are left unused because of real emission reductions can be banked. Allow-

ances left unused simply because the original allocation was too high, cannot be banked since there would be no environmental counterpart to be delivered by the beneficiary to outweigh the distortion caused by the aid. Second, the number of allowances to be banked must be subtracted from the overall cap of allowances to be allocated in the second trading period. Otherwise, banking would reduce the scarcity in the market, or even worse, transfer the over-allocation in the first period into the second, and this would go directly against the objectives of the scheme. The Commission rejected the absence of these safeguards in the NAP.

6. Concluding remarks

From the above, one can draw two conclusions. First, Member States have refrained from making optimal use of the system. In view of the environmental objectives, and in order to ensure that the State aid involved brings sufficient benefits to the Community, the Commission forced the Member States to reduce the levels of allocation by almost 10% on average. Secondly, the Member States proposed a wide variety of allocation rules with a high potential to generate distortions of compe-

tition. By applying criterion 5 of Annex III to the Directive and the State aid rules the Commission addressed many of these distortions. Significant differences between allocations to similar installations in different Member States will, however, remain. Under a system of free allocations and different national CO₂-reduction targets, significant distortions will in fact remain unavoidable. Clearly, from a competition point of view, it would be highly preferable to auction all allowances instead of allocating them for free. Obviously, this is one of the issues to be decided when reviewing the Emission Trading Scheme, on which the Commission is expected to adopt a proposal by the end of 2007 ⁽¹⁾.

As regards the NAPs for the second trading period, it is now up to the Member States to give the appropriate follow-up to the Commission decisions. In this respect, it is appropriate to remind the letter of 17 March 2004 from the two director generals of DG Environment and DG Competition to the Member States in which they explain that, if the Commission sees the serious risk of distortive effects arising in a way that is incompatible with the Treaty, it will take action under the State aid rules.

⁽¹⁾ For further information on the review of the Directive, see: http://ec.europa.eu/environment/climat/emission/review_en.htm.

Enforcement of State aid control in the banking sector: BAWAG-PSK

Martin LOEFFLER and Daniel BOESHERTZ ⁽¹⁾

On 27 June 2006 the Commission decided to approve a State guarantee of € 900 million granted to BAWAG-PSK by Austria ⁽²⁾. The guarantee provided collateral for specific bad loans with the consequence that the assets remained valuable and no value adjustments had to be carried out.

The exit of inefficient firms is a normal part of the operation of the market. Therefore, the provision of rescue or restructuring aid to firms in difficulty may only be regarded as legitimate subject to certain conditions. The Commission authorizes restructuring aid only under the following conditions:

- i) a restructuring plan, which must be endorsed by the Commission, has to be prepared, and fully implemented, restoring the firm's long-term viability (without additional aid).
- ii) Compensatory measures must be taken in order to ensure that the adverse effects on trading conditions are minimized as much as possible, so that the positive effects pursued outweigh the adverse ones. In addition, the Commission may impose any conditions and obligations it considers necessary in order to ensure that the aid does not distort competition to an extent contrary to the common interest.
- iii) The amount and intensity of the aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs.

1. Background

BAWAG-PSK is the fourth largest bank in Austria. It is active in all areas of financial services in Austria and abroad. It operates the largest centrally managed distribution network in the country, has 1.2 million private and more than 60,000 business

customers. On 31 December 2005, the balance sheet total was € 57.9 billion with savings deposits of around € 18 billion. BAWAG-PSK holds a strong position as a principal provider of banking services to the public sector. Governmental transfers and wage pay-outs to public employees are handled by the Bank. The Bank has also expanded internationally with branches, subsidiaries or participations in the Czech Republic, Slovakia, Slovenia, Hungary, Malta and Libya. The bank's history goes back to 1922 when a "Bank for workers" was founded for managing the financial assets of the unions. Until 2006, BAWAG-PSK was indirectly wholly owned by the Austrian federation of trade unions ("ÖGB").

The economic difficulties of BAWAG-PSK resulted mainly from two specific sources, the "Caribbean" and "Refco" transactions, conducted by some members of the management. These transactions were made possible because of insufficient risk controlling and the circumvention of existing control instances by the participants.

The "Caribbean" transactions were primarily conducted between 1995 and 2001. Considerable funds were used in order to speculate on currency exchange rates. The invested funds were nearly totally lost because the anticipated development did not take place. From 2001 onwards up to October 2005, the losses were often restructured and reduced by partial write-offs. The business relationship of BAWAG-PSK with the bankrupted US broker Refco, which took place over 1998-2005, consisted mainly in a participation of BAWAG-PSK in Refco, cooperation between BAWAG-PSK and Refco in several areas and the granting of loans from BAWAG-PSK to Refco. In April 2006, complaints were filed against BAWAG-PSK in the USA by Refco, the Refco's creditors committee, the Department of Justice and the Securities and Exchange Commission. During the course of these proceedings, a large amount of money was frozen by court order until a settlement was negotiated with the authorities of the United States and with the Refco creditors. The relationship with Refco resulted in total expenses and provisions of approximately € 1 billion for BAWAG-PSK.

In October 2005, BAWAG-PSK was hit by the insolvency of Refco and, at the same time, the losses of the „Caribbean" transaction came to light. These events led to value adjustments requiring

⁽¹⁾ Directorate-General for Competition, unit D-3 and unit F-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors. The authors want to thank the other members of the case team, namely Vincent VEROUDEN (Chief Economist Team) and Jürgen FOECKING (Unit A3).

⁽²⁾ Commission Decision of 27.06.2007 in case C 50/2006, BAWAG-PSK.

the provisioning of an amount which could not be brought by the Bank's own resources. Alerted by the press, depositors massively withdrew money from current and savings accounts in late April/early May 2006. Globally, the current and savings accounts held by the bank were reduced by several billion euros.

2. The State guarantee

On 8 May 2006, in order to stop the bank run and to secure the liquidity of the bank, Austria granted by law a guarantee for receivables of BAWAG-PSK for a amount of € 900 million. Without the guarantee, BAWAG-PSK would not have been able to comply with the solvency and equity capital provisions of the Austrian Banking Act and therefore not able to close the 2005 annual accounts.

The conditions of the guarantee obliged the owners of the Bank to sell their shares in BAWAG-PSK to an independent third party within one year. The guarantee would end 60 days after BAWAG-PSK was sold but, in principle, not later than 1 July 2007. An extension under certain conditions was however possible.

The guarantee of Austria could only be drawn if, cumulatively, i) BAWAG-PSK was not sold, ii) BAWAG-PSK, its direct and indirect shareholders had been requested to pay and to disclose their financial situations and obliged to pay up to the limit of their capacities for payment before the guarantee could be called on, iii) the economic threat to the bank continued to exist and iv) an insolvency of the Bank threatened or has already occurred. The drawdown of the guarantee was also permitted if insolvency threatened only because the guarantee would expire on 1 July 2007; the Federal Government could avoid the drawdown under the guarantee by extending it. However, this required an additional decision by the Federal Government.

The fee to be paid by BAWAG-PSK was fixed at 0.2% per year for the period ending 30 June 2007 and 1.2 % afterwards.

In addition to the State guarantee, two special purpose vehicles ("SPV") were created by private banks on the one hand and insurance companies on the other hand, which enabled BAWAG-PSK to increase its eligible capital by € 450 million.

The scenario of a sale of BAWAG-PSK to a third party formed the basis of the restructuring plan submitted by Austria in September 2006.

3. The in depth enquiry

Following a preliminary assessment, the Commission had doubts as to the legality and compat-

ibility of the restructuring aid with the common market and opened the formal investigation procedure⁽³⁾ in November 2006.

The Commission considered that no market operator would have granted the guarantee to BAWAG-PSK, which was a firm in difficulty at that time, for a fee of 0.2%. As a consequence, the State guarantee conferred an advantage on BAWAG-PSK. Furthermore the guarantee was granted by Austria on 8 May 2006, with retroactive effect from 31 December 2005, before the Commission decided on its compatibility. As a consequence, the Commission concluded that the guarantee provided to BAWAG-PSK was an illegal State aid⁽⁴⁾.

The subsequent investigation under the *Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty*⁽⁵⁾ mainly focussed on two issues:

- i) the aid element involved in the guarantee, and
- ii) the compensatory measures, i.e. the measures to mitigate the distortive effect of the aid on competition.

3.1. Assessment of the aid element in the State guarantee

The specific nature of the guarantee

In order to determine the aid element in the guarantee, the Commission had first to consider the specific nature of the guarantee granted by Austria.

The guarantee provided collateral for specific non-performing loans of the Bank. The consequence was that the assets remained valuable and no value adjustments, which would have generated additional losses of € 900 million in the 2005 accounts, had to be carried out. BAWAG-PSK's core capital ratio could thus be prevented from decreasing below the minimum statutory requirements. In this regard, the effect of the guarantee is similar to that of a capital injection.

Moreover, the guarantee is not comparable to guarantees securing the liabilities of a bank⁽⁶⁾. Such guarantees provide direct claims to the creditors of the bank. In the case of insolvency, the guarantor has to meet the liabilities, which cannot

⁽³⁾ OJ C 232, 30.12.2006, p. 11.

⁽⁴⁾ i.e. an aid which is implemented before the adoption of the Commission decision authorizing it. The fact that an aid is illegal does not mean that it is incompatible with the common market.

⁽⁵⁾ OJ C 244 of 01.10.2004, p.2.

⁽⁶⁾ Compare case C- 30/1996 *Commission decision of 23 June 1999 conditionally approving aid granted by France to Crédit Foncier de France* (notified under document number C(1999) 2035) (OJ L 34, 3.2.2001, page 36, para. 49).

be satisfied from its assets. Economically, this type of guarantees reduces the cost of refinancing of the bank via debt/bonds. In guaranteeing the recoverability of about 1.6 % of the total assets of the Bank in the deficiency case, the guarantee had also a limited indirect effect on the security of the liabilities but the overall impact of the guarantee can not be considered as comparable.

The aid element depends essentially on the future sale price

A key condition for the granting of the State guarantee was the commitment by ÖGB to sell BAWAG-PSK to independent third parties. It appeared quickly in the assessment that the aid element was directly connected to the expected sales price. Indeed, the recoverability of the claims that BAWAG-PSK had against its shareholders depended on the latter's ability to repay their debt. It was agreed that the sales price payment has to be used in the following order: first, to satisfy any rights of third parties and claims against the owners under the "Refco"-settlement in the US, secondly to pay all remaining liabilities owed by the direct and indirect owners, and thirdly to reduce the guarantee of the Republic of Austria. Any reduction of the sales price below the sum of the remaining liabilities and the amount of the guarantee ("threshold price") would have triggered the guarantee in the absence of additional equity support or short term reductions of risk assets.

At the time the guarantee was granted, three major scenarios would have been considered by a market operator:

- i) the sale of the Bank at a price above the threshold price with the consequence that the guarantee could have been abolished the day of the closing without being drawn;
- ii) the sale of the Bank at a price below the threshold price with the consequence that the guarantee had to be drawn fully or partially;
- iii) the sale of BAWAG is not achievable. In this latter scenario the guarantee has to be prolonged until the owner is able to execute the required capital injection or BAWAG-PSK itself has generated the necessary capital reserves.

The Commission was not able on the basis of the available information to determine precisely the probability of each scenario ⁽⁷⁾. At the time the

⁽⁷⁾ The fact that ÖGB sold BAWAG-PSK to a consortium led by the U.S. private equity group Cerberus Capital Management L.P. in December 2006 could not be considered in the Commission's assessment because it has only to consider what would have been known by a potential investor in April/May 2006.

guarantee was granted, the future development of BAWAG-PSK was not predictable. The situation of BAWAG-PSK in the end of April 2006, a few days before the Federal Chancellor declared in a press conference that Austria would issue a guarantee, was very critical and the reactions by the clients and partners were extremely threatening for the Bank. A run on the branches of the Bank had started, which took on a scale without precedent in recent Austrian history. This situation created a major danger for the liquidity of the Bank. A continuation of the development for even a short period of time would have had lethal consequences for the Bank.

In this context, the Commission has come to the view that:

- i) the timing of the sale and the level of the purchase price of BAWAG-PSK were unknown variables, bearing very important risks for a market oriented guarantor;
- ii) the time constraints were increasing to a very significant extent the difficulty for an operator to intervene;
- iii) the intrinsic value of the Bank was not so low as to fully exclude that a market guarantor would have granted the € 900 million, however conditioned on the high fees.

As a consequence, the Commission has concluded that the aid amount involved in the guarantee could only be estimated within a range. The upper value of this range is € 898 million, i.e. the nominal value of the guarantee minus the guarantee fee of 0.2% paid by the Bank. Fixing the lower value is the most complex; the Commission has estimated that this lower value is at least two thirds of the nominal value of the guarantee.

Additional considerations

The objective of the granting of the guarantee reflected the interests of Austria, which was to re-establish the trust of the investors and partners in the stability of BAWAG-PSK and the financial sector in Austria and to avoid an alleged disproportioned large damage for the Austrian economy ⁽⁸⁾.

These objectives are not in line with the intrinsic interests of a market investor, which are to maximise the return (taking into account the level of risk acceptable for a given rate of return), to take

⁽⁸⁾ However, the Commission has considered that Austria has not demonstrated that BAWAG-PSK's insolvency/bankruptcy would have had systemic implications on the Austrian financial system and, more globally, on the whole Austrian economy. The Commission therefore has decided that Article 87(3)(b) is not applicable in the present case.

control of or significant influence in the Bank and to use the decision-making power to succeed the turn around.

Furthermore, where an undertaking in difficulty needs financial support and is not able to pay an appropriate remuneration in the short term, a guarantee including the payment of an annual fee is technically not the appropriate instrument. The negative impact of a considerably high fee would have threatened the success of the reorganization and the continuation of the Bank.

Finally, a private investor would have been more prone to intervene with a capital injection, which would have given a stake in the Bank, and decision making power to ensure success of the restructuring. However, according to both the Commission and Austria, no private investor would have been willing to provide funds which would be considered as equity capital ⁽⁹⁾.

3.2. *Compensatory measures*

The Community Guidelines on State aid for rescuing and restructuring firms in difficulty state that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors. The measures must be in proportion to the distortive effects of the aid and, in particular, to the relative importance of the firm on its market or markets.

In exchange for obtaining the approval, in addition to the commitment by its former owner ÖGB to sell BAWAG-PSK, Austria submitted several other commitments to divest assets, reduce capacities or market presence. Some divestments were included in the restructuring plan and had already taken place, for example the sale of the shares in Voestalpine AG. Additional commitments were also adopted, for example the sale of a 50% share in PSK and BAWAG insurances, the sale of considerable real estate assets and the sale of its holdings in ATV Privat-TV Services AG.

In its core business, BAWAG-PSK agreed to reduce the volume of its loans to the Federal Republic of Austria for a given period of time and committed to temporary refrain from participating in tender procedures in which the Republic of Austria seeks to commission so-called Primary Dealers to issue bonds for the Federal Republic. These two measures have been regarded as particularly relevant

by the Commission because they take place in markets where the Bank will have significant market position after restructuring and go beyond anything necessary to restore viability. Furthermore, as a condition for the granting of the State guarantee, BAWAG-PSK had to sell its shares in the Austrian National Bank; this participation was of real significance for the Bank. Moreover, shares in Bank Frick & Co. AG and Hobex AG have been sold. By selling its participation in Hobex, which is active in debiting authorization, BAWAG-PSK withdrew from an important sector, where the most important banks are present in Austria.

While 3 branch offices in Vienna are to be closed, the Commission has not considered this closure as an effective compensatory measure because it has not been demonstrated that the relevant branches are not loss-making activities which would have to be closed at any rate to restore viability.

Besides, the Bank has also undertaken to sell the essential part of its non-core business activities.

Finally, no aid other than that referred to in Art. 87 (2) of the EC Treaty, or aid granted under research projects jointly financed by the European Union, or aid to general training within approved schemes, or aid for energy savings within approved schemes, can be granted to BAWAG-PSK for a given period of time.

The divestment, closure and other measures will lead to a substantial reduction of BAWAG-PSK business volume, which is consistent with the Commission's practice regarding restructuring aid for banks ⁽¹⁰⁾.

4. Conclusion

This decision is important as it sets a comprehensive reasoning on how State guarantees are addressed by the Commission in a State aid perspective.

Thanks to a series of intensive negotiation rounds with Austria and the new owners in spring 2007, the aid could be approved 7 months after the opening of the formal investigation procedure.

Following the closing of the sale of BAWAG-PSK to the Consortium on 15 May 2007, the guarantee was abolished and the private banks and insurance companies were entitled to terminate the respective SPV.

⁽⁹⁾ The setting up by private operators of the two SPVs does not invalidate this assessment as the SPVs would not have been created in the absence of the guarantee.

⁽¹⁰⁾ See for instance the *Commission decisions in Crédit Lyonnais* (Case C 47/1996 *Commission Decision of 20 May 1998 concerning aid granted by France to the Crédit Lyonnais group* (OJ L 221, 8.8.1998, page 28)) and *Bankgesellschaft Berlin* (Case C 28/2002 *Commission decision of 18 February 2004, C(2004) 327, Bankgesellschaft Berlin* (OJ L 116, 4.5.2005, page 1)).

Livrets A et bleu: la Commission demande à la France de supprimer les droits spéciaux de distribution attachés à ces produits

Christophe DU PAYRAT ⁽¹⁾

Le 10 mai 2007, la Commission européenne a considéré dans une décision fondée sur l'article 86, paragraphe 3, du traité CE que les droits spéciaux de distribution des livrets A et bleu constituaient une entrave aux règles du marché intérieur. Cette entrave n'étant pas indispensable au bon fonctionnement des services d'intérêt économique général associés à ces produits, la Commission a demandé à la France de mettre en conformité sa législation avec le droit communautaire dans un délai de neuf mois.

Les livrets A et bleu sont des livrets d'épargne liquides plafonnés à 15000 euros, dont le rendement est indexé au marché monétaire par l'État et favorisé par la défiscalisation des intérêts perçus. Seuls la Banque Postale, les Caisses d'Épargne et le Crédit Mutuel ont le droit de distribuer ces produits.

La question de la conformité avec le droit communautaire de ce système de distribution avait été soulevée auprès de la Commission depuis de nombreuses années. Par cette décision, la Commission prend une position claire et équilibrée, qui permet à la fois de mettre un terme à l'infraction pour le futur et d'assurer la pérennité des services d'intérêt économique général liés à ces livrets invoqués par les autorités françaises. Les enjeux associés à ce dossier étaient importants, s'agissant de produits d'épargne très anciens, créés au début du 19^{ème} siècle, et très populaires, détenus par près de 50 millions de Français pour un total d'encours d'environ 128 milliards d'euros.

Cette décision présente plusieurs spécificités intéressantes, tant en termes de procédure que de fond. Elle suit d'abord la procédure de l'article 86, paragraphe 3, du traité, rarement utilisée. La Commission développe ensuite une analyse détaillée *in concreto* des effets de la mesure nationale sur les marchés pertinents concernés, sans se limiter à la constatation de l'infraction aux règles du droit communautaire. La décision se conclut enfin par un examen attentif des services d'intérêt économique général concernés et des surcoûts qui y sont associés, afin de déterminer si une modifi-

cation du système de distribution permettrait de préserver ces services sans coût additionnel pour les finances publiques nationales.

Une décision fondée sur l'article 86, paragraphe 3, du traité

Suite à une plainte de l'Association Française des Banques dans les années 1990, la Commission s'était intéressée au livret bleu distribué par le Crédit Mutuel. Au titre du contrôle des aides d'État, la Commission avait ouvert la procédure formelle d'examen en 1998 avant de rendre une décision finale négative exigeant un remboursement en 2002. Cette décision a été annulée par le Tribunal de Première Instance des Communautés européennes le 18 janvier 2005 pour défaut de motivation ⁽²⁾.

Partant du constat que le livret A soulevait des problématiques sensiblement différentes du fait de l'ancienneté du mécanisme en cause, qui prédatait l'entrée en vigueur du traité de Rome, la Commission a considéré qu'il était plus pertinent d'appréhender globalement ce système sous l'angle des libertés d'établissement et de prestation de service que sous celui des aides d'État.

Parallèlement à la poursuite du cas d'aide d'État du livret bleu, la Commission a donc adressé aux autorités françaises le 7 juin 2006 une lettre de mise en demeure détaillant son analyse préliminaire quant à l'incompatibilité du système de distribution actuel avec les règles du traité. Il s'agit là d'une étape préalable à l'adoption d'une décision sur la base de l'article 86, paragraphe 3, du traité. Cet article, rarement utilisé dans des cas individuels, permet de demander à un État membre de mettre fin à un droit spécial qui serait contraire à certaines règles du traité.

En l'espèce, la Commission considère que les droits spéciaux de distribution des livrets A et bleu sont contraires aux articles 43 (liberté d'établissement) et 49 (libre prestation de services) du traité, lus en liaison avec l'article 86, paragraphe 1, sans que la dérogation prévue à l'article 86, paragraphe 2, pour les services d'intérêt économique général puisse s'appliquer. La combinaison des articles 43,

⁽¹⁾ Anciennement: Direction générale de la Concurrence, unité D-3. Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leur auteur.

⁽²⁾ Arrêt du 18 janvier 2005, Confédération nationale du Crédit Mutuel contre Commission, T-93/02, non encore publié au recueil.

49 et 86 n'a été utilisée qu'à deux reprises par la Commission ⁽³⁾, les infractions aux articles 43 et 49 étant généralement traitées via les procédures des articles 226 et 228 du traité et l'article 86, paragraphe 3, étant principalement mobilisé dans des cas d'abus de position dominante (article 82). La Commission a choisi cette base juridique inhabituelle car il s'agissait de l'instrument le plus efficace au cas d'espèce pour mettre un terme à l'entrave constatée aux règles du marché intérieur via une décision immédiatement contraignante pour l'État membre concerné.

Conformément à la jurisprudence de la Cour, une copie de la lettre de mise en demeure a été adressée pour commentaires aux trois réseaux bancaires concernés. Des échanges nourris sont ensuite intervenus avec l'État français, les trois banques distributrices et de nombreuses autres parties intéressées, en particulier des établissements bancaires.

Au terme de ces échanges, la Commission a adopté le 10 mai 2007 une décision finale tendant à la suppression des droits spéciaux en cause, pour les raisons détaillées ci-après.

Un système de distribution contraire aux libertés d'établissement et de prestation de services

Le Code monétaire et financier français a organisé des droits spéciaux en limitant à trois établissements bancaires seulement le droit de distribuer des produits fiscalement avantageés par l'État, les livrets A et bleu. Au titre de l'article 86, paragraphe 1, du traité, il appartient à la Commission de vérifier si ce droit ne crée pas de restrictions contraires aux règles du traité. En l'espèce, la Commission considère que l'interdiction faite aux opérateurs français et étrangers autres que les trois réseaux concernés de distribuer ces livrets limite directement leur champ d'activité, ce qui constitue une restriction contraire à la liberté d'établissement garantie à l'article 43 du traité.

Les autorités françaises considéraient pour leur part qu'il était nécessaire d'examiner *in concreto* si les droits spéciaux en cause constituaient un «obstacle sérieux», pour reprendre les termes de la jurisprudence CaixaBank ⁽⁴⁾, pour s'établir sur le marché français. Sur la base de la jurisprudence

de la Cour ⁽⁵⁾, la Commission estime traditionnellement qu'une telle analyse *in concreto* des effets restrictifs d'une mesure nationale n'est pas nécessaire, puisqu'il suffit de relever que la mesure constitue, en droit, une restriction contraire au traité. Pour autant, à titre subsidiaire, la Commission a accepté de conduire cet examen inhabituel dans le cadre de l'appréciation des entraves aux règles du marché intérieur, ce qui suppose d'abord la définition d'un marché pertinent puis l'évaluation de l'impact de la mesure sur ce marché. Au terme de son analyse, la Commission est parvenue à la conclusion que les droits spéciaux en cause étaient un obstacle à l'accès d'autres opérateurs au marché français.

La Commission s'est d'abord interrogée sur la définition du marché pertinent à retenir. Elle a considéré que ledit marché devait être défini comme celui de l'épargne bancaire liquide en France. Compte tenu de leurs caractéristiques en termes de liquidité, de rendement et de risque, des produits d'assurance-vie ou des actions ne peuvent notamment pas être considérés comme suffisamment substituables aux livrets A et bleu pour faire partie du même marché pertinent.

Sur la base de cette définition, la Commission s'est attachée à examiner les effets restrictifs des droits spéciaux sur le marché de l'épargne bancaire liquide en France. Il ressort de cette analyse que les droits spéciaux de distribution des livrets A et bleu confèrent aux trois établissements bancaires concernés une part de marché significative en valeur, environ 33 %, et plus encore en volume, les livrets A et bleu connaissant une diffusion exceptionnellement large dans la population française, touchant environ 70 à 80 % de celle-ci. De ce fait, les droits spéciaux de distribution des livrets A et bleu rendent l'entrée et le développement d'autres opérateurs sur le marché français à la fois plus difficile et plus coûteux.

Cet obstacle est en outre aggravé par l'effet d'appel que comportent ces produits défiscalisés, qui permettent notamment d'attirer et de fidéliser une clientèle jeune à laquelle d'autres produits peuvent être proposés. Cet avantage en terme de portefeuille de clientèle est particulièrement appréciable sur un marché arrivé à maturité tel que le marché de la banque de détail en France. Cette analyse est valable, *mutatis mutandis*, pour l'application de l'article 49 du traité relatif à la libre prestation de services.

En définitive, on peut considérer que des droits spéciaux qui avaient été créés dans un contexte

⁽³⁾ Décision 85/276/CEE de la Commission, du 24 avril 1985, relative à l'assurance en Grèce des biens publics (JO L 152 du 11.6.1985, p. 25) et décision 97/606/CE du 26 juin 1997, concernant le droit exclusif d'émettre de la publicité télévisée en Flandre (JO L 244 du 6.9.1997, p. 18).

⁽⁴⁾ Arrêt de la Cour du 5 octobre 2004, affaire C-442/02 (CaixaBank), Rec.p.I-8961.

⁽⁵⁾ Arrêt de la Cour du 30 mars 2006, affaire C-451/03 (Servizi Ausiliari Dottori Commercialisti), Rec.p.I-2941.

historique particulier au profit d'établissements très spécialisés deviennent, avec la libéralisation de ce secteur, une anomalie préjudiciable au développement de conditions de concurrence équitables.

Dans le cadre de l'examen de la compatibilité de certaines mesures avec les articles 43 et 49 du traité, il peut toutefois être admis certaines restrictions lorsqu'elles sont justifiées par des raisons impérieuses d'intérêt général⁽⁶⁾. La dérogation de l'article 86, paragraphe 2, du traité peut aussi jouer au bénéfice des services d'intérêt économique général. Il convenait dès lors d'examiner la nécessité et la proportionnalité des droits spéciaux en cause pour accomplir les missions d'intérêt général invoquées par les autorités françaises, à savoir le financement du logement social et l'accessibilité aux services bancaires de base.

Des droits spéciaux non indispensables pour assurer le financement du logement social

L'encours collecté sur les livrets A et bleu est transféré à la Caisse des Dépôts et Consignations, qui l'utilise pour financer le logement social. Les autorités françaises faisaient valoir qu'une suppression des droits spéciaux risquerait de conduire à une diminution de l'encours total collecté, mettant en danger le financement du logement social. Elles estimaient en effet que les banques seraient tentées de réorienter l'épargne vers d'autres supports plus rémunérateurs pour elles que les livrets A et bleu (phénomène dit de «cannibalisation»).

Au terme d'une analyse approfondie, la Commission est parvenue à la conclusion que le risque de diminution de l'encours collecté n'était pas suffisamment avéré pour justifier la restriction causée par les droits spéciaux de distribution. Elle considère au contraire que la banalisation de la distribution de ces livrets permettra de continuer à collecter un niveau d'encours suffisant et stable pour assurer le financement du logement social.

En premier lieu, la Commission constate que le réseau de distribution sera, en cas de banalisation, largement étendu, facilitant l'accès des clients à ces produits. Une politique commerciale plus dynamique, sous l'impulsion de la concurrence, pourra même être de nature à favoriser une collecte plus importante.

Le risque de cannibalisation invoqué repose ensuite sur un raisonnement en deux étapes dont la réalisation n'est pas très probable: d'abord les

banques attireraient chez elles les livrets existants puis, dans un deuxième temps, elles proposeraient aux épargnants de transférer cette épargne vers d'autres supports. La Commission considère que ce mécanisme, qui pourrait effectivement se réaliser à la marge, est peu probable pour trois raisons principales: il surestime la mobilité des consommateurs entre établissements bancaires, il sous-estime leur attachement aux livrets A et bleu et il fait une appréciation étroite de la politique commerciale future des banques. Il convient en particulier de souligner qu'une banalisation de la distribution ne modifiera en rien l'attachement des Français à ces produits d'épargne, dont les qualités en termes de sécurité, de fiscalité et de liquidité demeureront identiques.

La Commission souligne enfin que les autorités françaises pourront soumettre toutes les banques assurant la distribution de ces produits à la même obligation de centralisation intégrale des fonds collectés à la Caisse des dépôts, et ce afin de continuer à financer le logement social. Dans ces conditions, les raisons impérieuses d'intérêt général invoquées ne sont pas de nature à justifier une législation comportant des effets aussi restrictifs que celle en cause.

L'absence de justification sur la base de l'article 86, paragraphe 2, du traité

Les autorités françaises ont également invoqué l'article 86, paragraphe 2, du traité pour déroger aux articles 43 et 49 du traité. S'agissant du service d'intérêt économique général de financement du logement social, la Commission constate que l'application des principes de nécessité et de proportionnalité au titre de l'article 86, paragraphe 2, du traité n'implique pas de spécificité par rapport à leur application dans le cadre des «raisons impérieuses d'intérêt général» invocables au titre des articles 43 et 49 du traité.

Les autorités françaises invoquent toutefois un autre service d'intérêt économique général associé à ces livrets, à savoir celui d'accessibilité aux services bancaires de base. Ce service concerne de petits épargnants qui utilisent le livret A à la place ou en complément d'un compte courant pour faire des opérations fréquentes de dépôt et de retrait.

S'agissant de l'étendue de ce service, la Commission constate que ce mécanisme est rendu possible par l'obligation faite à la Banque Postale d'accepter d'ouvrir un livret à toute personne qui en fait la demande tout en lui garantissant la gratuité des opérations réalisées. En revanche, les obligations auxquelles sont soumises les Caisses d'Épargne

⁽⁶⁾ Arrêt de la Cour du 30 novembre 1995, affaire C-55/94 (Gebhard), Rec.p.I-4165.

et le Crédit Mutuel ne permettent pas de considérer que ces établissements sont chargés d'un service d'intérêt économique général d'accessibilité bancaire.

Sur la base de la jurisprudence Corbeau de la Cour de justice ⁽⁷⁾, les autorités françaises considèrent que le droit spécial de distribution permet d'organiser, au sein d'un même établissement, un système de péréquation entre la gestion coûteuse des petits livrets (faible encours épargné) peu rémunérateurs et la gestion peu coûteuse de gros livrets rémunérateurs. En cas de banalisation du système de distribution, un «phénomène d'écémage» risquerait de se produire par lequel la Banque Postale perdrait ses gros livrets rémunérateurs tout en gardant les petits livrets coûteux à gérer. Il s'ensuivrait un déséquilibre financier qui devrait être compensé par l'État en sus des commissions d'intermédiation versées par la Caisse des dépôts en proportion de l'encours collecté. Les autorités françaises en concluent que la suppression des droits spéciaux de distribution risquerait de conduire à un surcoût important dans le financement du service d'intérêt économique général d'accessibilité bancaire.

La Commission considère que ce phénomène d'écémage doit effectivement être pris en compte. Pour autant, sur la base d'un chiffrage

précis du coût des deux services d'intérêt économique général, à savoir financement du logement social et accessibilité bancaire, elle est parvenue à la conclusion qu'un système plus transparent et plus ouvert, fondé sur une distribution banalisée et des obligations d'intérêt général clairement définies, serait globalement moins coûteux pour les finances publiques françaises. Cette analyse repose principalement sur le fait qu'une banalisation permettrait de remplir la mission de collecte de l'épargne en vue du financement du logement social à un coût bien inférieur pour l'État, les commissions d'intermédiation comprises entre 1 et 1,3 % de l'encours collecté pouvant être réduites à environ [0,6-0,8] %.

Au total, l'ouverture du mode de distribution des livrets A et bleu permettra, sans surcoût pour les finances publiques, de mettre fin aux infractions constatées tout en préservant les services d'intérêt économique général concernés. S'agissant des particuliers, il est important de souligner qu'ils ne verront pas d'évolution négative du mode de fonctionnement de leurs livrets mais devront au contraire profiter des bénéfices de la concurrence sous forme d'une liberté de choix accrue et d'une amélioration de la qualité du service proposé. Les autorités françaises disposent de neuf mois à compter du 10 mai 2007, pour mettre leur législation en conformité avec le droit communautaire.

⁽⁷⁾ Arrêt de la Cour du 19 mai 1993 (Corbeau), Rec.p. I-2533.

Le nouveau dispositif de participation de l'État français au financement de la protection sociale complémentaire de ses agents: une aide à caractère social compatible avec le marché commun

Barbara JANKOVEC ⁽¹⁾

1. Introduction

Le 28 décembre 2005, la France acceptait la recommandation de la Commission ⁽²⁾ visant à ce qu'il soit mis un terme au régime d'aides d'État incompatible avec le marché commun dont bénéficiait historiquement la Mutualité Fonction Publique (MFP).

Sans revenir sur les détails de cette affaire ⁽³⁾, on rappellera brièvement que la MFP, union d'une trentaine de mutuelles de fonctionnaires spécialisées par catégorie professionnelle ⁽⁴⁾, est chargée de la gestion du régime de base de sécurité sociale des fonctionnaires français mais exerce également, au profit de ses adhérents, des activités d'action sociale complémentaires, telles que la gestion de centres médicaux et de services d'assurance et de prévoyance complémentaires sur des marchés ouverts à la concurrence.

Les autorités françaises s'étaient engagées à ce qu'il soit mis un terme, avant le 1^{er} janvier 2007, à toute mesure d'aide identifiée par la Commission relative aux activités de gestion d'assurance complémentaire de la MFP et de ses mutuelles membres. La première mesure d'aide identifiée ressortait de l'absence de prise en considération du coût réel des frais de gestion relatifs aux prestations du régime obligatoire de sécurité sociale des fonctionnaires pour la détermination du montant des remises consenties par l'État. La seconde consistait dans le versement de subventions directes aux mutuelles. Enfin, la troisième concernait la mise à la disposition des mutuelles par l'État et

les collectivités locales et sans contrepartie financière, de personnel et de locaux.

Désireuse de permettre aux personnes publiques de contribuer au financement des garanties de protection sociale complémentaire auxquelles les agents qu'elles emploient souscrivent, la France a modifié sa législation ⁽⁵⁾.

Les modalités d'application de cette participation ont été concrétisées par un projet de décret en Conseil d'État, notifié à la Commission à la fin de l'année 2006. Dans sa décision du 30 mai 2007 ⁽⁶⁾, la Commission a estimé que ce dispositif de financement constitue une aide à caractère social compatible avec le marché commun, au sens l'article 87, paragraphe 2, sous a), du Traité.

2. Le nouveau dispositif de participation au financement

Afin que l'État et ses établissements puissent participer au financement de la protection sociale complémentaire de leurs agents et de leurs retraités, le projet de décret prévoit que les employeurs publics organisent une mise en concurrence pour sélectionner un ou plusieurs organismes d'assurance auprès desquels leurs agents/retraités pourront souscrire un contrat de protection sociale complémentaire visant les risques d'atteinte à l'intégrité physique de la personne, concernant la maternité, l'incapacité de travail ainsi que, pour tout ou partie, les risques invalidité et décès.

Les employeurs publics détermineront chaque année le montant de leur participation financière à verser à l'organisme ou aux organismes sélectionné(s).

Il est prévu que la mise en concurrence, par le biais d'un appel public à candidature, permette à chaque employeur public de sélectionner un ou plusieurs organismes dont les contrats présenteront notamment un degré élevé de solidarité tant

⁽¹⁾ Direction générale de la Concurrence, unité D-3. Le contenu du présent article ne reflète pas nécessairement la position officielle des Communautés européennes. Les informations et les opinions qui y sont exposées n'engagent que leur auteur.

⁽²⁾ Le 20 juillet 2005, la Commission avait proposé à la France l'adoption de mesures utiles au titre de l'article 88, paragraphe 1, du Traité (JO C 295 du 26 novembre 2005, p. 12).

⁽³⁾ Voir Competition Policy Newsletter 2006 n° 3 Autumn: «Mutualité Fonction Publique: la France accepte les propositions de la Commission».

⁽⁴⁾ Par exemple, personnels des ministères (Intérieur, justice...), personnels de police, hospitalier, des collectivités territoriales etc.

⁽⁵⁾ L'article 39 de la loi n° 2007-148, du 2 février 2007, de modernisation de la fonction publique prévoit l'ajout d'un article 22 bis à la loi n° 83-634, du 13 juillet 1983, portant droits et obligations des fonctionnaires.

⁽⁶⁾ JO C 151 du 5 juillet 2007. Voir également: http://ec.europa.eu/competition/state_aid/register/ii/by_case_nr_n2006_0900.html#911

intergénérationnelle que familiale et financière. Cette exigence permettra d'assurer une couverture effective des plus âgés et des plus exposés au risque.

3. Un dispositif à caractère social

L'article 87, paragraphe 2, sous a), du Traité dispose que "sont compatibles avec le marché commun les aides à caractère social octroyées aux consommateurs individuels, à condition qu'elles soient octroyées sans discrimination quant à l'origine des produits".

Si la qualification de la mesure comme aide ne présentait pas de difficulté, la particularité de la décision de la Commission réside sans aucun doute dans la reconnaissance du caractère social de celle-ci. En effet, le dispositif notifié par la France a été examiné et approuvé par la Commission sur le fondement de la disposition concernant les aides à caractère social, qui n'a jusqu'à présent fait l'objet que d'une application parcimonieuse.

La Commission considère habituellement que des mesures d'aide présentent un caractère social dès lors qu'elles bénéficient à des catégories spécifiques d'individus dont la situation personnelle justifie que leur soit à certains égards apporté un soutien de l'État. On se référera, à titre d'illustration, aux personnes handicapées ainsi qu'à celles devant faire face aux désagréments résultant de l'insularité⁽⁷⁾.

S'agissant du caractère social du dispositif envisagé, la Commission estime qu'il ressort clairement du domaine concerné et de la finalité poursuivie par l'État français, en ce que celui-ci décide de soutenir le financement de l'assurance complémentaire de ses agents. Outre le fait que ce type de financement est fréquemment assuré par les entreprises privées au bénéfice de leurs employés, la Commission a relevé que le dispositif doit bénéficier aux agents/retraités de l'État désireux de contracter une assurance complémentaire, indépendamment de leur situation individuelle. Il ne doit donc, en principe, pas être tenu compte de leur

état de santé. De surcroît, la participation financière de l'employeur devant uniquement concerner des contrats dits "solidaires", la Commission a estimé que l'objectif poursuivi vise clairement à assurer une couverture effective de la population la plus fragile du point de vue assurantiel.

S'agissant des autres conditions requises par l'article 87, paragraphe 2, sous a), du Traité, la Commission s'est, d'une part, assurée de ce que le dispositif en cause bénéficierait effectivement et intégralement aux agents concernés, les organismes sélectionnés ne devant pas garder à leur profit une quelconque part de la contribution financière consentie par l'État. À cet égard, le projet de décret prévoit que la participation financière de l'État doit profiter aux consommateurs individuels, à savoir les agents/retraités de l'État, les organismes de référence devant intégralement transférer le bénéfice de celle-ci aux agents affiliés sous forme de réductions de leurs primes. Dans ce contexte, la participation financière de l'employeur public ne peut, en tout état de cause, excéder les transferts de solidarité effectivement mis en œuvre. Des exigences de nature comptable, couplées à des mécanismes de contrôle, garantiront l'effectivité de ces objectifs.

D'autre part, afin de vérifier que l'aide sera accordée par l'employeur public sans discrimination liée à l'origine du produit d'assurance considéré, la Commission a vérifié que les critères de sélection sont objectivement justifiés par l'objectif social poursuivi. Elle s'est également assurée que tout organisme, quel que soit son statut, sera autorisé à participer à la mise en concurrence organisée par chaque employeur public. Outre les mutuelles et unions de mutuelles, les institutions de prévoyance et les entreprises d'assurance sont en effet habilitées à participer aux mises en concurrence.

Sans que ne soient remis en cause les fondements du mouvement mutualiste, cette ouverture constitue le signe tangible d'une évolution des mécanismes de la protection sociale dans le sens d'une conformité avec les exigences d'une saine concurrence, au bénéfice des consommateurs.

⁽⁷⁾ Décision de la Commission du 27 juin 2007, N 558/2005 — Aid to «Zakłady Aktywnosci Zawodowej» — Establishments of professional activity for seriously disabled people et décision de la Commission du 4 décembre 2006, N 656/2006 — Régime d'aides sociales à caractère individuel au profit de certaines catégories de passagers des liaisons aériennes régulières entre la Réunion et la métropole (JO C 90 du 25.4.2007, p.14).

Municipal wireless networks and State aid rules: Insights from “Wireless Prague”

Norbert GAÁL, Lambros PAPADIAS and Alexander RIEDL ⁽¹⁾

1. Introduction

Access to advanced electronic communications networks and especially broadband services has become a critical component of the economic and social fabric of today's societies. Despite full liberalisation of the telecoms sector and increased competition through third-party access to the networks of fixed-line incumbents, the economics of broadband networks mean that not all geographic areas can receive and enjoy affordable broadband connections. To remedy some of the shortcomings of fixed networks, wireless technologies have emerged over the last years as an alternative technology that could serve the needs of citizens where access and use of fixed-line networks may not be a viable solution.

Today, local wireless networks are mushrooming all over Europe. Initially deployed in rural areas and remote areas as a complementary network component to a fixed-line broadband network, wireless networks are now being set up in cities and towns where broadband technologies may already be in place. Apart from many private initiatives, some local authorities have also been considering playing a significant role in the deployment of such networks in several European towns and cities. The public funding for such networks often aims to relieve a perceived gap in broadband supply to enable the provision of services ⁽²⁾ to citizens and businesses. However, often “municipal pride” seems to play a role as well. The complaint against the Prague Municipal Wireless Network project ⁽³⁾ was the first such case assessed by DG Competition under the State aid rules. This article provides a short overview of the case and a number of general policy considerations.

2. The “Wireless Prague” project

The project plans

In 2006, the City of Prague initiated plans to build an entirely publicly-funded, city-wide wireless broadband network in Prague. According to the Czech authorities, this would support the development of the knowledge society in Prague and improve the competitiveness of the city. The total planned cost to the City of Prague over 5 years amounted to CZK 342 million (approx. € 12.2 million).

The network would enable all citizens to have wireless broadband access (using their laptops, mobile devices, etc.) throughout 21 out of 57 Prague municipal districts, which is approximately one-third of the Czech capital. For the network, the City of Prague chose to implement WiFi technology, a Wireless Local Area Network technology using unlicensed spectrum, and offering broadband access at short distances around so-called “hot spots”. The construction and operation of the network was planned to start in 2007 and the complete infrastructure is expected to be finished by 2008.

The initial plans also provided for commercial exploitation, whereby capacity on the municipal network to be built would have been available to telecommunications operators via a public tendering process. These operators would have been able to use the capacity on the new, municipal wireless network to offer their own broadband internet services to citizens and business users in the covered area.

The market context

Although broadband penetration in the Czech Republic remains below the EU average ⁽⁴⁾, the broadband market in the Czech Republic is characterised by significant platform competition, with the third highest market share for alternative operators in the EU ⁽⁵⁾. Thus, broadband access in Prague is provided over several competing tech-

⁽¹⁾ Directorate-General for Competition, unit C-4. This article reflects the personal opinions of the authors and may not be regarded as stating an official position of the European Commission or of its Competition Directorate-General. Responsibility for the information and views expressed lies entirely with the authors.

⁽²⁾ Broadband access is deemed essential for various public e-services such as e-Government, tourism applications or telemedicine.

⁽³⁾ Case NN 24/2007 — Prague Municipal Wireless Network (ex CP127/2006), Czech Republic, of 30.05.2007, see http://ec.europa.eu/competition/state_aid/register/ii/doc/NN-24-2007-WLWL-en-30.05.2007.pdf

⁽⁴⁾ According to the European Commission's 12th report on the Implementation of the Telecommunications Regulatory Package, it reached 9.6% of the population in 2006 compared to 15.7% on average in the EU-25.

⁽⁵⁾ Source: 12th Report on the Implementation of the Telecommunications Regulatory Package — 2006. COM(2007) 155 — 29 March 2007.

nology platforms such as ADSL, cable, wireless or mobile communications. A notable feature of the Czech broadband market is the significantly higher market share of wireless connections compared to other EU countries: wireless access comprises 31.1% of all broadband connections ⁽⁶⁾. So it came as no surprise that the initial plans of the City of Prague triggered opposition by private operators already offering broadband services in the Czech capital.

3. State aid assessment

Preliminary investigation of DG Competition

Following a complaint by private operators in June 2006, the Commission conducted a preliminary investigation of the initial plans. However, during the investigation and after consulting the Czech Competition Authority (ÚOHS), the City of Prague modified its initial plans considerably in the light of concerns as to the possible negative effects of the project on existing providers. In order to alleviate these concerns, the project was accordingly split into 2 phases:

- Phase 1 was limited to the provision of high-speed connectivity to public buildings and institutions (such as schools or municipal buildings), free wireless internet access to public administration services (such as e-government services) and to public sector information for citizens as well as the development of public-sector applications (such as mobile camera surveillance of municipal areas or traffic monitoring).
- Phase 2 involved plans for the future commercial exploitation of the network.

Since Phase 2 was postponed indefinitely by the Czech authorities, the Commission's State aid assessment was limited to Phase 1 of the project only.

Presence of State aid

In its decision of 30 May 2007, the Commission concluded that Phase 1 of the project did not involve State aid. Although there were no doubts that state resources were involved given that this was a publicly-funded project, no economic advantage within the meaning of Article 87 (1) of the EC Treaty was conferred at any level. In particular, the provider selected to build and operate the network was chosen by means of an open

tender. The public-sector organisations whose websites could be accessed for free via the wireless network do not carry out any economic activities and therefore cannot be regarded as undertakings within the meaning of Article 87 (1). Moreover, at the level of end-users, the new network would not be able to substitute existing market offers as it will offer access only to publicly-funded websites which in any event are already accessible via any other existing broadband connection offered (ADSL, cable, mobile and WiFi networks).

4. Insights — Some policy considerations

The "Wireless Prague" case is regarded by market observers as an important precedent. Following the decision, several European cities significantly modified their plans to roll out municipal wireless networks. The decision is in line with the Commission's policy concerning the public funding of broadband networks ⁽⁷⁾. In areas characterised by adequate broadband coverage over several competing broadband infrastructures, such as Prague, the justification for State aid is doubtful as there is a high risk that state intervention crowds out existing and future private investments.

The main concern of the complainants regarding the "Wireless Prague" project had been the distortive effects of the initially planned commercial exploitation of the wireless network on existing providers. Given that several competing broadband offers were already provided by private operators in the area covered by the municipal wireless network, creating a new broadband network with public funds and making it available for commercial exploitation could have raised serious questions about the *necessity* and *proportionality* of such a measure.

In general, public authorities may provide public support for the provision of (wireless) broadband if there is no offer by private operators. However, there are also several alternative ways of encouraging private operators to provide (wireless) broadband which do not involve granting State aid. For example, local authorities may procure services by means of public tender from broadband operators for public sector use instead of building their own networks. This would avoid State aid issues related to the exploitation of excess capacity on such networks from the outset.

⁽⁶⁾ This is significantly more than in any other EU country: the EU-25 average of "alternative" technologies for broadband access, including wireless, is 2.7% of all connections, *ibid*.

⁽⁷⁾ See also "Public funding for broadband networks — recent developments", by Papadias, Riedl and Westerhof, Competition Policy Newsletter, 2006-3 autumn.

Public authorities may help wireless operators to deploy their networks, for instance by granting antenna permits to operators more cheaply and more quickly. They may also grant non-discriminatory access to public infrastructure such as lamp posts or municipal buildings for antenna sites. They can actively coordinate the

deployment of hotspots or encourage service take-up by providing attractive e-government services. The experience from several European cities shows that local authorities are well-advised to work *with* private operators and not against them, in a joint effort to bring affordable broadband to everyone.

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Notices and news in brief

II Conferência de Lisboa sobre Direito e Economia da Concorrência and 15th European Competition Day

Lisbon 15-16 November 2007

The first Competition Day took place in Lisbon in 2000 as an initiative of former Competition Commissioner Mario Monti, to bring competition policy closer to consumers. Seven years later, Portugal has hosted the 15th edition of this event, which brings decision makers and practitioners to discuss topical issues shaping today's competition policy. This year the topics discussed were:

- The reform of State aid control
- Administrative decisions and restitution for breach of the competition rules
- Merger control in regulated markets
- Monopoly practices and the abuse of a dominant position
- Competition policy and industrial policy in a globalised world

Mr. Abel Mateus President of the Autoridade da Concorrência (Portuguese Competition Authority), opened the conference by listing the competition policy challenges today. He echoed the proposals of national competition authorities on European Competition Network, such as the revision of the "two third rule", the possibility of vying freely for a company in a take-over bid, and the application of a competition impact assessment to decision-making. He also described the work on the approach for article 82 cases as one of the most important initiatives of the Commission.

Competition Commissioner Mrs. Neelie Kroes emphasised the commitment required to get the best out of free but fair markets and pass these benefits to citizens. After outlining the features of the new approach to State aid control, she underlined the dangers of subsidy races at a global level and stressed the need for an active EU trade policy that includes international discipline on subsidies to complement internal competition policy.

During her intervention, Meglena Kuneva, European Commissioner for consumer protection, pointed out that "healthy markets are the most direct and efficient way to benefit consumers".

All speakers agreed on the importance of private individuals being able to assert their rights. Mrs Kroes emphasized the need for an effective system allowing all victims of competition abuses exercise their right to compensation. She announced the adoption of a White Paper in early 2008 to make it easier for private damages cases to come successfully to court.

More information on the conference is available on <http://www.autoridadedaconcorrencia.pt>

**The next Joint European Competition and Consumer Day
will take place in Ljubljana (Slovenia) on 22 May 2008
under the Slovenia Presidency of the Council.**

Information is available on the Slovene Competition Protection Office web page:
<http://www.uvk.gov.si/en/>

Directorate-General for Competition — Organigramme (6 February 2008)

Director-General	Philip LOWE	02 29 65040/02 29 54562
Deputy Director-General Operations	Lowri EVANS	02 29 65029
Deputy Director-General Mergers and Antitrust Adviser	Nadia CALVIÑO Claude RAKOVSKY	02 29 55067 02 29 55389
Deputy Director-General State Aids	Herbert UNGERER	02 29 68623
Chief Economist	Damien NEVEN	02 29 87312
Adviser: Consumer Liaison Officer	Juan RIVIERE Y MARTI	02 29 51146
Audit adviser	Rosalind BUFTON	02 29 64116
Assistants to the Director-General	Inge BERNAERTS Tomas DEISENHOFER	02 29 51888 02 29 85081
Task Force “Ethics, security and procedures”	Monique NEGENMAN acting	02 29 55228
01. Communications policy and institutional relations	Kevin COATES acting	02 29 59758
02. Antitrust and merger case support	Guillaume LORIOT	02 29 84988
03. State aid case support	Nicola PESARESI	02 29 92906
DIRECTORATE A Policy and Strategy	Emil PAULIS	02 29 65033
1. Strategy and delivery	Joos STRAGIER	02 29 52482
2. Antitrust and mergers policy and scrutiny	Donncadh WOODS acting	02 29 61552
3. State aids policy and scrutiny	Alain ALEXIS	02 29 55303
4. Evaluation	Dietrich KLEEMANN	02 29 65301
5. European Competition Network	Kris DEKEYSER	02 29 54206
6. International Relations	Sari SUURNÄKKI acting	02 29 91828
DIRECTORATE B Markets and cases I – Energy and environment	Herbert UNGERER	02 29 68623
1. Antitrust — energy, environment	Lars KJOLBYE	02 29 69417
2. State aids	Jorma PIHLATIE	02 29 53607/02 29 69193
3. Mergers	Dan SJOBLÖM	02 29 67964
DIRECTORATE C Markets and cases II – Information, communication and media	Cecilio MADERO VILLAREJO	02 29 60949
1. Antitrust — telecoms	Michael ALBERS	02 29 61874
2. Antitrust — media	Arianna VANNINI	02 29 64209
3. Antitrust — IT, internet and consumer electronics	Per HELLSTROEM	02 29 66935
4. State aids	Eric VAN GINDERACHTER	02 29 54427
5. Mergers	Carles ESTEVA MOSSO	02 29 69721
DIRECTORATE D Markets and cases III – Financial services and health-related markets	Irmfried SCHWIMANN acting	02 29 67002
1. Antitrust – Financial services	Irmfried SCHWIMANN	02 29 67002
2. Antitrust – Pharmaceuticals and other health-related markets	Georg DE BRONETT	02 29 59268
3. State aids	Blanca RODRIGUEZ GALINDO	02 29 52920
4. Mergers	Joachim LUECKING	02 29 66545

DIRECTORATE E**Markets and cases IV – Basic industries, manufacturing and agriculture**

1. Antitrust — Consumer goods, agriculture and goods
2. Antitrust – Basic industries, chemicals and other manufacturing
3. State aids – Industrial restructuring
4. Mergers

Paul CSISZAR

02 29 84669

Yves DEVELLENES

02 29 51590/02 29 52814

Paolo CESARINI

02 29 51286/02 29 66495

Karl SOUKUP

02 29 67442

Maria REHBINDER

02 29 90007

DIRECTORATE F**Markets and cases V — Transport, post and other services**

1. Antitrust — Transport and post
2. Antitrust — Other services
3. State aids
4. Mergers

Olivier GUERSENT acting

02 29 65414

Linsey Mc CALLUM

02 29 90122

Zsuzsanna JAMBOR

02 29 87436

Joaquin FERNANDEZ MARTIN

02 29 51041

Olivier GUERSENT

02 29 65414

DIRECTORATE G**Cartels**

1. Cartels I
2. Cartels II
3. Cartels III
3. Cartels IV
4. Cartels V

Kirtikumar MEHTA

02 29 57389

Paul MALRIC-SMITH

02 29 59675

Dirk VAN ERPS

02 29 66080

Jarek POREJSKI

02 29 87440

Ewoud SAKKERS

02 29 66352

Flavio LAINA acting

02 29 69669

DIRECTORATE H**State aid – Cohesion, R&D&I and enforcement**

1. Regional aid
2. R&D, innovation and risk capital
3. State aid network and transparency
4. Enforcement and procedural reform

Humbert DRABBE

02 29 50060/02 29 52701

Robert HANKIN

02 29 59773/02 29 68315

Wouter PIEKE

02 29 59824/02 29 67267

Wolfgang MEDERER

02 29 53584/02 29 65424

Dominique VAN DER WEE

02 29 60216

DIRECTORATE R**Registry and Resources**

1. Document management
2. Resources
3. Information technology

Isabelle BENOLIEL

02 29 56199/02 29 60198

Corinne DUSSART-LEFRET

02 29 61223/02 29 90797

Michel MAGNIER

02 29 56199/02 29 57107

Manuel PEREZ ESPIN

02 29 61691

Reporting directly to the Commissioner

Hearing officer

Michael ALBERS

02 29 61874

Hearing officer

Karen WILLIAMS

02 29 65575

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://ec.europa.eu/competition/speeches/>

Speeches by the Commissioner, 1 May 2007 — 31 August 2007

4 July: Press conference on Telefónica decision — introductory remarks — Neelie KROES — Brussels (European Commission)

30 June: What competition has done for Europe's citizens in the wake of globalisation — Neelie KROES — Paris, France (Nouvelle République — Colloque "Libéralisme vs protectionisme: pour une Europe ouverte mais pas offerte")

28 June: How best to complete the Single European Market for energy? — Neelie KROES — Brussels (International Federation of Industrial Energy Consumers)

27 June: Introductory remarks at press conference on Ryanair/Aer Lingus decision — Neelie KROES — Brussels (European Commission)

26 June: Competition Policy: Achievements in 2006; Work Programme in 2007; Priorities for 2008 — Neelie KROES — Brussels (European Parliament Economic and Monetary Affairs Committee)

5 June: European Competition Policy in a changing world and globalised economy: fundamentals, new objectives and challenges ahead — Neelie KROES — Brussels (GCLC/ College of Europe Conference on "50 years of EC Competition Law")

30 May: The International Competition Network — Achievements and Goals — Neelie KROES — Moscow (International Competition Network (ICN) Annual Conference)

21 May: Two years into the SAAP — State of Play and prospects — Neelie KROES — Brussels (European State Aid Law Institute Conference)

15 May: Broadband rollout and competition policy — what role for public funding? — Neelie KROES — Brussels ('Bridging the Broadband Gap' Conference)

11 May: European competition policy facing a renaissance of protectionism — which strategy for the future? — Neelie KROES — St. Gallen, Austria (St Gallen International Competition Law Forum)

Speeches and articles, Directorate-General Competition staff, 1 May 2007 — 31 August 2007

29 June: State aid reform — current directions — Lowri EVANS — Brussels (Law Society Conference)

21 June: A new European Energy policy — the importance of a functioning internal energy market — Herbert UNGERER — Monaco (WBR)

31 May: Introduction to cartels working group plenary session — Philip LOWE — Moscow (ICN Annual conference)

21 May: Concluding remarks — 5th experts' forum on new developments in European State — Lowri EVANS — Brussels (European State aid Law Institute (EStALI))

18 May: Consolidation in the World Steel Industry — a government policy point of view: EU competition policy aspects — Herbert UNGERER — Istanbul, Turkey (OECD)

16 May: Recent Developments in the European Gas Sector — a Competition Perspective — Herbert UNGERER — Oslo, Norway (Norwegian Petroleum Society)

Community Publications on Competition

New publications

- **Report on competition policy 2006 — available in electronic version**

The report adopted by the Commission (25 pages) is available in 20 languages: Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Italian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Portuguese, Slovak, Slovene, Spanish and Swedish.

The Commission Staff working document (105 pages) is available in English, French and German.

- ***Report on competition policy 2005 — now available in print version***

The report adopted by the Commission is available in 20 languages and is distributed free of charge.

The supplement to the report contains detailed information on the application of competition rules in the European Union and Member States, including statistics. Available in English only. Price: 25 EUR.

All publications can be ordered or downloaded from the EU bookshop:

<http://bookshop.europa.eu/>

Publications for sale are also available the sales agents of the Office for Official Publications of the European Communities. Requests for free publications can also be addressed to the representations of the European Commission in the

Member states, to the delegations of the European Commission in other countries, or to the Europe Direct network.

Links to your nearest contact point for free and priced publications can be found at:

http://publications.europa.eu/howto/index_en.htm

Further information about our publications as well as PDF versions of them can be found on the DG Competition web site:

<http://ec.europa.eu/competition/publications/index.html>

Upcoming publications

- ***Competition policy newsletter, 2008, Number 1***
- ***Provisions on international relations in EU competition policy***

Press releases

1 May 2007 — 31 August 2007

All texts are available from the Commission's press release database RAPID at: <http://europa.eu/rapid/>. Enter the reference (e.g. IP/06/14) in the 'reference' input box on the 'search' screen to retrieve the text of a press release. Note: Languages available vary for different press releases.

General

IP/07/971 — 29/06/2007 — Competition: 2006 Annual Report on Competition Policy, a contribution to a European economic policy for growth and jobs

Antitrust

MEMO/07/330 — 23/08/2007 — Antitrust: Commission confirms sending a Statement of Objections to Rambus

IP/07/1213 — 06/08/2007 — Commission to appeal to Court of Justice against judgment of Court of First Instance in Case T-351/03 Schneider Electric v Commission

MEMO/07/321 — 06/08/2007 — La Commission européenne décide de former un pourvoi devant la Cour de justice contre l'arrêt du Tribunal de première instance dans l'affaire T-351/03, Schneider Electric/Commission

MEMO/07/319 — 02/08/2007 — Competition: Commission confirms sending statement of objections to companies in sodium chlorate sector

MEMO/07/316 — 30/07/2007 — Antitrust: Commission opens formal proceedings against E.ON and Gaz de France concerning suspected market-sharing

MEMO/07/315 — 27/07/2007 — Competition: Commission confirms sending of a Statement of Objections regarding an alleged cartel for the sale of bananas

MEMO/07/314 — 27/07/2007 — Competition: Commission confirms sending of Statement of Objections to Intel

MEMO/07/313 — 26/07/2007 — Antitrust: Commission initiates formal proceedings against Electrabel and EDF for suspected foreclosure of the Belgian and French electricity markets

IP/07/1137 — 19/07/2007 — Competition: Commission ends Court proceedings against Hungary after amendment of Media Act

IP/07/1114 — 18/07/2007 — Competition: Commission formally requests Italy to comply with EU rules on electronic communications

IP/07/1113 — 18/07/2007 — Antitrust: Commission closes proceedings against past roaming tariffs in the UK and Germany

IP/07/1074 — 11/07/2007 — Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts

IP/07/1011 — 04/07/2007 — Antitrust: Commission fines Telefónica over €151 million for over five years of unfair prices in the Spanish broadband market

MEMO/07/276 — 04/07/2007 — Antitrust: Commission carries out inspections in the sector of hardware for windows and doors

MEMO/07/274 — 04/07/2007 — Antitrust: Commission decision against Telefónica — frequently asked questions (see also IP/07/1011)

IP/07/973 — 29/06/2007 — Competition: Commission ends block exemption for IATA passenger tariff conferences for routes between the EU and non-EU countries

IP/07/961 — 28/06/2007 — Competition: Commission welcomes simplification of access to Luxembourg telecommunication markets

IP/07/958 — 28/06/2007 — Competition: Commission requests Malta to adjust import monopoly for petroleum products

IP/07/956 — 28/06/2007 — Antitrust: Commission closes infringement procedure after Czech Republic brings Competition Act into line

MEMO/07/250 — 23/06/2007 — Statement by European Commissioner for Competition Neelie Kroes on results of June 21-22 European Council — Protocol on Internal Market and Competition

IP/07/829 — 14/06/2007 — Antitrust: Commission market tests commitments from CISAC and 18 EEA collecting societies concerning reciprocal representation contracts

MEMO/07/232 — 07/06/2007 — Competition: Commission welcomes Court of Justice judgment in zinc phosphate case

CES/07/53 — 05/06/2007 — Neelie Kroes attends EESC INT section meeting: A consumer-friendly competition policy

MEMO/07/225 — 05/06/2007 — Memo on the Energy Council

MEMO/07/215 — 01/06/2007 — Antitrust: European Commission confirms issuing a Statement of Objections against alleged participants in a cartel in the paraffin waxes industry

MEMO/07/205 — 24/05/2007 — Antitrust: Commission welcomes Court of First Instance judgments in German recycling cases

MEMO/07/187 — 11/05/2007 — Antitrust: Commission initiates proceedings against the ENI Group concerning suspected foreclosure of Italian gas supply markets

MEMO/07/186 — 11/05/2007 — Antitrust: Commission initiates proceedings against RWE Group concerning suspected foreclosure of German gas supply markets

IP/07/641 — 10/05/2007 — Freedom of establishment and freedom to provide services: the Commission calls on France to end special rights to distribute savings books (“livret A” and “livret bleu”)

MEMO/07/182 — 10/05/2007 — Competition: Commission welcomes Court of Justice judgment in specialty graphite cartel case

MEMO/07/178 — 08/05/2007 — Anti-trust: European Commission confirms issuing a Statement of Objections against alleged participants in a cartel for chloroprene rubber

MEMO/07/163 — 03/05/2007 — Antitrust: Commission has carried out inspections in the marine hose sector

Merger control

IP/07/1267 — 30/08/2007 — Mergers: Commission clears proposed joint control of Magna by Russian Machines and the Stronach Trust

IP/07/1266 — 30/08/2007 — Mergers: Commission clears the proposed creation of “Vivergo Fuels” jointly controlled by BP and ABF

IP/07/1249 — 24/08/2007 — Mergers: Commission approves acquisition of Borealis Norway by INEOS

IP/07/1248 — 23/08/2007 — Mergers: Commission approves proposed acquisition of certain assets of Tate & Lyle by Syral

IP/07/1241 — 21/08/2007 — Mergers: Commission clears proposed acquisition of US provider of electronic travel distribution services Worldspan by Travelport (US)

IP/07/1240 — 21/08/2007 — Mergers: Commission approves proposed acquisition of sole control of BHS by Cinven

IP/07/1239 — 20/08/2007 — Mergers: Commission clears acquisition of Telenor Satellite Services by Apax Partners

IP/07/1238 — 20/08/2007 — Mergers: Commission approves proposed acquisition of Orange Netherlands by T-Mobile

IP/07/1231 — 13/08/2007 — Mergers: Commission authorises proposed joint venture between STMicroelectronics and Intel

IP/07/1229 — 10/08/2007 — Mergers: Commission approves proposed acquisition of Lanxess by the INEOS Group

IP/07/1222 — 08/08/2007 — Mergers: Commission clears proposed acquisition of SSM Coal by Oxbow

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