



EC COMPETITION
POLICY NEWSLETTER

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EUROPEAN COMMISSION

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Merger Remedies Study

Alexander KOPKE, Directorate-General Competition, unit A-2

DG Competition has recently published the **Merger Remedies Study**, a major *ex post* evaluation exercise. The Study reviewed the design and implementation of merger commitments accepted by the Commission in the five-year period 1996 to 2000.

The objectives of the Study were to identify with the benefit of hindsight *i.e.* three to five years after the Commission's decision:

- (1) any serious issues arising in the design and implementation of remedies;
- (2) the effectiveness of the Commission's merger remedies policy during the reference period; and
- (3) areas for further improvement of the Commission's existing merger remedies policy and practice.

The evaluation of past merger remedies is important, as without effective remedies, the Commission's merger intervention would be pointless. With this Study the Commission demonstrates its commitment to evaluate its policy and practice.

Methodology

The Study analysed 40 Commission decisions, which included 96 different remedies. These 96 remedies accounted for 42% of the 227 remedies adopted by the Commission during this five-year reference period and are a representative sample as regards (1) the types of remedies imposed, (2) the number of remedies accepted in Phase I or after an in-depth Phase II investigation, and (3) the different industrial sectors involved.

The Study conducted a thorough analysis of the processes involved in the design and the implementation of a relatively large number of remedies. Therefore, the Study opted for the method of interviewing the practitioners who were involved in the design and implementation of the remedies at the time.

A team of ten DG Competition case handlers carried out 145 interviews with a wide range of industry participants, including CEOs, heads and members of legal, M&A, finance, strategy, purchasing, marketing and sales departments, as well as product managers and outside legal advisors, who had the following functions at the time of the remedy process: committing parties (40 interviews); purchasers (61 interviews); trustees (37 interviews); and customers and competitors (7 interviews).

The one- to three-hour hour interviews were structured on the basis of a predefined questionnaire, yet were open-ended to allow the interviewees to comment freely on various aspects of the remedies process. The Study thus created an opportunity for the business and legal communities to provide feedback to the Commission on all merger remedy aspects, while being assured full anonymity.

This opportunity for dialogue was well-received and used by the more than 300 participating persons and companies who shared their views on many aspects of the Commission's remedy procedures. All interviews were recorded and transcribed. The quality of the replies was generally considered high. Of course, some interviewees did not comment on all aspects of the proceedings in their cases. Only 15 of the requested interviews could not be conducted, as the company declined to participate or all relevant respondents had left the business.

For a number of cases, interviews were followed-up with written questions; and for 20 remedies, detailed quantitative follow-up questionnaires were sent out to the parties and the purchasers of the divested business. After the interviews, the interview teams drafted detailed case reports for each remedy in accordance with a standard format. The case reports were subsequently discussed both within the interview team and in wider panels including other members of the Study team. The reports were also submitted for comments to the original case teams who had conducted the merger procedure at the time.

This vast amount of original information was compiled into a final report, a non-confidential version of which has recently been published on DG Competition's website.

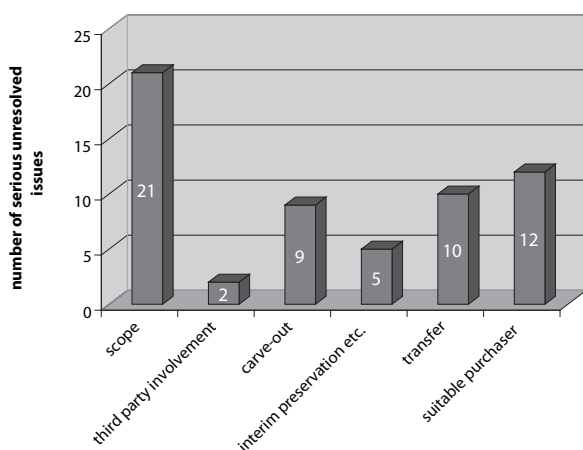
Divestiture remedies

The vast majority of remedies — 84 out of 96 — involved divestiture commitments. The Study's findings have confirmed the relevance of various aspects of the Commission's merger remedies practice introduced since 2000, *i.e.* after the reference period of the selected sample, such as the **Remedies Notice** and the **Model Commitments Texts**. Nevertheless, they have also identified a number of serious issues regarding the design and implementation of the analysed remedies which require further attention.

The following Chart shows the type of serious unresolved design and implementation issues that

were found to be arising in the different stages of the remedies' implementations.

Of these issues, the failure to adequately define the scope of the divested business was the most frequent problem, followed by the approval of an unsuitable purchaser, the incorrect carve-out of assets and the incomplete transfer of the divested business to the new owner.



The following indications are some of the main findings of the Study which may lead the Commission to consider introducing certain refinements to the current merger remedies policy and practice.

Definition of the scope of a divested business: Removing only the market share overlap often resulted in insufficient consideration of important aspects in the analysis of the commercial viability of a divested business. Such aspects included the upstream and downstream dependence of the divested business on the merging parties, geographic limitations, critical size of the divested business, and also product cycle effects and difficult IPR issues. The Remedies Notice already generally mentions the viability requirement. The Study also confirmed that a more detailed description of the scope of the divested business in the commitment texts would have made a number of remedies more effective. The Study highlighted that the assessment of a divested business typically required important insights into the relevant business, going much beyond the initial competition assessment.

Third party dependence: Where third parties were able to legally block the implementation of remedies (for example rights of partners in a JV the parties committed to exit), this did not ultimately lead to any reported failed remedies. However, the Study found that non-co-operation by third parties regularly delayed implementation up to several months and thus affected the full restoration of effective competition. Such situations will have to be better dealt with at the design stage by identifying all third-party issues upfront and, wherever

possible, by consulting such third parties during the Commission's investigation.

Carve-out issues: The carving out of assets from a wider company structure led to many serious implementation issues, such as delay, reduced effectiveness, or longer term dependence of the divested business on the sellers. Carve-out issues involved both tangible and intangible assets (in particular know-how), as well as (key) personnel. To date, the Commission has issued very little guidance on the principles according to which business carve-outs should be carried out.

Interim preservation: The preservation of the viability, marketability and competitiveness of the divested business in the interim period pending divestiture raised a significant number of serious issues, thus confirming the crucial role of monitoring during this stage. The Study found that particular damage can be done when investment programmes are stopped, or customer and supplier relationships neglected. The cases examined showed that the longer the divestiture period and thus the period of uncertainty, the greater the need for effective interim preservation and hold-separate measures.

Monitoring trustees: All but two studied divestiture remedies required the monitoring of the commitments by a trustee. In more than half of these remedies, the role of the trustee raised issues regarding the selection and appointment, its qualifications, its mandate, its relationship with the Commission and the parties, or its particular functions. Trustees were more often than not appointed too late to monitor or influence crucial early decisions in the divestiture process. Also, trustees rarely monitored the actual transfer of the business following the conclusion of the sales and purchase agreement. Few trustees had close enough contact with the divested business.

The Study generally concluded that the role assigned to the monitoring trustee had great potential for improvement in many analysed cases. Trustee mandates were often not sufficiently precise to guide their intervention.

Hold-separate managers: The carving-out of the divested business and its preservation and holding-separate was sometimes carried out by a hold-separate manager appointed for that task, who was expected to stay with the divested business. The Study's assessment underlined the crucial importance of hold-separate managers, their independence from the retained business, their co-operation with the trustee, their loyalty to the divested business, and their adequacy of experience and preparedness. So far, the Remedies Notice contains little guidance on hold-separate managers.

Purchasers: The selection and approval of a suitable purchaser proved critical to the effectiveness of many analysed remedies. In interviews, many purchasers, as well as a number of sellers and trustees, highlighted the unforeseen difficulties they experienced because they had underestimated the level of *expertise* required to operate the divested business.

The purchaser's *incentives* to maintain and develop the business proved questionable in hindsight for a number of remedies where the purchaser either ceased operation of the divested business shortly after its acquisition, quickly sold on the divested business, or seemed unwilling to compete with the parties and other competitors. Purchaser incentives often seemed questionable where the divested business had been acquired for free, or at a negative price. Financial investors proved unproblematic in the two analysed cases where they were the purchaser.

Transfer of the divested business: Serious issues also arose in connection with the final step of a divestiture remedy, *i.e.* the transfer of the business to the new owner. Such issues concerned all tangible and intangible assets, including IP, know-how, authorisation and contract matters, as well as personnel. Purchasers — particularly smaller firms and new entrants — were sometimes not able to safeguard their interests and enforce implementation of vital provisions of their sales and purchase agreements.

Access remedies

The Study analysed ten commitments to grant access. They were designed to maintain actual or potential competition in the relevant market by preventing foreclosure to critical infrastructure or technology or by surrendering exclusive rights. They raised a number of serious design and implementation issues, mainly involving the terms of access to be granted. These problems led to considering one access remedy as 'ineffective' and two as only 'partially effective'. In four access remedies (three of which involved access to infrastructure), the actual market developments turned out substantially differently from what had been anticipated by the parties and the Commission at the time the commitments were offered, in that the dynamic market growth that had been predicted had failed to materialise in those specific sectors.

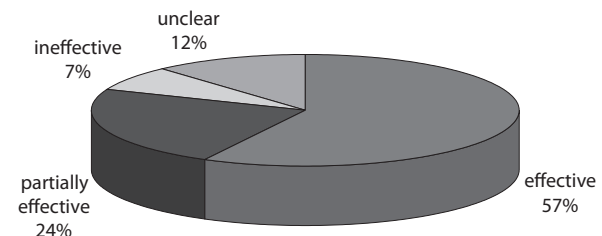
The insights offered by the Study tend to suggest that such access remedies have only worked in a very limited number of instances. The primary causes for the failure of access commitments were found to lie in the inherent difficulties in setting the terms for effective access and in monitoring them. The Study confirmed how challenging it is to effectively minimise these difficulties.

Effectiveness in competition terms

The Study also attempted an overall evaluation of the effectiveness of each remedy. This was based on an assessment of the collected quantitative market data (operational status of the divested business, evolution of relative market shares, etc.), as well as the findings from the Study case reports, and taking account of relevant facts from the case file, the statements of purchasers, the parties, trustees (and sometimes other third parties involved in the interviews), and the replies to the detailed follow-up questionnaires. This effectiveness indicator attempts to classify the assessed remedies on the basis of the extent to which they have fulfilled their competition objective (*i.e.* maintaining effective competition by preventing the creation or strengthening of a dominant market position). However, in the absence of a full new market investigation for each remedy, the Study's evaluation can only provide first indications.

The overall effectiveness evaluation was possible in 85 of the 96 analysed remedies and is presented in the chart on the right.

The Study found that 57% of the analysed remedies were fully effective, while 24% were considered only partially effective. Few remedies (7%) had clearly not reached their intended objective and were thus considered ineffective.



As regards different types of remedies, the Study found that, overall, remedies for the dissolution of JVs were the most effective type of remedy (no failure), while the effectiveness of access remedies was the weakest.

What next?

The Study has been published on DG Competition's website ⁽¹⁾ in a non-confidential format. All interested persons are invited to make their comments directly to the project leader Alexander KOPKE.

The results of the Study and comments will be contributing to an upcoming review of the Merger Remedies Notice and of the Model Divestiture Commitments and Trustee Mandate.

⁽¹⁾ See: <http://europa.eu.int/comm/competition/mergers/legislation/remedies.htm>

The European Commission's 2002 Leniency Notice in practice

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Introduction

In the Summer 2003 issue of the EC Competition Policy Newsletter, one of the authors described the Commission's first year of practice in implementing the 2002 Leniency Notice (hereafter 'the 2003 article') (2). In the current article, we discuss the Commission's handling of certain additional issues in the implementation of the 2002 Leniency Notice (hereafter 'the 2002 Notice' or 'the Notice') (3) that have become prominent over the past two and a half years (4). Specifically, we address the question which legal entity within an undertaking should make a leniency application, what the procedure is for submitting leniency applications in oral fashion, what the evidential value is of corporate statements, in which situations the Commission will normally not be in a position to grant immunity and how to interpret the notion of significant added value. We start by providing some updated statistics on the operation of the 2002 Notice so far (5).

Some statistics

Since the entry into force of the Notice in February 2002, the Commission had received, by the end of September 2005, 80 applications for immunity (6) and 79 applications for a reduction of fine (7).

With respect to these 80 immunity applications received, 11 of them were hypothetical applications pursuant to point 13(b) of the Notice. By the end of September 2005, the Commission had granted conditional immunity decisions in 49 cases. 45 of these conditional immunity decisions were granted under point 8(a) of the Notice, i.e. on the basis that the evidence submitted enabled the Commission

(1) The views expressed in this article do not represent official positions of the European Commission. The authors wish to thank Waltraud Mizelli of the Cartels Directorate for her help with statistics and Ewoud Sakkers for his detailed comments. The authors alone are responsible for any remaining errors.

(2) Bertus van Barlingen: *The European Commission's 2002 Leniency Notice after one year of operation*, EC Competition Policy Newsletter, Number 2, Summer 2003, pp. 16 to 22.

(3) OJ C 45, 19.2.2002, pp. 3 to 5. The previously applicable Notice, which was issued by the Commission in 1996 (OJ C 207, 18.7.1996, pp. 4 to 6) is referred to as 'the 1996 Leniency Notice' or 'the 1996 Notice'. The term 'leniency' is used to cover both immunity from fines and reduction of fines.

(4) The discussion of the issues raised in the 2003 article continues to be relevant unless specifically re-addressed in this article.

(5) Issues raised by multiple leniency applications within the European Competition Network (ECN) are not dealt with in this article. For a discussion of these issues, reference is made to Stephen Blake and Dominik Schnichels: *Leniency following modernisation: safeguarding Europe's leniency programmes*, EC Competition Policy Newsletter, Number 2, Summer 2004, pp.7 to 13.

(6) In practice, leniency applications are normally made for immunity from fines or, in the alternative, reduction of fines. For statistical purposes, where several immunity applications have been received for the same alleged infringement, the first application is counted as an immunity application and the subsequent ones as applications for a reduction of fines. The 80 immunity applications listed therefore pertain to 80 different infringements.

(7) Compared to this total of 159 leniency applications received in the three and a half years of operation of the 2002 Notice, the six years of operation of the previous 1996 Leniency Notice saw a total of slightly more than 80 leniency applications. See François Arbault and Francisco Peiro: *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, Competition Policy Newsletter, Number 2, June 2002, pp. 15 to 22. The most important difference, however, is not so much the considerably higher number of leniency applications received under the 2002 Notice, as the fact that the large majority of the leniency applications under the 1996 Notice were made only after the Commission had undertaken inspections and resulted in a reduction of fines. Under the 2002 Notice, on the contrary, more than half of all leniency applications have been made before any inspection took place and in most of these cases conditional immunity from fines has been granted upfront. The 2002 Notice has therefore been much more successful than the 1996 Notice in revealing secret cartels.

to carry out a surprise inspection ⁽¹⁾. Most of these decisions were indeed followed up by surprise inspections or requests for information within weeks after conditional immunity was granted ⁽²⁾. The remaining four were granted under point 8(b) of the Notice, i.e. on the basis that the evidence submitted enabled the Commission to find an infringement of Article 81 EC.

Of the 31 immunity applications which had not been granted by the end of September 2005, 12 were still being examined. In the remaining 19 cases, conditional immunity was not granted. In one case, this was because the application did not fall within the material scope of the Leniency Notice as such. In five other cases, it was because the criteria in point 8 of the Notice, necessary for granting conditional immunity, were not met. Finally, in 13 cases where there was considerable doubt as to whether the conditions of the Notice were met and the case was not suitable for further investigation by the Commission, the applicants were informed that the Commission did not intend to consider the application further.

In one case where conditional immunity had been granted, the Commission subsequently informed the applicant that it did not intend to

grant immunity at the end of the administrative procedure, because one of the requirements for receiving immunity had not been met ⁽³⁾.

Regarding the 79 applications for a reduction of fines, the Commission had, by the end of September 2005, informed 18 applicants of its intention to apply a reduction within a certain band.

At the time of writing of this article, the Commission was still processing most of the remaining 61 applications for a reduction of fines within the framework of the ongoing investigations ⁽⁴⁾. There have also been several instances where the Commission considered, in a preliminary fashion, that no significant added value had been provided.

The legal person making the leniency application

Although infringements of Article 81 EC are committed by 'undertakings', i.e. economic entities, fines are imposed on and collected from legal persons ⁽⁵⁾. According to the Notice, leniency is applied for and granted to 'undertakings' ⁽⁶⁾. However, since prohibition decisions with fines are addressed to legal persons, it is important for undertakings, when they apply for leniency, to be clear about which legal persons are meant to be covered by their application and are thus meant to benefit from immunity from fines or a reduction of fines at the end of the administrative procedure in any prohibition decision. In the case of immunity applications, clarity regarding the legal persons covered by the application is needed also to determine which legal persons fall under the obligation of cooperation with the Commission during the administrative procedure ⁽⁷⁾.

Potential problems in respect of the legal persons covered by the leniency application may arise in particular in situations where a leniency application is made by a subsidiary within an undertaking rather than the parent company managing the undertaking. Since the subsidiary normally cannot control the behaviour of the parent company or of its sister companies within the undertaking, the

⁽¹⁾ This includes a number of cases where the evidence may also have been sufficient to qualify for conditional immunity under point 8(b) of the Notice, meaning that the evidence could have enabled the Commission to find an infringement of Article 81 EC. This is in line with the Commission's policy to use the lower of these two thresholds for conditional immunity whenever both options have been applied for (as is usually the case) and are available. Indeed, the legal position of the applicant is the same whether it is granted conditional immunity under point 8(a) or point 8(b) of the Notice. In this manner, the Commission is able to grant conditional immunity more quickly — within a number of weeks — than if it had first to make a definitive analysis of whether the evidence provided is sufficient to find an infringement of Article 81 EC. As a result, point 8(b) of the Notice is in practice used primarily to deal with immunity applications that are made after an inspection has taken place (and provided conditional immunity has not yet been granted to another undertaking under point 8(a) of the Notice).

⁽²⁾ In a very few cases where the conditions for conditional immunity were fulfilled and the Commission granted conditional immunity, the Commission and the national competition authority/ies of the Member State(s) concerned agreed that investigative action should be taken at Member State level. In those cases, the applicant was duly informed that the Commission did not intend to actively investigate the case and applied for immunity (when it had not already done so) with the national authority/ies concerned before inspections were carried out.

⁽³⁾ These four possible outcomes where immunity is not granted ('non eligibility letters', 'rejection decisions', 'no action letters' and 'loss of leniency') will be analysed in greater detail further below under 'Situations where immunity is not granted'.

⁽⁴⁾ Whereas applications for conditional immunity are normally decided within a matter of weeks, applications for a reduction of fines can often only be decided shortly before a statement of objections is issued. See the discussion further below on significant added value.

⁽⁵⁾ The situation of an undertaking consisting only of one or more natural persons is not considered here.

⁽⁶⁾ Compare points 8, 12, 20 and 24 of the Notice.

⁽⁷⁾ See point 11(a) of the Notice.

Commission cannot, in such a situation, assume that the parent company or any sister companies are covered by the leniency application. To avoid any unwelcome surprises in respect of any fines to be imposed at the end of the administrative procedure, it is recommendable that the leniency application be made by the legal person which manages the undertaking that is involved in the infringement. In that case, the Commission will assume that all legal persons under the direct or indirect control of the parent company are also covered by the leniency application and, in the case of immunity applications, by the duty of cooperation. Such presentation of the application is not interpreted by the Commission as an admission by the parent company that it had been involved in or is liable for the infringement. But it does ensure that all potentially liable legal entities may benefit from lenient treatment in any prohibition decision.

Where a joint venture has been involved in a cartel and wishes to apply for leniency, the question arises whether one or both of its parent companies can be parties to the leniency application together with the joint venture. The answer may differ depending on the precise factual circumstances of the case. If, for instance, neither of the parent companies had ever participated in the cartel in their own right, it may be possible to regard the joint venture and its two parent companies together as a single cartel participant. In that case, it could be possible to associate the parent companies to the application, so as to cover any potential liability on their part. On the other hand, if one or both of the parent companies had, in the present or past, participated in the cartel in their own right, a joint application would in fact cover more than one cartel participant. Since under the Notice each leniency application is to be made by a single, separate undertaking⁽¹⁾, the Commission will want to ensure itself that a joint venture construction is not created or abused to seek immunity or the same reduction of fines for two separate cartel participants. It is therefore desirable that in all cases where a joint venture wishes to apply for leniency, it discusses the possible association of one or both of its parent companies to the application as quickly as possible with the Commission.

⁽¹⁾ See points 6, 8, 12, 15, 19, 21, 24 and 27 of the Notice.

Corporate statements and the oral leniency procedure

As mentioned in the 2003 article⁽²⁾, the Commission allows applications to be made orally both for immunity and for reduction of fines. The Commission does so in order to ensure that by making an application under the Commission's Leniency Notice, undertakings are not worse off than non-cooperating cartel members in respect of civil procedures for damages. Many applicants have used this possibility, describing verbally their participation and that of other undertakings in the cartel. Until now, the Commission has not set any requirement that the applicant must show that it would face a serious risk of discovery if its corporate statement were made in writing. In any case, written corporate statements also receive special protection from the Commission in terms of the form in which access to these documents is given when access to the file is granted to the addressees of a statement of objections. It should also be noted that, in accordance with point 13(a) of the Notice, all available relevant contemporaneous documents always have to be submitted (unless - and then only in a first stage - a hypothetical application is made under point 13(b)). The 'oral' part of the application therefore pertains in particular to the corporate statement which is exclusively made for the purposes of a leniency application to the European Commission.

Evidential value of the corporate statement

As to the value of corporate statements for the Commission to prove the infringement, there is jurisprudence from the Court of First Instance (hereafter the 'CFI') recognising that statements of undertakings (whether made in writing or orally) can constitute evidence in cartel cases. In *JFE Engineering Corp. and others v. Commission*, the CFI stated:

'In that connection, no provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings...'⁽³⁾.

⁽²⁾ See footnote 2, page 6.

⁽³⁾ *JFE Engineering Corp. and others v. Commission*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, not yet published, paragraph 192.

The CFI went on to say, referring to its earlier judgment in *Enso-Gutzeit v. Commission* ⁽¹⁾:

'...an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence' ⁽²⁾.

The interesting question in this respect is whether this corroborating information may be formed by a statement from another cartel participant. There should be nothing in principle to prevent this. At the end of the day, however, both the Commission and the Court will have to make an overall assessment of the reliability of all the evidence taken together to assess whether it suffices to establish that an undertaking infringed the competition rules ⁽³⁾.

As to oral statements in particular, the CFI has recognised the admissibility of oral information in *Graphite Electrodes*, a case handled under the 1996 Leniency Notice, where the CFI stated:

'...the [1996] Leniency Notice states that not only 'documents' but also 'information' may serve as 'evidence' which materially contributes to establishing the existence of the infringement. It follows that the information need not necessarily be provided in documentary form' ⁽⁴⁾.

Even if the 2002 Leniency Notice no longer refers to 'information, documents or other evidence' ⁽⁵⁾,

but simply to 'evidence' ⁽⁶⁾, it is clear from this legislative history and jurisprudence that the notion of 'evidence' in the 2002 Leniency Notice includes oral information and in particular oral corporate statements.

Obviously, lawyers involved in leniency applications with the Commission would prefer it if, in order to minimise the risk of discovery in civil procedures for damages, the Commission only used corporate statements by leniency applicants as a so-called 'road map' to get a better understanding of the cartel and did not use such corporate statements in evidence in its prohibition decisions. The actual evidence would then have to be collected by the Commission through surprise inspections or requests for information. However, such suggestions overlook the requirements of the legal system within which the Commission has to operate. Within the European legal anti-trust regime, the Commission is the institution that establishes the facts of the case, determines whether an infringement exists and imposes the appropriate penalty, even if its decision may be appealed to the European Courts. It is therefore essential for the Commission to provide sufficient evidence in its decisions to justify the prohibition of the behaviour concerned and the penalties it imposes. The value to the Commission of corporate statements in proving the infringement in its prohibition decisions is considerable, even after surprise inspections have taken place. Nothing convinces more than cartel participants' own admission of misbehaviour. It is clear therefore that corporate statements will continue to form an important part of leniency applications made to the Commission and will continue to be used in the Commission's prohibition decisions.

Procedure for submitting oral corporate statements

The Commission's current practice in handling oral leniency applications is as follows:

The applicant, usually represented by outside legal counsel ⁽⁷⁾, contacts the Commission's Cartel Directorate through the phone ⁽⁸⁾ or fax numbers ⁽⁹⁾ dedicated to leniency applications. A meeting to discuss an intended leniency application or to make an oral corporate statement can be set up at the shortest possible notice. The meeting will take place at the day and hour proposed by the applicant, provided it falls within normal working

⁽¹⁾ *Enso-Gutzeit Oy v. Commission*, Case T-337/94, [1998] ECR II-1571, paragraph 91.

⁽²⁾ *JFE Engineering Corp. and others v. Commission*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, not yet published, paragraph 219. This follows the CFI's earlier line established in *Cimenteries CBR and Others v. Commission*, Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, [2000] ECR II-491, paragraph 1838.

⁽³⁾ In the words of the CFI: *'...the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place.... However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement'*. *JFE Engineering Corp. and others v. Commission*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, not yet published, paragraphs 179 and 180.

⁽⁴⁾ *Tokai Carbon Co. Ltd. and others v. Commission*, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, not yet published, paragraph 431.

⁽⁵⁾ See point D.2 of the 1996 Leniency Notice, page 4.

⁽⁶⁾ See for instance points 8, 13, 21 and 24 of the Notice.

⁽⁷⁾ Henceforth, the term 'the applicant' should be understood to include the applicant's outside legal counsel.

⁽⁸⁾ The dedicated telephone number is +32 2 298 41 90 or 298 41 91.

⁽⁹⁾ The dedicated fax number is +32 2 299 45 85.

hours⁽¹⁾. Applicants have to realise, however, that there is no 'marker' system and an application is only made when evidence has been submitted to the Commission. Therefore, should the Commission receive evidence from another undertaking before the scheduled meeting takes place, the other application will take priority of place⁽²⁾. For this reason, it is always advisable, also when an applicant intends to make an oral corporate statement, to immediately submit by fax all relevant contemporaneous documents in the possession of the undertaking to the Commission.

In proposing the starting hour for a meeting, applicants should also take into account that the meeting may be interrupted by the Commission services in case it extends beyond normal working hours and may then be continued from the start of working hours in the afternoon or, if the meeting started in the afternoon, on the following working day. Whenever immunity applications are not made in a single uninterrupted period, even if it concerns just a break over lunch, the rule applies that should a second applicant submits evidence regarding the same infringement in the intervening period, the first application can no longer be supplemented with further evidence and will be evaluated on the basis of the evidence submitted until the moment the second application was made⁽³⁾. Applicants therefore have every incentive to submit a maximum of evidence within the shortest possible period.

The Commission records on tape the oral statement made by the applicant. This registration on tape is the original evidence and is part of the Commission's investigation file. The applicant has the right to check the correctness of the recording and of the substance of its statement. To facilitate their work, the Commission services may and usually do produce a written transcript of the oral statement. This is added to the investigation file.

As required by the Notice⁽⁴⁾, the Commission prepares a written acknowledgement of receipt of the application and of any subsequent submissions. This acknowledgement may be notified to the applicant at the premises of the Commission, without the applicant taking possession of the document. The same procedure for notification may be used in respect of the subsequent Commission

decision to grant (or deny) conditional immunity and the Commission's preliminary conclusion regarding whether significant added value has been provided.

Before a statement of objections is issued, no access to the Commission's investigation file is granted to any party, including the leniency applicant. When a statement of objections is issued, the Commission sends the statement of objections to the addressees together with a CD-ROM with all accessible documents in the Commission's investigation file, with the exception of (transcripts of) corporate statements⁽⁵⁾. The Commission is legally obliged to grant access to corporate statements to the addressees of the statement of objections, so that they can exercise their legitimate rights of defence. However, access to corporate statements, whether made in written form or on tape, is granted only at the premises of the Commission. Parties may read written corporate statements and transcripts of oral corporate statements and make their own notes. They may also, if they deem it necessary, request access to a copy of the tape recording of an oral corporate statement and make their own notes. But they are not allowed to make any mechanical copies of corporate statements (whether made in writing or orally) or of transcripts thereof.

The Notice provides that statements made by the leniency applicant may not be disclosed or used for any other purpose than the enforcement of Article 81 EC⁽⁶⁾. Furthermore, pursuant to Article 15 (4) of Commission Regulation (EC) No 773/2004 of 7 April 2004⁽⁷⁾, documents obtained through the access to the file may only be used for the purposes of judicial and administrative proceedings for the application of Article 81 EC. For this reason, the Commission will reject any request for access to the file for any other purpose than the application of Article 81 EC. Moreover, to underline the protection of the integrity of its investigation, the Commission now requests that undertakings that seek access to the file sign a document whereby they commit to abide by these provisions.

Situations where immunity is not granted

Whereas at the time of writing of the 2003 article almost all immunity applications that had been processed qualified for the granting of conditional immunity, the number of applications that are less

⁽¹⁾ The Commission's normal working hours are Monday to Friday from 08.30 to 13.00 hours and from 14.15 to 17.30 hours.

⁽²⁾ See footnote 2, page 6. Under the Notice, it is not sufficient to announce a leniency application to ensure one's 'place in line', as the application is considered to be made when actual evidence is received.

⁽³⁾ See footnote 2, page 6.

⁽⁴⁾ See points 14 and 25 of the Notice.

⁽⁵⁾ The same procedure applies to all addressees of the statement of objections, whether or not they are leniency applicants.

⁽⁶⁾ See point 33 of the Notice.

⁽⁷⁾ Official Journal L 123, 27.04.2004, pages 18 to 24.

solid has unfortunately grown in the meantime. Based on this experience, one can now distinguish four basic situations where immunity may not be granted:

- the facts reported are not covered by the material scope of the Notice: in these cases, the Commission services issue a so-called ‘non eligibility letter’;
- the substantive conditions for conditional immunity are not met; in these cases, the Commission adopts a so-called ‘rejection decision’ whereby it denies conditional immunity;
- it does not appear, *prima facie*, that the substantive conditions for immunity have been met and the case is not suitable anyway for further investigation by the Commission; in these cases, the Commission services issue a so-called ‘no action letter’; and finally
- the conditions for receiving immunity in any prohibition decision turn out not to have been met by the undertaking which was granted conditional immunity; in these cases of ‘loss of leniency’, the Commission informs the applicant that it will not receive leniency in any prohibition decision.

‘Non eligibility letters’

Point 1 of the Notice makes it clear that the type of infringement for which leniency can be granted is ‘secret cartels between two or more competitors aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports’. Because of the secret nature of cartels and consequently the difficulties to detect them, immunity can be offered to the first participating undertaking to come forward and provide evidence that will permit the launching of a surprise inspection or the finding of an infringement (as well as varying degrees of reduction of fines for subsequent undertakings if they add significant added value to the Commission’s ability to prove the facts in question). As point 4 of the Notice puts it, ‘The interests of consumers and citizens in ensuring that cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices’.

In an unwelcome recent development, the Commission has received an application for immunity that clearly does not concern secret cartel activity, but rather clauses in a general business contract, *in casu* even of a vertical nature. The compatibility of these contractual clauses with Article 81 EC might well be doubtful, but they clearly do not fall within the above described scope of the Notice. By reporting such clauses to the Commission and asking

immunity for them, legal counsel of the undertaking concerned apparently attempted to re-create something similar to the previous notification system that was abolished with the entry into force of Regulation (EC) No 1/2003 ⁽¹⁾. The Commission has reacted to this application by sending a short standard letter at the administrative level saying that the reported arrangements do not fall within the scope of the Notice, that this letter is without prejudice to the compatibility of the arrangements with EC competition rules and that the applicant may withdraw the evidence disclosed, but that this does not prevent the Commission from using its normal powers of investigation in order to obtain the information.

‘Rejection decisions’

There has been a slight increase in the number of instances where the immunity application did not meet the substantive conditions for conditional immunity under point 8(a) of the Notice, i.e. did not, in the Commission’s view, enable it to adopt a decision to carry out a surprise inspection.

Partially, this increase may be due to the fact that several large undertakings have, following the entry into force of the 2002 Notice, conducted intensive internal compliance programmes and as a result have reported multiple alleged cartel violations to the Commission. For certain of these alleged violations very little concrete information may then in fact have been available, so that carrying out an inspection on this basis would not have been possible.

Partially, however, the increase may also have been caused by the fact that in some cases the undertaking concerned, rather than frankly admitting its own participation in the cartel, has chosen extremely cautious language regarding its own participation in the cartel, and sometimes even regarding the participation of other undertakings. It is clear that an applicant should not accuse other undertakings or make admissions regarding its own behaviour if these accusations or admissions are not grounded in fact, supported by evidence whenever available and based on a true conviction that the events actually occurred. But when words such as ‘might’, ‘could have’, ‘it appears that’ ‘cannot be excluded that’, ‘possibly’ etc. abound in a corporate statement, and very little or no evidence in the form of contemporaneous documents is submitted, the applicant should not be surprised that the Commission becomes hesitant to consider that it could order a surprise inspection on such an uncertain basis.

⁽¹⁾ Compare Article 15(5) of Regulation 17, OJ 13, 21.02.1962, page 204.

In instances where the application for immunity could not be granted for lack of sufficient evidence, the undertakings concerned have so far always chosen to apply for a reduction of fine, rather than to withdraw the evidence ⁽¹⁾. The application for a reduction of fine then stays on the record but only becomes active if and when the Commission decides to investigate the matter further on its own motion (for instance through a request for information or *ex officio* sector investigation) or receives another, better-founded leniency application regarding the same infringement.

'No action letters'

A different situation may arise where it does not appear, *prima facie*, that all of the conditions of the Notice are met (for instance because the infringement is local only and the applicant does not clearly establish that the infringement may affect trade among Member States) and the case is in any case not suitable for further investigation by the Commission. An application may be unsuitable for further consideration by the Commission because it is considered too unimportant for the Commission to investigate, given the Commission's limited resources; because one or several Member State competition authority(ies) may be considered well placed to investigate the matter; or because the Commission considers that further investigative measures would be unlikely to bring any positive result (for instance if the same undertakings have already been recently inspected for a related product).

In such cases, coming to a conclusion on whether or not the applicant qualifies for conditional immunity could be time-consuming for the Commission and would not bring it any benefits, since, based on the evidence available, it does not intend to investigate the matter anyway. From the applicant's perspective, it is well possible that if a decision has to be taken, the Commission would reject the application for immunity. In such situations, the Commission services may therefore send a so-called 'no action' letter to the applicant stating that, in view of their preliminary assessment that it does not appear *prima facie* that the conditions of the Notice are met, it is not the intention of the Commission services at present, and in the absence of other evidence, to consider the application further. The letter adds that should the Commission services change their position in this respect, the Commission would take a formal position on the application for immunity.

In this manner, the decision on the initial immunity application is, as it were, put on ice. The evidence submitted remains on the file (unless the

applicant chooses to withdraw its application) and the applicant's leniency position is safeguarded if the Commission should later choose to investigate the matter, e.g. on the basis of a second application. While it remains possible for the applicant to insist that the Commission should take a formal decision on its application (which may be either positive or negative), applicants have until now been satisfied with the protection offered by the 'no action letter'.

'Loss of leniency'

As mentioned earlier, there has, until now, been only one case where the Commission, after it had first granted an applicant conditional immunity, subsequently informed the applicant of the Commission's intention not to grant it any leniency in any prohibition decision to be adopted. This concerned a case where the Commission discovered in the course of the administrative procedure that the immunity applicant had informed the other cartel members of its leniency application before the Commission had undertaken an inspection. Such conduct is considered to constitute a violation of the obligation of full cooperation upon which immunity is conditional ⁽²⁾. It is evident that if an immunity applicant tips off the other cartel members about its application, before the Commission has even started its investigation, the surprise element in any ordered inspection is lost and the Commission is unlikely to be able to locate any useful evidence. The applicant has then not kept its side of the bargain. ⁽³⁾

A different, but potentially comparable situation could arise where an undertaking applying for immunity has a publication obligation regarding the fact that it may face a liability for an antitrust infringement, for instance under rules of the US Securities and Exchange Commission. It is essential that the undertaking either finalises its immunity application sufficiently long in advance of any such publication deadline or arrives at a prior agreement with the Commission regarding the wording of any text to be published. No publication may, in any case, take place prior to the intended inspection without the Commission's permission. Violation of this obligation is interpreted as a violation of the obligation of full cooperation and could lead to the loss of leniency, as it would endanger the results

⁽²⁾ See point 11(a) of the Notice.

⁽³⁾ See Commission press release IP/05/1315 of 20.10.2005, 'Competition: Commission fines companies € 56 million for cartel in Italian raw tobacco market'. It should be noted that in this proceeding, due to the particular circumstances of the case, the Commission granted the undertaking concerned a reduction outside of the leniency notice to acknowledge its actual contribution to the establishment of the infringement.

⁽¹⁾ See point 17 of the Notice.

of the intended inspection. If the non-authorised publication takes place before conditional immunity has been granted, conditional immunity may be denied.

What legally happens in such cases of loss of leniency in immunity cases is that the Commission, rather than withdrawing the conditional immunity it had granted, decides in its prohibition decision not to grant immunity. It should be remembered that where conditional immunity has been granted, the final grant of immunity in any prohibition decision always remains dependent on compliance with the conditions stated in the Notice ⁽¹⁾. Similarly, if an applicant for a reduction of fine turns out not to have terminated its involvement in the cartel at the time of its application, it will not be granted any reduction of fines in any prohibition decision, even if the Commission, initially unaware of this continued involvement, had already indicated its intention to grant a reduction.

If non-compliance with the conditions of the Notice leads the Commission to take the view that immunity or a reduction of fine finally should not be granted in the prohibition decision, it will immediately so inform the applicant concerned and provide it with an opportunity to respond before any final decision is taken. It should be noted that, once conditional immunity has been granted, loss of the conditional immunity status also implies that no reduction of fines will be granted under the Notice for the application concerned ⁽²⁾. Nor is the

applicant allowed to withdraw the evidence it had submitted ⁽³⁾. With respect to other applicants, nothing changes in their position. Loss of immunity does not mean that the second leniency applicant then becomes eligible for immunity or that an applicant that qualified for a band of between 20% to 30% reduction now suddenly qualifies for the band of 30% to 50% previously occupied by the applicant that lost leniency.

Significant added value

Substantive issues

Given that only a limited number of statements of objections under the 2002 Notice have been issued at the time of writing of this article (and no prohibition decision yet adopted), the exact contours of the notion of significant added value as defined in points 21 and 22 of the Notice have not crystallised yet. Whether an applicant for a reduction of fines has submitted sufficient evidence to constitute 'significant added value' compared to the evidence already in the possession of the Commission is, of course, very much a case-specific evaluation. Moreover, while the Notice describes the notion of 'added value' in point 22 as 'the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question', the Notice does not provide guidance as to when such added value must be considered 'significant'. It is clear, therefore, that the Commission can determine only on a case-by-case basis what evidence it finds to be 'significant' in adding value to its ability to prove the facts in question. Nevertheless, a few general guidelines can be given.

If the Commission has already granted conditional immunity under point 8(a) of the Notice, but, possibly even after an inspection, is not yet able to prove the infringement, it seems beyond doubt that if a leniency applicant brings sufficient new evidence to the Commission to allow the Commission, taking all evidence in its possession into account, to then prove the infringement, the leniency applicant will have provided significant added value.

Significant added value may also be provided when a leniency applicant does not necessarily bring new evidence, but corroborates already existing evidence where such corroboration is needed to prove the infringement. Where the Commission is in possession of clear contempora-

⁽¹⁾ See point 30 of the Notice. For immunity, these conditions are the immediate provision of all evidence relating to the suspected infringement available to the applicant at the time of the submission of its application (point 11(a) of the Notice), full cooperation throughout the investigation, the ending of the involvement in the cartel at the time of the application, and no coercion of other undertakings to participate in the cartel (point 11 of the Notice). For a reduction of fines, there is only one condition, that the applicant must have terminated its involvement in the cartel at the time of its application (point 21 of the Notice). For a discussion of these conditions, see footnote 2 (pages 18 and 19).

⁽²⁾ Point 17 of the Notice provides that an undertaking which fails to qualify for conditional immunity may ask the Commission to consider the evidence disclosed for a reduction of fines. This possibility is not, however, given to undertakings that do qualify for conditional immunity but subsequently violate their obligations under the Notice. Indeed, were this otherwise, the applicant could still under the last paragraph of point 23 of the Notice *de facto* benefit from full protection against any fine for its reported behaviour, because none of that behaviour may have been known to the Commission at the time when the applicant made its application. As for a new application for a reduction of fines, it remains theoretically open to such applicants to subsequently file a new application for a reduction of fines, with new evidence not previously available. However, the chances of this being factually possible appear minimal.

⁽³⁾ Point 17 of the Notice, which allows the withdrawal of evidence, does not apply to this situation: as mentioned in the previous footnote, the applicant has met the conditions set out in points 8(a) or 8(b) of the Notice, but has violated point 11 of the Notice.

neous documents, corroboration is not normally required. However, where the Commission only has a statement from an immunity applicant, corroboration by a second applicant would normally be required. Such corroboration could consist either in documents or in a statement by the second applicant. If the original statement from the immunity applicant plus the documents provided by the second applicant or the statements from the two applicants together are considered sufficient to find an infringement, the second applicant will have provided significant added value. The same may apply in situations where the Commission possesses contemporaneous documents which in themselves are not sufficient to prove an infringement, for instance because they are unclear. Here too, corroborating information from a second applicant, whether in the form of documents or statements, may be of significant added value if it is instrumental in allowing the Commission to find an infringement.

The examples mentioned above describe situations where it was only through the assistance of the second applicant that the Commission was able to find an infringement. However, significant added value may also be provided where the Commission was already able to find an infringement ⁽¹⁾.

Point 23 of the Notice states that ‘if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence’. While it would be hazardous to draw any direct conclusions from this paragraph regarding the notion of significant added value, this text does suggest that the Commission attaches considerable value to evidence that allows it to prove facts that result in a significant increase in the total fine amount. Examples could be evidence that, compared to the original evidence, allows the Commission to prove that the infringement covered a larger geographic area, that the cartel activities covered more products or services, that there were

more participating undertakings or that the duration of the infringement was longer than the Commission could prove originally.

Two observations can be made regarding the previous paragraph: First, there are no absolutes. If, for instance, a leniency applicant adds only limited duration to an infringement which the Commission could already prove lasted many years, the applicant should not be surprised that the Commission will not consider this to be significant added value ⁽²⁾. On the other hand, a limited extra duration may be of significant added value if the Commission could until then only prove a very short duration. Secondly, in situations where the Commission was not yet aware of the facts which the second applicant now provides evidence of, that applicant may in effect get a double ‘reward’: Not only may it get a reduction from its fine for having provided significant added value, but also the new facts in question will not be held against it ⁽³⁾.

Beyond this, it is difficult at this point in the development of the application of the Notice to provide further guidance that would be generally applicable. As was mentioned, much will depend on the facts of each case and the relative strength of the evidence already in the possession of the Commission. Suffice it to say that a mere confirmation of facts the Commission could already prove clearly does not constitute significant added value.

Procedural issues

An application for a reduction of fines is usually not made in a single submission, but tends to take the form of a series of submissions over time, each one of them being made as soon as the evidence is ready to be presented to the Commission. For applications for reductions of fines there is no rule in the Notice, as there is for immunity applications ⁽⁴⁾,

⁽¹⁾ This interpretation is supported by the fact that according to point 17 of the Notice, if an undertaking fails to meet the conditions set out in points 8(a) or 8(b), it may ask the Commission to consider the evidence it has disclosed under section B of the Notice, i.e. with a view to obtaining a reduction of fines. This suggests that even if the Commission is already able to prove an infringement and immunity is therefore no longer available, it should still be possible to provide significant added value to the Commission’s case.

⁽²⁾ At the same time, if the Commission was not yet aware of this additional duration, they will not be held against the applicant, in accordance with the last paragraph of point 23 of the Notice.

⁽³⁾ Thus, to give a numerical example, if the duration is extended from five to ten years, the fine for the applicant that provided the evidence for this previously unknown period will be calculated based on a duration of five years. The resulting fine amount will then be reduced by the percentage of reduction granted. If, on the other hand, the Commission already knew that the infringement had lasted ten years, but could only prove five years, the applicant will benefit from a reduction for having provided significant added value. This reduction will be calculated on a fine amount based on a duration of ten years.

⁽⁴⁾ Regarding successive submissions in the context of an immunity application see our discussion above under the section ‘Procedure for submitting oral corporate statements’.

that the Commission must first take a position on a first application before it can start to examine a second application ⁽¹⁾. For reduction of fine applications, undertakings are therefore in a virtual race against each other to be the first to voluntarily provide the Commission with evidence constituting significant added value. The Commission will examine each voluntary submission of evidence, from whichever applicant, in the chronological order in which submissions have been made and evaluate for each submission whether it, together with the value accorded to any previous submissions by the same applicant, constitutes significant added value with respect to the evidence already in the Commission's possession ⁽²⁾. As soon as the Commission is able to determine that an undertaking has reached the threshold of significant added value, the Commission will inform the applicant in the form of a Commission decision. Subsequent submissions can then help the applicant to obtain

a higher percentage of reduction within the band of reduction to which it has been assigned ⁽³⁾.

As may be deduced from the discussion above on substantive issues regarding significant added value, a careful (and possibly time-consuming) analysis is required to determine whether the applicant had provided significant added value compared to the evidence already in the Commission's possession at the time of application. In accordance with its obligations under the Notice ⁽⁴⁾, the Commission has, however, so far always informed all the applicants which qualified for a band of reduction before the statement of objections was issued. The Commission will, with a view to further increasing transparency, henceforth also inform applicants that do not qualify for a band by means of a Commission decision sent to them before the statement of objections is issued, even if this is not specifically foreseen in the Notice ⁽⁵⁾. It should be noted that these decisions are provisional and that the Commission will determine and motivate its final position only in any prohibition decision to be adopted. The letters preliminarily assigning bands

⁽¹⁾ Compare points 18 and 25 of the Notice.

⁽²⁾ See point 21 of the Notice. To take a hypothetical example: Let us assume that 100 points are needed to reach the threshold of significant added value. Undertaking A makes a first submission. It is worth 70 points, taking into account the evidence the Commission already had at that moment. At this point in time, undertaking A has not yet qualified for significant added value. One week later, undertaking B makes a voluntary submission of evidence. Based on the evidence the Commission already had, including the submission of undertaking A, the value of this submission is considered to be 80 points. Undertaking B also does not qualify yet. Again one week later, undertaking B comes back with a second submission, worth 20 points, taking into account as always all the evidence the Commission had gathered until then. Undertaking B has now accumulated 100 points in total and is the first undertaking to qualify for significant added value, even if undertaking A was the first applicant for a reduction of fines. Undertaking B will thus benefit from a reduction between 30% and 50%. If undertaking A then comes back again a week later with a second submission worth 80 points, it will have accumulated 150 points and will be the second undertaking to qualify. It will thus receive a reduction between 20% and 30%. Where exactly in each band the final reduction will be located depends largely on the total value of the cooperation of each undertaking, also taking into account whether useful subsequent submissions were made. In our example, undertaking B could get a reduction at or just above 30% because it has precisely met the threshold of 100 (assuming it does not make any further useful submissions), whereas undertaking A may get a reduction at or just below 30% because it has significantly exceeded the threshold of 100 points.

⁽³⁾ It is sometimes argued that if there is some delay in the notification to the applicant that it has reached the threshold for significant added value, the applicant is disadvantaged because the value of its subsequent submissions (i.e. after the threshold had been reached but before the notification) would be neglected. As the numerical example in the previous footnote shows, this is not correct, as long as each submission is given its due weight. The result is the same whether the Commission determines only shortly before issuing the statement of objections that an applicant was the first to reach the threshold of 100 points, that it should be in the 30-50% reduction band and then in the prohibition decision decides that it should be given a 50% reduction because the total number of points it has obtained is 200, or immediately informs the applicant when it has reached 100 points and then decides in the prohibition decision that the applicant should receive a 50% reduction based on the additional 100 points value of its subsequent submissions. See points 26 and 27 of the Notice. In accordance with point 27, the final position of each applicant within the band to which it has been assigned will be determined in the prohibition decision, taking into account all the available information, including the replies to the statement of objections.

⁽⁴⁾ See point 26 of the Notice.

⁽⁵⁾ Previously such applicants could deduce from the fact that they received a statement of objections without any prior letter indicating that they had qualified for a band of reduction that their application for a reduction had not been successful.

of reduction are not, therefore, decisions that are challengeable before the European Courts in their own right ⁽¹⁾.

Conclusion

The high number of leniency applications submitted to the Commission over the past three and a half years clearly shows that the 2002 Notice has been instrumental in persuading many undertakings that, instead of continuing their cartel behaviour, it is in their best interest to denounce the cartels in which they participate to the Commission with a view to obtaining the lenient treatment foreseen in the Notice. The high number of decisions granting conditional immunity in particular shows that this confidence has not been misplaced. As a result, the Notice has proven a crucial and highly successful instrument for the Commission to further detect and punish cartels, thereby deterring their formation in the first place, to the advantage of European consumers and the European economy.

The Commission's task in the years ahead is to maintain and if possible further strengthen this

confidence in the fairness and effective functioning of its leniency instrument in the face of continuing and new challenges. A major continuing challenge is, in particular, the risk of discovery by US courts of corporate statements made to the European Commission. A new challenge could be the sheer administrative burden of handling the large volume of leniency applications and subsequent cartel investigations under the 2002 Notice. Cartel cases are, by their very nature, lengthy and complex procedures. The recent creation of a dedicated Cartels Directorate within DG Competition will help to handle the flow of cases more efficiently and expeditiously.

Finally, through its ever increasing experience with the application of the Notice as well as the experience gained in other leniency systems in the European Competition Network and in third country jurisdictions, the Commission will in the period ahead contemplate the desirability of any further changes to its leniency policy, with a view to achieving maximum effectiveness and attractiveness for business. Input from legal and business circles in this regard will be welcomed.

⁽¹⁾ The same is true for Commission decisions granting or rejecting conditional immunity, for 'no action letters', for 'non eligibility letters' and for decisions indicating that an applicant may lose leniency. In all these cases, only the Commission's prohibition decision imposing fines can be successfully appealed before the European Courts. As long as the Commission does not adopt any decision imposing fines, any appeal before the CFI for interim measures opposing the Commission's stated intention to grant or withhold immunity from fines or reduction of fines if fines are to be imposed, would be premature, as the applicants would be unable to demonstrate that they would suffer serious and irreparable damage in the absence of such interim measures. Indeed, such damage only arises if and when the Commission imposes a fine on an undertaking. For comparable situations, see for instance *Hoechst AG v. Commission*, Case 46/87R, [1987] ECR 1549, *Cimenteries CBR SA and Others v. Commission*, Joined Cases T-10/92 R, T-11/92 R, T-12/92 R, T-14/92 R, T-15/92 R, [1992] ECR II-1571 and *Reisebank AG v. Commission*, Case T-216/01 R, [2001] ECR II-3481.

L'évolution de la politique des aides à finalité régionale 1956-2004

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Les règles de concurrence au sein de l'espace communautaire, fixées par le Traité CE, interdisent les aides accordées par les Etats lorsque celles-ci faussent ou menacent de fausser la concurrence. Cependant l'article 87, paragraphe 3, prévoit un certain nombre de dérogations au principe d'incompatibilité établi à l'article 87, paragraphe 1. Parmi elles, des dérogations en faveur des aides d'Etat à finalité régionale: d'une part les aides destinées à «favoriser le développement économique des régions où le niveau de vie est anormalement bas» et d'autre part, les aides destinées à «faciliter le développement de certaines activités ou de certaines régions économiques, quand elles n'altèrent pas les conditions des échanges dans une mesure contraire à l'intérêt commun». La Commission, sous le contrôle de la Cour de Justice européenne est l'institution compétente pour appliquer cette politique et contrôler la compatibilité des aides octroyées par les Etats membres dans les régions défavorisées.

La politique des aides, née des dérogations au principe d'incompatibilité des aides du Traité CE, est une politique ancienne, ayant beaucoup évolué depuis la signature du Traité en 1956. Des premières résolutions du Conseil en 1971 et les différentes communications de la Commission, aux lignes directrices de 1998 sur les aides régionales, les modalités de mise en œuvre ont suivi le processus de construction européenne.

L'article a pour principal objectif de montrer que les discussions actuelles sur la révision des lignes directrices régionales ne sont pas nouvelles, mais récurrentes à chaque adaptation des textes réglementaires. Il s'agira, ici, de revenir sur l'évolution des règles de mises en œuvre des aides régionales, des principes de base fixés par le Traité, à la réforme majeure de 1998, afin de signaler les grandes étapes politiques qui ont marqué l'évolution des aides régionales. La révision des lignes directrices pour la période 2007-2013 constitue un processus complexe, avec la prise en compte d'éléments essentiels pour s'adapter au contexte géographique, politique, institutionnel et économique de l'Union européenne. Le processus de révision a débuté en 2003 avec une première consultation des Etats membres et se poursuit actuellement avec les propositions

de la Commission et les réunions bi et multilatérales, la dernière réunion multilatérale ayant eu lieu en septembre 2005, afin d'aboutir à l'adoption des textes fin 2005.

Chapitre 1: Des principes de base aux premiers contrôles des aides 1956-97

Les principes de base du contrôle des aides régionales

Le comité intergouvernemental créé par la conférence de Messine remit, le 21 avril 1956, un rapport des chefs de délégation aux ministres des affaires étrangères présentant leurs conclusions sur la mise en place d'un plan d'action concret pour la création d'une Communauté européenne. Ce rapport précisait les objectifs des nouvelles communautés tant au niveau institutionnel que des principes des politiques communes (regroupement progressif des économies nationales, création du Marché commun et harmonisation de la politique sociale). Une partie du rapport était consacrée aux principes de concurrence, et notamment aux aides accordées par les Etats. En 1956, le comité déclarait déjà que la règle générale est «que sont incompatibles avec le marché commun les aides, sous quelque forme qu'elles soient accordées, qui faussent la concurrence et la répartition des activités en favorisant certaines entreprises ou certaines productions». Les auteurs du rapport notaient néanmoins que ces critères permettaient de mettre hors de cause une importante proportion des aides accordées par les Etats: d'une part, les subventions aux consommateurs individuels ayant une incidence limitée sur le marché commun, et d'autre part, les aides destinées à compenser les désavantages dont souffrent certaines régions afin d'éviter des concentrations urbaines excessives ou au maintien d'un équilibre entre différents groupes sociaux n'étaient pas incompatibles avec le marché commun.

La signature du Traité de Rome du 25 mars 1957, marquait les premiers pas du processus de construction européenne. Il établissait les fondements d'une Union entre les peuples européens, ainsi que les premières institutions communautaires et les principes fonda-

⁽¹⁾ Je tiens à remercier l'ensemble de l'unité G-1 Aides à finalité régionale, sans qui la rédaction de cet article n'aurait pas été possible et particulièrement Klaus Junginger-Dittel et Brigitte Lemoigne pour leurs conseils, leur soutien et leur gentillesse.

mentaux des politiques communes (dans les domaines commerciaux, agricoles, des transports et de la concurrence).

Les principes de concurrence loyale entre les Six Etats fondateurs prévoyaient (articles 87 et 88 anciens articles 92 et 93) que «les aides accordées par les Etats ou au moyen de ressources d'Etat, sous quelque forme que ce soit, qui faussent ou menacent de fausser la concurrence sont interdites», cependant des dérogations peuvent être accordées lorsqu'il s'agit d'aides régionales visant à mieux équilibrer le développement de régions défavorisées ou pour des secteurs en difficulté. Ces dérogations sont prévues à l'article 87 paragraphe 3 points a) et c) et sont destinées, d'une part à favoriser le développement économique des régions où le niveau de vie est anormalement bas (régions éligibles au point «a») et d'autre part, les aides destinées à faciliter le développement de certaines activités ou de certaines régions économiques, quand elles n'altèrent pas les conditions des échanges dans une mesure contraire à l'intérêt commun (régions éligibles au point «c»).

En matière d'aides d'Etat à finalité régionale, la résolution du Conseil du 20 octobre 1971 ⁽¹⁾, constitue le premier document fixant les modalités d'application du Traité CE. Celle-ci fixait les mesures de coordination destinées à limiter les risques de distorsion de concurrence et la surenchère des aides par les Etats membres: mise en place d'un plafond unique d'intensité (20% Equivalent Subvention Net), plus de transparence (ne plus mettre en vigueur de nouvelles aides opaques, à savoir des aides dont on ne peut pas mesurer à l'avance l'élément d'aide), la reconnaissance de la spécificité régionale (caractère d'exception des aides, régions délimitées à partir de critères objectifs, intensité, gradation et modulation des aides en fonction des besoins spécifiques des régions).

1) *Naissance des principes de coordination, définition des notions clés: 1979-88*

1979 a marqué une étape importante dans l'évolution du contrôle des aides régionales. En effet, la Commission a proposé dans une communication ⁽²⁾, d'approfondir le système et les mesures de coordination des aides afin de tenir compte des évolutions du secteur industriel.

⁽¹⁾ JO C 111 du 4.11.1971.

⁽²⁾ JO C 31 du 3.2.1979.

Les principes de coordination de 1979

Les coûts éligibles pour les aides régionales étaient jusqu'alors limités aux investissements fixes, ne prenant pas en considération ni les préoccupations des Etats membres ni les besoins des entreprises dans le secteur de l'emploi. La Commission, en conséquence a accordé la possibilité aux Etats membres d'aider les entreprises pour la création d'emplois liée à leurs investissements. La communication stipule également que les aides régionales peuvent être attribuées aux entreprises réalisant un transfert d'établissements avec un plafond d'aide fixé à 100% du coût. L'annexe de la communication précise également la définition de l'investissement initial (en capital fixe), celui-ci se rapportant à la création d'un nouvel établissement, à l'extension d'un établissement existant ou au démarrage d'une activité impliquant un changement fondamental dans le produit ou le procédé de production d'un établissement existant. Ce document a également instauré des plafonds d'aide différenciés proportionnels à la gravité des problèmes régionaux rencontrés.

Chapitre 2: Les aides régionales dans les années 1980 et 1990

En 1983, la Commission a adopté une méthode d'application facilitant la mise en œuvre de l'article 87, paragraphe 3 point c) pour les Etats membres concernant les aides destinées à faciliter le développement de certaines activités ou de certaines régions économiques, quand elles n'altèrent pas les conditions des échanges dans une mesure contraire à l'intérêt commun. Toutefois, cette méthode n'a été publiée que lors de la Communication de la Commission de 1988.

Les Etats membres, en signant l'Acte unique européen, le 14 février 1986, déléguaient une partie de leur pouvoir aux institutions européennes, notamment en matière de cohésion économique et sociale, nouvel objectif de la Communauté européenne. L'Acte unique stipule par ailleurs que la mise en œuvre des politiques et actions de la Communauté prennent en compte cet objectif.

La réforme des Fonds structurels inscrite comme priorité dans l'Acte ⁽³⁾, visait ainsi à réduire les disparités de développement entre les régions des Etats membres. Les principes des nouvelles règles étaient: la concentration des fonds par objectif et

⁽³⁾ Règlement du Conseil du 24 juillet 1988 (2052/88) et du 19 décembre 1988 (4253/88).

par région, le partenariat entre la Commission, les Etats et les autorités régionales pour la planification, la mise en œuvre et le suivi des interventions, la programmation des interventions et l'additionnalité des contributions communautaires. Cette nouvelle réglementation s'accompagnait d'un effort financier important. Au cours de la même année 1988, le Conseil européen donnait son accord de principe à un train de mesures économiques appelé «paquet Delors I» qui prévoyait un doublement de la dotation des fonds structurels pour les cinq années suivantes (jusqu'en 1993). Le contrôle des aides régionales, autorisées sur la base des dérogations de l'article 87 du Traité contribue pleinement à cet objectif de rattrapage des régions souffrants de handicaps géographiques ou économiques importants.

La Commission a publié, en 1988 ⁽¹⁾, sa méthode d'application de l'article 87, paragraphe 3 point a), ayant pour objectif de clarifier la mise en œuvre des aides visant les régions dont le niveau de développement est anormalement bas.

La méthode d'application de 1988

Cette méthode, permettait de définir des critères quantitatifs d'éligibilité des régions (en lien avec leur niveau de développement) pour les aides à finalité régionale. Elle se base sur des indicateurs précis, comme le PIB par habitant mesuré en parité de pouvoir d'achat, sur une base géographique commune (NUTS II), comparé à la moyenne communautaire de développement (le seuil de 75% de la moyenne communautaire ayant été retenu comme significatif pour définir une région défavorisée) et introduit la notion d'intensités d'aide différentes selon les niveaux de développement des régions éligibles. Initialement, les régions éligibles à l'article 87.3.a étaient définies comme des régions de niveau NUTS II dont la majorité des régions NUTS III avaient un PIB inférieur à 75% de la moyenne communautaire. Toutefois afin d'éviter les problèmes d'incohérence avec l'approche suivie par les Fonds structurels quant à la définition des régions éligibles à l'objectif 1 à l'époque, la Commission a changé sa définition en matière d'aides d'Etat pour ne retenir que le niveau de découpage NUTS II dont le PIB est inférieur à 75% de la moyenne communautaire.

La Communication revient également sur les possibilités d'aides autres que les aides à l'investissement initial. En effet, certaines régions

souffrent de handicaps tellement importants liés par exemple à leur isolement géographique, qu'il est parfois difficile de conserver les investissements réalisés sur place. C'est pour cette raison exceptionnelle que la Commission autorise dans des cas spécifiques l'octroi d'aides au fonctionnement, afin de promouvoir l'intégration économique de ces régions.

La Communication de 1988 propose également une méthode d'application de l'article 87, paragraphe 3 point c) («aides au développement de certaines régions économiques lorsque celles-ci n'altèrent pas les conditions des échanges dans une mesure contraire à l'intérêt commun»). Cette méthode permettait à la Commission d'apprécier l'éligibilité d'une région aux aides régionales au titre de ladite dérogation, dans un contexte à la fois national et communautaire par une approche en deux phases d'examen. Le document précise les conditions d'octroi des aides dans un premier temps en évaluant la situation socio-économique d'une région en fonction de critères précis comme le revenu mesuré en termes de richesse (PIB) par rapport à la valeur ajoutée brute et le taux de chômage. La Commission a mis en place une formule pour définir un seuil statistique destiné à mesurer la situation d'une région sur le plan national, tout en prenant en compte la position relative de l'Etat membre à l'intérieur de la communauté. Le but essentiel poursuivi par ce seuil est que, plus la position d'un Etat membre par rapport à la moyenne communautaire est favorable, plus grande doit être la disparité d'une région sur le plan national pour justifier l'octroi de l'aide.

Les plafonds d'intensité sont également liés à la nature, l'intensité ou à l'urgence des problèmes régionaux. Toutefois, le résultat de cette première phase était vérifié par une deuxième phase plus développée. En effet, de nombreux autres indicateurs économiques, fondés sur des statistiques nationales et communautaires, peuvent être également utilisés pour éclairer avec plus de précision la situation socio-économique d'une région donnée. C'est pourquoi le fait que le seuil nécessaire soit atteint dans la première phase de l'analyse ne justifie pas automatiquement qu'une région bénéficie d'une aide d'Etat, ou vice versa qu'elle sera définitivement exclue. Ces indicateurs peuvent consister dans la tendance et la structure du chômage, l'évolution de l'emploi, la migration nette, la pression démographique, la densité de population, les taux d'activité, la productivité,

⁽¹⁾ JO C 212 du 12.8.1988.

la structure de l'activité économique, l'investissement, la situation géographique, la topographie et l'infrastructure.

La seconde phase est donc susceptible de fournir une justification adéquate à l'aide régionale, même à des zones qui ne correspondent pas entièrement aux seuils établis dans la première phase. Cependant, la Communication ne prévoyait pas d'examen simultané a priori des cartes par les Etats membres, et ne limitait pas l'étendue des régions éligibles à certains plafonds de population ou de superficie.

En 1994, en préparation à l'adhésion de la Suède et de la Finlande à l'Union européenne, la Commission a introduit un nouveau critère d'éligibilité pour les régions défavorisées, compte tenu des spécificités géographiques de ces deux pays: la densité de population ⁽¹⁾ (pour les régions NUTS III où la densité démographique est inférieure à 12.5 habitants par Km²). En effet, ces deux pays connaissent des particularités géographiques, climatiques, économiques et des distances très longues, uniques au sein de l'espace communautaire, qui nécessitent une prise en considération spécifique pour la mise en œuvre des aides à finalité régionale. Pour refléter ces problèmes particuliers, le critère de densité de population apparaît pertinent, dans la mesure où il reflète les handicaps régionaux que doivent surmonter ces régions.

Chapitre 3: Préparation et événements de la période 2000-2006

Dans le contexte de la préparation de l'Agenda 2000, en 1997, les différentes institutions européennes se sont penchées sur l'élaboration des règles pour la période de programmation pour l'octroi des aides régionales. Lors du Conseil européen d'Amsterdam, les Etats membres ont approuvé le Plan d'action pour le marché intérieur proposé par la Commission européenne ⁽²⁾, et qui a reçu le soutien des Etats membres. Celui-ci proposait notamment de supprimer les principales distorsions qui affectent le marché et préconisait «d'adopter une approche rigoureuse en matière de politique de concurrence». Ce plan insistait sur l'importance des distorsions de concurrence des aides d'Etat (particulièrement les aides aux grandes entreprises) et invitait les Etats membres à réduire le niveau général des aides (les pays accordant le plus d'aides étant les quatre économies les plus développées de l'Union). En matière d'aides régionales, il prévoyait

l'adoption des lignes directrices ⁽³⁾, ainsi que celle d'un encadrement multisectoriel en faveur des grands projets d'investissement (supérieur à 50 millions d'€), dont l'objet était le remplacement des encadrements sectoriels existants et le renforcement des aides au sauvetage et à la restructuration.

Le Conseil européen proposait également de renforcer le dialogue entre les Etats membres et la Commission afin de définir un calendrier précis et de proposer de nouvelles orientations pour que les aides soient plus concentrées sur des objectifs de cohésion, visant à réduire les disparités régionales au sein de l'espace communautaire.

Parallèlement aux fonds structurels, la politique de concurrence et particulièrement les aides régionales apportent une contribution essentielle et directe au renforcement de la cohésion économique et sociale de l'Union. La Communication de la Commission sur la cohérence entre les Fonds structurels et les aides à finalité régionale ⁽⁴⁾ de 1998, a pour principal objectif de renforcer la concentration des aides afin de limiter géographiquement l'étendue des distorsions résultant de l'octroi des aides régionales, tout en favorisant le développement des régions défavorisées. D'autre part, il s'agit de renforcer la cohérence entre les deux politiques communautaires, afin que dans chaque Etat membre, les régions bénéficiant des interventions des Fonds structurels puissent être également couvertes par un régime d'aides à finalité régionale.

Préparation de l'élargissement de l'UE aux Pays d'Europe centrale et orientale

Un des objectifs principaux de la politique des aides à finalité régionale consiste à aider les régions les plus défavorisées (zones géographiques ayant un niveau de développement inférieur à 75% de la moyenne du PIB communautaire, taux de chômage élevé, régions ultrapériphériques, régions à faible densité de population...) en leur octroyant la possibilité d'aider les investissements des entreprises par des financements publics. Cependant, conformément au Traité CE, ces aides constituent des distorsions de concurrence par rapport au marché commun, elles doivent donc conserver leur caractère d'exception, la couverture de population dans la Communauté ne pouvant excéder 50% de la population communautaire.

Lorsqu'en 1996, la Commission a commencé à préparer la rédaction des lignes directrices régionales pour la période 2000-06, elle a dû prendre en compte les implications qu'un élargissement futur

⁽¹⁾ JO C 364 du 20.12.1994, p. 8.

⁽²⁾ COM (97) 184 et Bull. 5-1997, point 1.3.34.

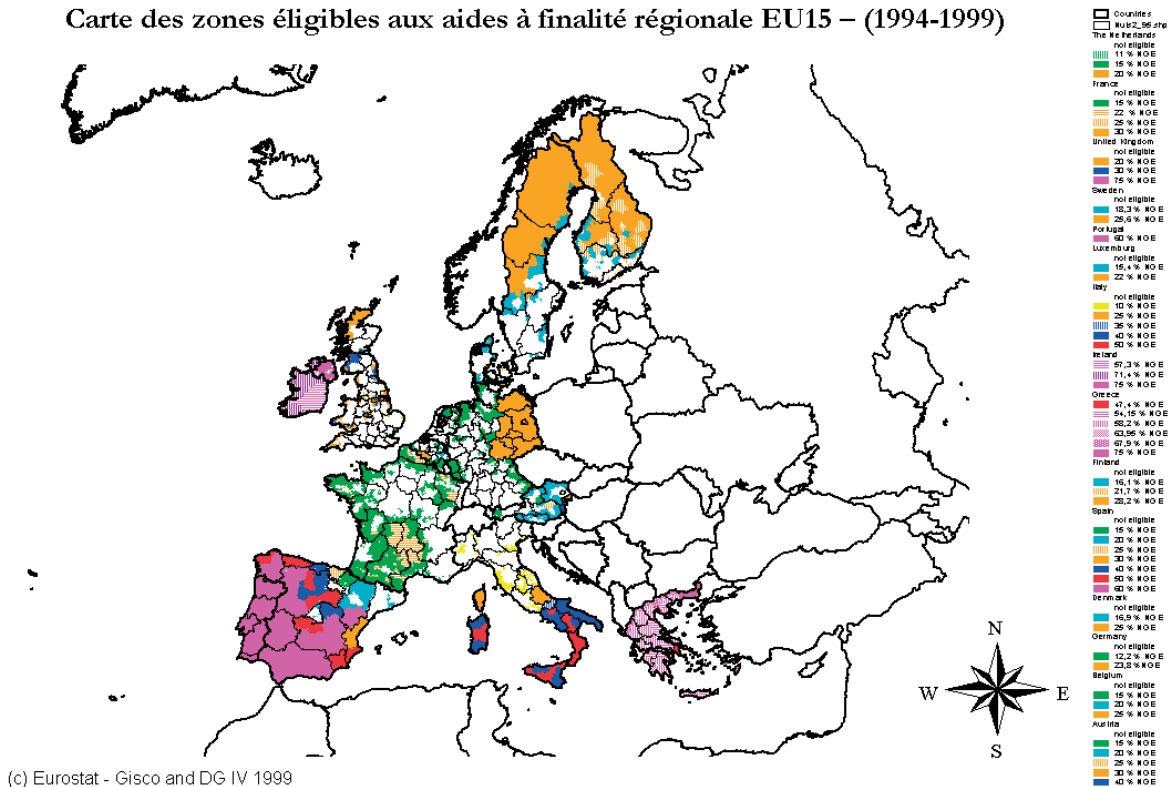
⁽³⁾ JO C 74 du 10.3.1998, p. 9-31.

⁽⁴⁾ JO C 90 du 26.3.1998, p. 3.

aurait sur le taux de couverture des aides à finalité régionale, compte tenu des disparités de développement qui existent entre les pays de l'UE 15 et les nouveaux pays candidats à l'époque. Le taux de couverture totale de la population européenne pour la période 1994-1999 était de 46.7%. Or, en prévision de l'élargissement futur, la Commission a dû revoir sensiblement à la baisse le taux de cou-

verture au niveau des pays de l'UE 15, afin que la population totale de l'Europe élargie couverte par les aides reste inférieure à 50%. Par conséquent la Commission a proposé pour la période 2000-2006, une baisse de couverture de la population UE 15 totale éligible (42,7% contre 46,7%), ce qui implique une réduction sensible des régions éligibles à l'article 87 paragraphe 3 point c).

Carte des zones éligibles aux aides à finalité régionale EU15 – (1994-1999)



(c) Eurostat - Gisco and DG IV 1999

La définition des zones éligibles à l'article 87.3.a) est restée automatique sur la base du critère des régions en retard de développement (moins de 75% de la moyenne communautaire pour le PIB/habitant en parité de pouvoir d'achat) au niveau européen (sans distinctions nationales). En revanche, pour la définition des zones éligibles à l'article 87.3.c, au moins 15% du territoire national non éligible au point a) devait être couvert (sans pour autant dépasser les 50% de population éligible au point c). De plus, les Etats membres ne pouvaient perdre plus de 25% de taux de couverture entre la période antérieure (1994-1999) et la suivante (2000-2006).

La réduction de la couverture européenne de population éligible aux aides régionales pour les régions en retard de développement était une mesure nécessaire pour préparer l'adhésion des pays de l'Europe centrale et orientale. Pour les zones perdant leur éligibilité à l'article 87.3.a, à cause de leur développement économique, la Commission a décidé, comme pour les fonds structurels (notamment l'objectif 1 et 2), de mettre en place un méca-

nisme de soutien transitoire. La Commission a donc proposé de mettre en place, pour ces régions une diminution régulière d'intensité de l'aide sur la moitié de la période (2000-2003), et de conserver un niveau d'intensité équivalent aux régions éligibles au paragraphe 87.3.c sur la seconde moitié (2004-2006). Ce dispositif permet aux régions de ne pas connaître de rupture totale du niveau d'aides et de s'adapter économiquement aux changements d'intensité pour mettre en place une nouvelle politique économique territoriale efficace.

La réforme de 1998 : une avancée majeure.

Le contrôle des aides d'Etat à finalité régionale s'est également manifesté par la baisse des taux d'intensité. Alors qu'auparavant, pour les régions éligibles au point a) l'intensité de l'aide atteignait 75% net, ce taux a été baissé à 50% net (avec une majoration de 15% pour les régions ultrapériphériques). Pour les régions éligibles au point c) l'intensité a diminué de

10 points de pourcentage (de 30% d'intensité à 20, en conservant le taux de 30% pour les régions à faible densité de population).

La Commission a également accordé plus de flexibilité aux Etats membres en élargissant la base éligible des aides aux investissements immatériels afin de répondre aux évolutions de l'industrie européenne (notamment la tertiarisation des activités économiques). Lors de la réforme de 1998, la Commission a autorisé les Etats membres à choisir entre les coûts éligibles des aides liés aux investissements (les bâtiments, les équipements et le terrain) et ceux liés aux coûts salariaux.

Un autre changement important dans l'approche des aides à finalité régionale pour la période 2000-2006 (harmonisation de la période de programmation avec les fonds structurels), a été l'instauration de la notification obligatoire en début de période de programmation des cartes d'aides, la définition des seuils de population couverte et l'instauration d'une méthodologie contraignante mais transparente pour la définition de l'éligibilité des régions aidées. En effet, afin de renforcer le contrôle de l'attribution des aides régionales, la Commission a invité les Etats membres à concevoir une méthode basée sur des indicateurs précis pour définir les zones éligibles à l'article 87.3.c. La méthodologie devait être objective, permettre

de mesurer les disparités des situations socio-économiques des régions sous examen en mettant en évidence des disparités significatives, être claire et détaillée, basée sur des indicateurs assez nombreux, objectifs et pertinents, et enfin utiliser des statistiques fiables.

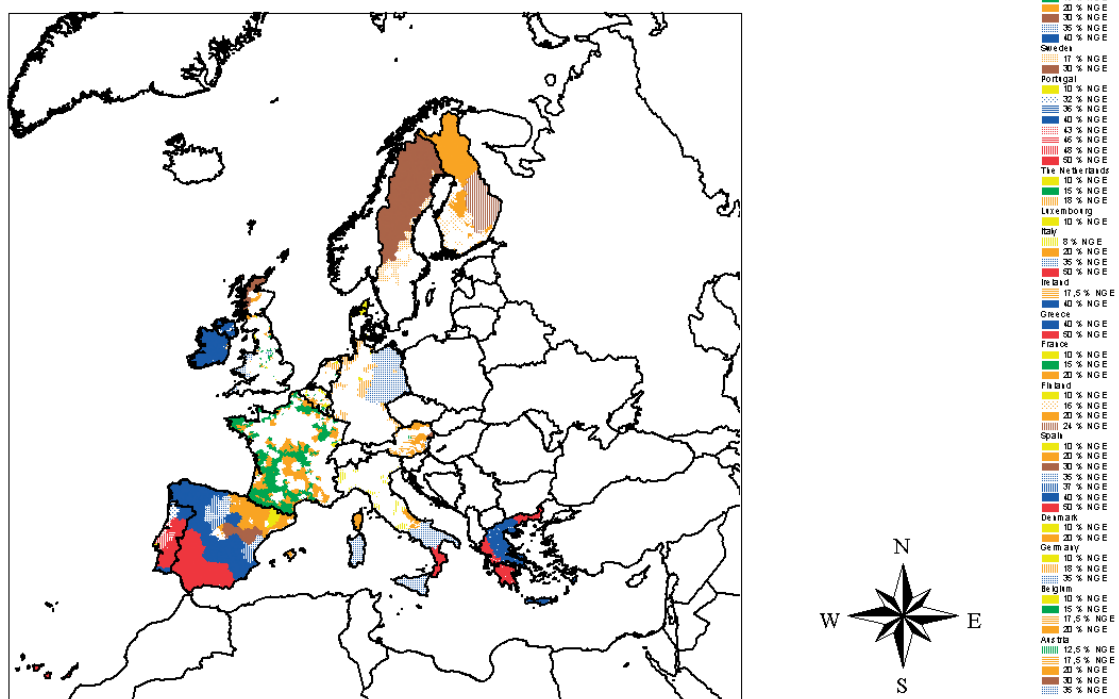
De plus, la Commission a imposé l'adoption d'une vraie méthode de zonage purement statistique à l'aide de critères précis : niveau NUTS III, zone de 100 000 habitants au minimum, mise en évidence de disparités de développement significatives.

1998 a également marqué l'année de la création d'un premier encadrement sur les aides à finalité régionale en faveur des grands projet d'investissements (1). Cet encadrement a pour objectif principal de limiter les aides à ces grands projets, ceux-ci ayant souvent d'importants effets de distorsion de concurrence, tout en préservant l'effet d'attraction de la région aidée. L'encadrement impose aux Etats membres l'obligation de notifier tout projet d'investissement (création, extension d'un établissement ou lancement d'une nouvelle activité), situé dans une région éligible aux aides à finalité régionale supérieur à 50 millions d'€ (encadrement révisé en 2002 (2)).

(1) JO C 107 du 7.4.1998.

(2) JO C 263 du 1.11.2003.

Carte des zones éligibles aux aides à finalité régionale EU15 (2000-2006)



(c) Eurostat - Gisco + DG COMP (2000)

Les événements importants de la période de programmation 2000-2006

Au cours de la période 2000-2006 et après la mise en application des lignes directrices pour les aides régionales, le processus de construction européenne a continué à évoluer. Les sommets européens, l'élargissement à 25 Etats membres, ont marqué le contexte institutionnel, politique, économique, et géographique de la communauté européenne.

Sommet de Lisbonne

Depuis 1996, la croissance économique en Europe est inférieure de 0.4% en moyenne par rapport aux Etats-Unis. La concurrence internationale étant de plus en plus développée, l'Europe n'a pas d'autres choix que d'améliorer son positionnement sur l'économie de la connaissance et sa compétitivité. En mars 2000, les dirigeants des Etats membres européens ont donné pour objectif à l'Europe de devenir d'ici à 2010 «*l'économie de la connaissance la plus compétitive et la plus dynamique du monde, capable d'une croissance économique durable accompagnée d'une amélioration quantitative et qualitative de l'emploi et d'une plus grande cohésion sociale*», objectif appelé la stratégie de Lisbonne.

A mi-parcours, il apparaît flagrant que les objectifs ne seront pas atteints. La nouvelle Commission européenne, entrée en fonction en novembre 2004, s'est fixé comme priorité pour son mandat de relancer l'emploi, la croissance et la compétitivité de l'Europe afin d'atteindre les objectifs adoptés à Lisbonne.

La politique de concurrence, et particulièrement les aides d'Etat ne «produisent» pas directement la compétitivité, mais permettent d'une part, la coordination, la cohérence et l'intégration des différentes politiques communautaires et d'autre part le développement de certaines zones géographiques à travers les aides régionales. Les différents conseils européens des dernières années ont réaffirmés le rôle majeur des aides régionales pour favoriser le rattrapage des régions en retard de développement en lien avec les objectifs de cohésion économique et sociale que s'est fixée la Commission, tout en offrant plus de flexibilité aux Etats membres pour renforcer d'une manière efficace les politiques orientées vers la compétitivité de l'Europe à l'échelle mondiale.

Objectifs de Stockholm

Lors du conseil européen de Stockholm en mars 2001, les chefs d'Etat et de gouvernement de l'Union européenne se sont entendus sur les réformes économiques et l'emploi. Les dirigeants européens ont notamment rappelé aux Etats membres, lors du Conseil européen de Barcelone en mars

2002, qu'il était important d'orienter les aides à la baisse par rapport au PIB et les cibler vers des objectifs horizontaux d'intérêts communs, incluant la cohésion économique et sociale sous l'égide de la formule: «moins d'aides, mais mieux ciblées». La décision d'accorder des aides au développement régional ne peut être prise qu'à la condition que l'équilibre entre les distorsions de concurrence et les avantages qui résultent de ces aides en terme de développement d'une région moins favorisée soit garanti. Afin de rendre les aides le plus efficace possible, celles-ci doivent être attribuées aux régions en ayant le plus besoin.

Le 3^{ème} rapport sur la cohésion économique et sociale

Le troisième rapport sur la cohésion économique et sociale européenne ⁽¹⁾, paru en février 2004, dresse le bilan à mi-parcours de la période de programmation de la politique régionale. Il présente le bilan de trois années de travail et la vision de la Commission européenne pour l'avenir d'une politique de réduction des disparités et de promotion d'une plus grande cohésion économique, sociale et territoriale en Europe.

Dans la partie du rapport concernant l'impact des politiques communautaires en matière de compétitivité, d'emploi et de cohésion, il est mentionné la complémentarité entre les aides d'Etat et la politique de cohésion. En effet, en attribuant des aides aux secteurs ou aux régions où elles sont le plus nécessaires et où elles ont le moins d'effets de distorsion de concurrence, la politique des aides d'Etat à finalité régionale contribue au rattrapage des régions et à la réduction des disparités au sein de l'espace communautaire. La discipline du contrôle des aides imposée par les Conseils européens de Stockholm et de Barcelone permet également aux Etats membres d'accroître l'efficacité des interventions publiques.

L'élargissement

L'élargissement de l'Union européenne à 25 Etats membres le 1^{er} mai 2004 a constitué une étape importante du processus de construction du projet européen. Mais il a également modifié considérablement les caractéristiques de l'espace communautaire. Les 10 nouveaux Etats membres étant à l'origine d'une augmentation de superficie du territoire communautaire de près de 30%, de population de 28 % et du PIB de seulement 5%. La population vivant dans les régions ayant un PIB/habitant inférieur à 75% de la moyenne communautaire est passée de 71 millions à 174 millions d'habitants, le

⁽¹⁾ http://europa.eu.int/comm/regional_policy/sources/docoffic/official/reports/cohesion3/cohesion3_fr.htm.

nombre de régions NUTS II concernées passant, lui, de 46 à 97. Le taux d'emploi des pays adhérents n'étant que de 56% comparé à 64% pour les pays de l'UE 15, les aides à finalité régionale seront essentiellement concentrées dans ces Etats.

Conclusion

Cet article permet de mieux cerner l'évolution de la politique des aides régionales, en rappelant que depuis 1956, celles-ci sont interdites sauf au titre des dérogations de l'article 88 paragraphe 3, points a) et c). Il permet de rappeler les enjeux de la politique des aides, dans le contexte des discussions sur les perspectives financières pour la période 2007-2013 et la réforme des règlements fixant la mise en œuvre des aides régionales.

Le contrôle a été renforcé, la transparence et la flexibilité des aides a été amélioré, le dispositif de mise en œuvre simplifié, tout en adaptant les règlements, les intensités, les coûts éligibles au processus de construction européenne. A la veille de la révision des lignes directrices il est important de rappeler que les débats et négociations actuelles ne sont pas nouveaux, mais qu'ils existent depuis de nombreuses années.

La révision des lignes directrices des aides à finalité régionale ne doit pas être envisagée comme un question isolée, mais comme faisant partie d'un processus plus large de réforme globale des politiques communautaires et plus particulièrement de la politique de concurrence. Ainsi, les aides d'Etat font l'objet d'une attention particulière au sein de la Commission européenne, suivant les conclusions du Conseil européen de Stockholm, appelant les Etats membres à réduire et mieux cibler les aides publiques. La Commission a pour objectif de limiter les aides aux régions et secteurs en ayant le plus besoin, objectif qu'elle a déjà depuis plus de trente ans.

Dans ce contexte de redéfinition complète de l'architecture en matière d'aides d'Etat, la Commission s'appuiera sur les commentaires des Etats membres et des autres parties intéressées. Le processus de consultation a été commencé en 2003 et poursuivi par des réunions bi et multilatérales dans le courant de l'année 2005, avec la perspective que la Commission puisse adopter les nouvelles lignes directrices régionales, ainsi que la plupart des autres éléments nécessaires à cette réforme globale pour la fin 2005.

Towards a proportionality test in the field of the liberal professions?

The pending reference for a preliminary ruling in Case C-202/04 *Macrino and Capodarte* raises the issue of the compatibility with Articles 10 and 81 EC of State regulation drafted by private actors

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Introduction

On 25 October the Grand Chamber (13 judges) of the European Court of Justice held an oral hearing on a reference for a preliminary ruling from the Tribunale di Roma in Case C-202/04 *Macrino and Capodarte v. Meloni* (2) (hereinafter *Macrino*).

The main issue raised by that case is similar to the one raised in *Arduino* (3), i.e. under which conditions is a State measure compatible with Articles 10 and 81 EC (4) which makes a draft tariff submitted by representatives of a given profession fixing minimum fees for the services provided by that profession obligatory.

The Court has essentially to choose between three possible approaches:

- under the *automatic legality* approach such a State measure would be automatically outside the scope of the prohibition of Articles 10 and 81 EC independently of the procedure followed or of possible anticompetitive effects;
- under the *procedural* approach such a State measure would be compatible with Articles 10 and 81 EC independently of possible anticompetitive effects where there are sufficient procedural safeguards ensuring that the State did not effectively waive its decision making powers;
- under the *proportionality* approach such a State measure would be compatible with Articles 10 and 81 EC only if it pursues a legitimate public interest objective and complies with the proportionality principle.

(1) The views expressed are personal to the author and do not necessarily reflect those of the Commission or of DG Competition.

(2) At the same hearing the Court also dealt with Case C-94/04 *Cipolla*. In that case the referring Corte di Appello di Torino wants to know in essence whether a rule according to which no derogation from the tariffs setting minimum fees for the services of lawyers for legal proceedings is permitted is compatible with Article 81 in combination with Articles 3(1)(g) and 10 of the Treaty.

(3) Case C-35/99 [2002] ECR I-1529.

(4) In its case-law on State measures depriving the competition rules of their effectiveness often also to Article 3(1)(g). It is submitted that the reference to Article 3(1)(g) is not indispensable since the basis of the Member States' legal obligations is Article 10 EC, see below. For easier reading the present article will therefore refer only to Articles 10 and 81 EC.

The Court's decision may have important implications for the Commission's reform efforts in the sector of the liberal professions. (5) In that sector many of the more problematic restrictions are proposed by representatives of the professions and rendered obligatory by laws or State regulations. It may also have implications for other sectors of the economy in which Member States regulate prices or other key vectors of competition on the basis of draft regulatory measures prepared by professional or industry bodies (e.g. insurance, agriculture, energy, transport, health).

The reference for a preliminary ruling in the *Macrino* case

Under Italian law (6) the criteria for determining fees and emoluments payable to members of the Bar in respect of court proceedings and out-of-court work are to be set every two years by decision of the Consiglio Nazionale Forense (National Council of the Bar, 'CNF'). (7) The CNF is composed of members of the Bar elected by their fellow members. In order to become compulsory deci-

(5) Commission's work in this area includes: 'Economic Impact of regulation in the field of liberal professions in different EU Member States', Ian Paterson, Marcel Fink, Anthony Ogus, Institute for Advanced Studies, Vienna, January 2003

<http://www.europa.eu.int/comm/competition/liberalization/conference/libprofconference.html>; Report on 'Competition in Professional Services', February 2004

http://www.europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf; 'Stocktaking Exercise on Regulation of Professional Services — Overview of Regulation in the New EU Member States', November 2004

http://www.europa.eu.int/comm/competition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf; 'Follow-up report 'Professional Services — Scope for more reform', September 2005

http://www.europa.eu.int/comm/competition/liberal_professions/sec200564_en.pdf; 'Professional services: more competition, more competitiveness, more consumer orientation', 2004 Competition Policy Newsletter 2004, number 2, page 71 and 'Professional Services — Scope for more reform, on page [xx] of this Competition Policy Newsletter.

(6) The basic text governing the profession of avvocati and procuratori in Italy is Royal Decree-Law No 1578 of 27 November 1933 (GURI No 281 of 5 December 1933) which was converted into Law No 36 of 22 January 1934 (GURI No 24 of 30 January 1934).

(7) Article 57 of Royal Decree-Law No 1578 cited above.

sions of the CNF on fees and emoluments must be approved by the Minister of Justice after having obtained the opinion of the Comitato Interministeriale dei Prezzi (Interministerial Committee on Prices) and consulted the Consiglio di Stato (Council of State).

The tariff of fees for members of the Bar at issue in the main proceedings was adopted by decision of the CNF of 12 June 1993, as amended on 29 September 1994. That CNF decision was approved and made obligatory by Ministerial Decree No 585 of 5 October 1994 ⁽¹⁾ after having obtained the opinion of the Interministerial Committee on Prices and consulted the Council of State. The tariff comprises three sections: (a) fees for legal services in civil or administrative law court proceedings, (b) fees for legal services in criminal law court proceedings and (c) fees for out-of-court work. The section concerning out-of-court work provides that the fees foreseen in that section are in principle binding minimum fees. ⁽²⁾

In 1998 M. Meloni, a member of the Bar, sought and obtained an injunction ordering M. Macrino and Ms. Capodarte to pay for out-of-court legal work (comprising telephone consultations, meetings, oral opinions and letters to the opposing party's lawyer) performed for them in connection with copyright. The injunction was obtained on the basis of an opinion from the Bar based on the section of the tariff concerning out-of-court.

Before the referring Tribunale di Roma M. Macrino and Ms. Capodarte contest the injunction on the ground that the fees were disproportionate in the light of the work actually done. The referring court considers that under Italian law as it stands it has to determine the fees owed by M. Macrino and Ms. Capodarte by reference to the section of the tariff for out-of-court work. Since the referring court has however doubts about the compatibility of that section of the tariff with Articles 10 and 81 EC it referred the following question for a preliminary ruling:

'Do ... Articles 10 and 81 EC ... preclude a Member State from adopting a law or regulation which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession in respect of services rendered in connection with activities (so-called out-of-court work), that are not reserved to members of the Bar but may be performed by anyone?'

⁽¹⁾ GURI No 247 of 21 October 1994.

⁽²⁾ See Articles 1, 4(2) and 9 of the section of the tariff concerning out-of-court work.

In the order for reference, the referring court explains that in Italy the activity of providing legal assistance in court proceedings is reserved to members of the Bar, but out-of-court legal work (e.g. assistance in drawing up contracts, legal advice, drafting of demands for payment) may be performed by any economic operator.

The referring court also states that it seeks in particular a clarification from the Court of Justice on whether a State measure setting minimum fees for out-of-court activities, in order to be compatible with Articles 3(1)g, 10(2), and 81 EC, must not only guarantee a control of last resort by qualified public bodies ⁽³⁾, but according to the proportionality principle ⁽⁴⁾ also pursue a public interest objective and be the means least restrictive of competition to achieve that objective.

The Court's case-law and the Commission's 'Report on competition in professional services'

According to its wording Article 81 EC concerns only the conduct of undertakings and not State measures. Under Article 10(2) of the Treaty the Member States must however abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Under Article 3(1)g of the Treaty a central ⁽⁵⁾ objective of the Treaty is to create and maintain a system ensuring that competition in the internal market is not distorted.

Already in 1977 in *INNO v ATAB* ⁽⁶⁾ the Court established therefore the general principle that, whilst Articles 81 and 82 were directed at undertakings, Articles 3(1)g, 10(2) and 81/82 EC read together imposed a duty on the Member States not to adopt or maintain in force any measure which could deprive the competition rules of their effectiveness.

According to the Court's subsequent case-law codified in the so-called *Van Eycke* ⁽⁷⁾ formula a State measure deprives the competition rules of their effectiveness where it:

⁽³⁾ See the operative part of the judgment in Case C-35/99 *Arduino* [2002] ECR I-1529. Two possible interpretations of that judgment are discussed in more detail below.

⁽⁴⁾ The proportionality principle is discussed in detail below.

⁽⁵⁾ See the preamble of the Treaty which refers to the need to guarantee fair competition and Article 4(1) of the Treaty pursuant to which the economic policy of the Member States and the Community must be conducted in accordance with the principle of an open market economy with free competition.

⁽⁶⁾ Case 13/77 [1977] ECR 2115.

⁽⁷⁾ Case 267/86 [1988] ECR 4769.

- (1) requires or favours the adoption of agreements, decisions or concerted practices of the kind referred to in Article 81 EC,
- (2) reinforces the effects of agreements, decisions or concerted practices of the kind referred to in Article 81 EC, or
- (3) deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

For the assessment of the *Macrino* case the second branch of that formula is of particular interest, i.e. under what conditions a Member State making a draft tariff submitted by a professional association compulsory infringes Article 10 and 81 of the Treaty by reinforcing the effects of a decision of an association of undertakings which establishes a tariff with uniform minimum prices. In its case-law the Court has always assessed this type of situation under the second branch of the *Van Eycke* formula.

In that respect in its early judgments in *Asjes* ⁽¹⁾ and *BNIC/Aubert* ⁽²⁾ the Court found in comparable cases that

- the professional association submitting the draft tariff infringed Article 81 EC, *and*
- the Member State making the tariff compulsory infringed Articles 10 and 81 EC because it ‘reinforced the effects’ of the private conduct in question.

Under those early judgments all State measures making a draft tariff compulsory were therefore automatically contrary to Articles 10 and 81 of the Treaty. None of the early judgments discussed the possibility for a Member State to justify such measures on public interest grounds.

In a subsequent line of cases culminating in *Pavlov* ⁽³⁾ the Court reached the opposite result as in *BNIC/Aubert* and *Asjes* and held that a Member State which makes a draft measure submitted by a professional association compulsory for all members of the profession was compatible with Articles 10 and 81.

In order to understand that striking change of outcome it must be borne in mind that a decision by a professional association to submit a draft tariff to the public authorities for approval, *taken in isolation*, does not have as its object or effect to restrict competition on the market. That is first because

the mere elaboration of a draft is neither intended nor capable to have effects on the market in the absence of its publication or approval ⁽⁴⁾. Secondly, the submission of the draft for approval by the State as indeed any other form of lobbying has also no anticompetitive effects on its own and is part of a process which is normal in our democratic societies. ⁽⁵⁾ The more recent case-law of the Court therefore overruled the first element of its early case-law and held that a decision by a professional association to submit a draft tariff to the public authorities taken as such is not contrary to Article 81(1). ⁽⁶⁾ It is submitted that the new case-law in so far as it concerns the liability of associations of undertakings under Article 81 EC is correct. All potential or real anticompetitive effects are caused by the State measure making the draft tariff obligatory and not by the draft itself.

In the line of cases culminating in *Pavlov* the Court went however one step further and required a ‘perfect’ infringement of Article 81(1) EC also in order to find that the ‘reinforcing’ State measure infringed Articles 10 and 81 EC. The Court established thus an automatic link between the legality of the behaviour of the undertakings under Article 81(1) and the legality of the State measure under Articles 10 and 81 EC. ⁽⁷⁾ On that basis the Court effectively held that because the submission of a draft to the State was not contrary to Article 81(1) the State measure making the draft compulsory could also not infringe Article 10 and 81 EC, since it was not reinforcing the effects of an agreement contrary to Article 81(1). The consequence of that new case-law was that a State measure making a

⁽⁴⁾ See by contrast for a case where a professional body uses a non-approved draft to restrict competition in the absence of State approval the recent *Belgian Architects* Commission decision (COMP 38.549): where a professional body publishes a draft tariff and asks its members to respect that tariff despite the fact that it did not receive State approval it signals the expected prices and creates thereby a focal point. In such cases there might be a restriction of competition independently of the State’s intervention.

⁽⁵⁾ See paragraphs 291 to 293 of the Opinion of AG Jacobs in *Albany*. See also paragraph 98 of the judgment in *Pavlov*.

⁽⁶⁾ See paragraph 99 of the judgment in *Pavlov*. The judgment effectively overruled is Case 123/83 *BNIC/Clair* [1985] ECR 391. See for the underlying reasons paragraphs 77 to 79 of the Opinion of AG Léger in *Arduino*.

⁽⁷⁾ In paragraph 99 of the judgment in *Pavlov*, cited above, the Court concluded that a decision by the members of a profession to set up a pension fund entrusted with the management of a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all members of the professions was not contrary to Article 81(1). In paragraph 100 the Court continued as follows: ‘Thus, *for the same reasons*, a decision by the Member State in question to make membership of such a fund compulsory for all members of the professions is not contrary to Articles [10] and [81 EC] *either*.’ (emphasis added).

⁽¹⁾ Joined Cases 209 to 213/84 [1986] ECR 1425.

⁽²⁾ Case 136/86 [1987] ECR 391.

⁽³⁾ See Case C-266/96 *Corsica Ferries* [1998] ECR I-3949, Case C-67/96 *Albany* [1999] ECR I-5751 and Joined Cases C-180 to 184/98 *Pavlov* [2000] ECR I-6451.

draft submitted by a professional association compulsory was automatically and independently of its potentially detrimental effects on competition outside the scope of Articles 10 and 81.

In their Opinions in *Pavlov* and *Arduino* Advocate General Jacobs and Advocate General Léger expressed concern as regards this new approach of 'automatic legality'.⁽¹⁾ Both Advocates General proposed to follow an alternative approach based on the principle of proportionality.⁽²⁾

The 2002 *Arduino* case⁽³⁾ concerned in principle the same Decree as *Macrino*. The section of the fee tariff in issue in *Arduino* was however the one for court related work and not the one for out of court work.⁽⁴⁾ The Court held that Articles 10 and 81 EC did not preclude a Member State from adopting a measure such as the Decree in issue.

It is however interesting to note that the Court refrained from expressly relying on the 'automatic legality' approach used in *Pavlov*. The Court instead dealt with the problem of 'reinforcement of the effects' only in one dense sentence which refers back to another section of the judgment dealing with the separate problem of unlawful delegation of regulatory powers:

Nor, for the reasons set out in paragraphs 41 and 42 above, is the Italian State open to the criticism that it requires or encourages the adoption of agreements, decisions or concerted practices contrary to Article [81] of the Treaty or reinforces their effects.⁽⁵⁾

(1) Advocate General Jacobs stated in that respect at paragraph 161 of his Opinion in *Pavlov*: 'I must confess that I do not find that case-law with its automatic link between the legality of a private and a Member State's measure very satisfactory in cases such as the present one: the [association's] decision is not caught by Article [81(1)] because any restrictive effects are the result of subsequent State intervention; that State intervention in turn is not caught by Article [10] because the [association's] decision as such is not restrictive enough. Therefore, neither the concertation between medical specialists nor the State measure in question can be challenged under Community competition law although the Minister could not have restricted competition without prior concertation by economic actors.'

(2) Advocate General Jacobs stated at paragraph 163 of the Opinion in *Pavlov* in that respect: 'In cases such as the present ones it would thus be more satisfactory to accept a prima facie infringement justifiable on public interest grounds. In my view, measures taken by Member States comply with Article [10(2)] where, although they reinforce the restrictive effects of a concertation between undertakings, they are taken in pursuit of a legitimate and clearly defined public interest objective and where Member States actively supervise that concertation.'

(3) Cited above.

(4) The differences between the background in *Arduino* and *Macrino* are set out in more detail below.

(5) Paragraph 43 of the judgment.

In the operative part of the judgment the Court stated that Articles 10 and 81 EC did not preclude a Member State from adopting a decree such as the one in issue, 'where that State measure forms part of a procedure such as that laid down in [the Royal Decree-Law]'.⁽⁶⁾

Since the question of reinforcement had been at the heart of the debate before the Court⁽⁶⁾, the judgment is not easy to interpret.

According to one possible interpretation the Court wished to overrule the existing case-law on 'reinforcement' and establish a new 'procedural' test. Under that new test there would be no unlawful 'reinforcement' where there are sufficient procedural safeguards intended to ensure that the Member State in issue does not waive its power to make decisions of last resort and of reviewing the implementation of the rules in issue. In other words there would be no separate test for the 'reinforcement' branch of the *Van Eycke* formula any longer, since it would be replaced by the test for unlawful 'delegation'.

Under a second possible interpretation *Arduino* is, as regards 'reinforcement', a carefully drafted transitional judgment. For the 'reinforcement' branch of the *Van Eycke* formula the Court on the one hand did not wish to confirm the automatic legality approach, but on the other in the circumstances of the case found it unnecessary to establish a new test. That interpretation would explain why the Court hardly discussed the issue of reinforcement and relied very much on all the specificities of case before it.⁽⁷⁾ Moreover, in the operative part it expressly linked the outcome to the specificities of the Italian law in issue. Finally, there is no indication in the judgment explaining why the Court would have wished to abandon its case-law on reinforcement altogether.

In its 2004 'Report on competition in professional services'⁽⁸⁾ the Commission endorsed a proportionality approach similar to the one proposed by Advocates General Jacobs and Léger.

In section 5 of that Report entitled 'Possible application of EC Competition Rules' in subsection 5.2. entitled 'Liability of Member States' the Commission made statements which go beyond the existing case-law and thereby arguably signalled to the Court, to national courts and to economic actors that it would welcome a change of the case-law on Articles 10 and 81.

(6) See the summary of the arguments of the parties and their extensive discussion in paragraphs 43 to 119 of opinion of AG Léger.

(7) See paragraphs 41 and 42 of the judgment.

(8) Communication from the Commission of 9 February 2004, COM(2004) 83 final.

As regards the ‘reinforcement’ branch of the *Van Eycke* formula the Report states:

A proportionality test would seem appropriate to assess to what extent an anti-competitive professional regulation truly serves the public interest.

The section of the executive summary relating to the competition law section of the report contains the following statement:

Ultimately, in the Commission’s view, in all scrutiny of professional regulation a proportionality test should be applied. Rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and they must be the mechanism least restrictive of competition to achieve that objective. Such rules serve the interests of users and of the professional alike.

Should *Macrino* be decided under a proportionality test?

One of the purposes of the Commission’s Report on competition in professional services was to trigger a debate about the appropriate approach in cases where State legislation or regulation is prepared by professional associations. That is how the referring Court in *Macrino* has understood the relevant passages in the Report. In its reference for a preliminary ruling the Tribunale di Roma refers extensively to the Report.

The referring court also rightly points out that there are important differences between *Macrino* and *Arduino*:

- *Macrino* concerns the section of the professional tariff for out-of-court legal services and not the one for legal services related to court proceedings;
- as regards legal services related to court proceedings Italian law obliges the CNF to establish a tariff with maximum and minimum limits. ⁽¹⁾ It is by contrast not clear whether Italian law foresees the same obligation for out-of-court legal work. ⁽²⁾ It could thus be that the drawing up of the tariff for out-of-court work is attributable only to the initiative of the CNF.
- whilst maximum fee tariffs for legal services related to court proceedings exist in a number of Member States ⁽³⁾, Italy seems to be the only Member State with compulsory minimum fees for out-of-court legal work; for out-of-court legal work the usual access to justice argumentation seems less pertinent.

⁽¹⁾ Article 58(1) of Royal Decree-Law No 1578, cited above.

⁽²⁾ Article 58(3) of Royal Decree-Law No 1578, cited above.

⁽³⁾ The justification usually invoked for that type of regulation is access to justice at an affordable price.

- in Italy out-of-court legal services are not reserved to members of the bar, but may be performed by any person; regulating the fees for out-of-court services provided by members of the Bar can therefore also not pursue the public interest objective of protecting consumers against low quality out-of-court legal services; it is therefore doubtful whether the tariff in issue pursues a legitimate public interest objective at all.

In view of the Commission’s Report and the differences between *Arduino* and *Macrino* the referring Tribunale di Roma expressly supports the proportionality approach and invites the Court to either refine its case-law or to distinguish *Arduino* and *Macrino* on the facts.

Against that background the question arises whether the Court of Justice should apply in the *Macrino* case (a) the automatic legality approach relied on in *Pavlov*, (b) a procedural test as it was possibly suggested by *Arduino* or (c) a proportionality test as endorsed by two of its Advocates General, the Commission in its Report on competition in professional services and the referring court.

(a) *The automatic legality approach*

A first problem with the ‘automatic legality’ approach appears to be that it is based on circular reasoning. It is illogical for concertation between private actors, which is made compulsory by a State measure, to escape Articles 10 and 81, merely because the outcome of that concertation is not compulsory in itself. ⁽⁴⁾ By definition, in that type of scenario the function of the State intervention is that it makes an agreement compulsory, which previously had no such effect.

Moreover, the approach of ‘automatic legality’ appears to be incompatible with the basic idea underlying the case-law on Articles 10 and 81, namely that Article 10 prohibits the Member States from depriving Article 81 of its effective-

⁽⁴⁾ This important argument has already been made by Advocate General Darmon in his Opinion in *Reiff* (Case C-185/91[1993] ECR I-5801) which was handed down before *Pavlov*. He referred first to *Asjes* and *BNIC* and then explained why such an approach was superior as compared to the automatic legality approach: ‘The Court does not require, for the combined application of Articles 3(f), 5 and 85, proof of a «perfect» cartel: a cartel created subject to the condition of precedent official approval, the only way of making it binding, is still caught by the latter article. Indeed, it would be illogical for concertation between undertakings, made binding by a State decision, to escape Articles 3(f), 5 and 85 merely because it did not produce effects in itself. By definition, the advantage of regulations is, in the present case, that they endow with general and binding effect an agreement that previously had no such effect.’

ness. In reality, the adverse effects on competition of a State measure making a draft private measure compulsory do not depend on whether or not that draft had restrictive effects on its own. Depending on the circumstances of the case a State measure making a draft tariff compulsory can have much more detrimental effects on competition than a State measure which reinforces the effects of a pre-existing private restriction. For instance, under the approach of 'automatic legality', a State decree which makes a draft decision of an association of the cement industry on uniform prices compulsory would fall outside Articles 10 and 81. This suggests that the automatic legality approach may lead in some cases to absurd results.

In a key passage in the full court judgment in *Conorzio Industrie Fiammiferi*, which concerned a similar infringement of Articles 10 and 81 EC and was handed down after *Arduino* the Court stated:

[I]t is of little significance that, where undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for infringement of Articles 81 EC and 82 EC (see, to that effect, Commission and France v Ladbroke Racing, paragraph 33). Member States' obligations under Articles 3(1)(g) EC, 10 EC, 81 EC and 82 EC, which are distinct from those to which undertakings are subject under Articles 81 EC and 82 EC, none the less continue to exist.'⁽¹⁾

The Court of Justice seems thus to have accepted that there is no general rule according to which the Member States' liability under Articles 3(1)(g), 10(2), 81/82 EC is dependent on whether in the same case the undertakings are liable under Articles 81/82 EC (i.e. have committed a 'perfect infringement').

It is therefore submitted that there are good reasons for the Court to definitively abandon the approach of 'automatic legality'.

(b) A procedural test

Under a procedural test as possibly suggested by *Arduino* a Member State would comply automatically with Articles 10 and 81 EC, if procedural safeguards were in place which are intended to ensure that the ultimate decision on the content of a restrictive measure is taken by public authorities.

Since the procedural approach looks by definition only into procedural aspects, it appears to be incapable of preventing a Member State from adopting

on the initiative of private actors rules which may be even deliberately in conflict with the idea of a system of undistorted competition in the Internal market (Article 3(1)(g) EC).

A procedural approach would seem to be in particular ineffective to deal with the well known phenomenon of 'capture of the regulator'. Regulatory capture occurs where private actors manage to influence the content of State legislation or regulation in such a way that that legislation or regulation does not serve the public interest, but predominantly their own interests. It is submitted that where State legislation is drafted by private actors the danger of regulatory capture is particularly high.

The present case shows why a procedural approach can be insufficient and why it should at least be complemented by proportionality considerations. Italy appears to be the only Member State, in which the legal profession obtained from the State the approval of a compulsory tariff for out-of-court legal work for services which are not subject to a legal monopoly. Since the protection of consumers from low quality legal services does not appear to be the objective of the tariff (see above) one may wonder what public interest objective it actually pursues.

Finally, it should also be remembered that under Articles 86 and 87 the Court and the Commission engage in a proportionality assessment of State measures granting special or exclusive rights or of State aid. One of the reasons why the Court and the Commission have that power is the danger of regulatory capture, i.e. that special or exclusive rights or State aid do not serve so much the general public interest, but mainly narrow private interests. It is submitted that State measures which are adopted at the initiative of and drafted by private actors are as likely to be negatively affected by 'regulatory capture' as for example a State aid measure.

It is therefore submitted that there are good reasons for the Court not to decide *Macrino* according to a merely procedural test.

(c) The proportionality test

An assessment in two steps

As under a number of other rules of the Treaty⁽²⁾ a proportionality test would require an assessment in two steps: first an assessment whether the State measure in issue reinforces private conduct

⁽¹⁾ Emphasis added. Case C-198/01, judgment of 9 September 2003, paragraph 51 of the judgment.

⁽²⁾ See the case-law on Articles 86 and 87 EC, but also the case-law on free movement of goods or the freedom to provide services.

of the kind of referred in Article 81 (prima facie infringement of Articles 10 and 81 EC) and second an assessment whether the State measure is nonetheless objectively justified, because it pursues a legitimate public interest objective and complies with the principle of proportionality (compatibility assessment).

Under the first step of that approach there would be — as in *BNIC/Aubert* or *Asjes* and contrary to the ‘automatic legality’ approach used in *Pavlov* — a reinforcement of anticompetitive private conduct falling under Articles 10 and 81 also in situations where the concerted private behaviour (e.g. a draft tariff) requires first the approval or endorsement by the State in order to produce restrictive effects.

It is submitted that this has in fact always been the intention of the Court. The Court formulated in the operative part of the judgments in *Meng* and *Ohra* that the applicability of Articles 10 and 81 EC presupposed a ‘link with conduct on the part of undertakings of the kind referred to in Article [85(1)] of the Treaty’.⁽¹⁾ It did by contrast not expressly require a fully fledged *infringement* of Article 81(1) as had been suggested by Advocate General Tesouro in his Opinion in *Meng* and *Ohra*.⁽²⁾

Under the second step of the proportionality test Member States must be allowed to justify the regulation in issue under Article 10 of the Treaty, because a Member State may have legitimate reasons for reinforcing the effects of concerted private behaviour.⁽³⁾ The duty to cooperate in good faith under Article 10(2) of the Treaty cannot be read as precluding Member States from adopting measures which, even though they restrict competition, pursue an overriding legitimate public interest goal. State measures reinforcing concerted private behaviour which are objectively necessary to attain a clearly articulated and legitimate public interest objective and comply with the principle of proportionality are therefore compatible with Articles 10 and 81 EC.

Effectiveness of the competition rules

In favour of the proportionality approach it can be argued first that it is the one of the three possible approaches most capable of ensuring the effectiveness of the competition rules.

⁽¹⁾ Emphasis added. Operative part of the judgments in Case C-2/91 [1993] ECR I-5751 and Case C-245/91 [1993] ECR I-5851.

⁽²⁾ See paragraph 18 of the Opinion in the cases cited above.

⁽³⁾ A Member State may for example wish to impose maximum legal fees for litigation related legal services in order to ensure access to justice to all at an affordable price.

As explained above the fundamental legal principle underlying Articles 10 and 81 is that those rules impose a duty on the Member States not to adopt or maintain in force any measure which could deprive the competition rules (in particular Article 81 EC) of their effectiveness.

In that connection the full Court has stated that in constitutional terms since entry into force of the Maastricht Treaty the objective in Article 3(1)(g) EC of ensuring that competition in the internal market is not distorted has gained in importance:

‘Moreover, since the Treaty of Maastricht entered into force, the EC Treaty has expressly provided that in the context of their economic policy the activities of the Member States must observe the principle of an open market economy with free competition (see Articles 3a(1) and 102a of the EC Treaty (now Article 4(1) EC and Article 98 EC)).’⁽⁴⁾

As explained above, it would be contrary to the principle of effectiveness of the competition rules to adopt a formalistic ‘automatic legality’ approach by making the legality of a State measure reinforcing the effects of a private measure dependent on the legality of the reinforced private measure. The effects on competition of such a State measure do not depend on the legality of the reinforced private measure, but on the overall effects of the private measure and the reinforcing State measure taken together.

It would also be contrary to that fundamental principle to adopt a purely procedural approach. As explained above a procedural approach is ineffective to address the risk of regulatory capture.

A balanced approach

A second argument in favour of the proportionality approach is that it ensures an appropriate balance between the degree of undistorted competition aimed at by the Treaty and legitimate regulation of the professions in the public interest.

The risk of regulatory capture and therefore of regulation excessively restrictive of competition is particularly acute in economic sectors with a large amount of self-regulation such as in the area of the liberal professions.

This does not mean that self-regulation is as such problematic. Many sectors are so complex and evolve so rapidly that a certain amount of self-regulation is the best method to adopt the necessary

⁽⁴⁾ See Case C-198/01 *Conorzio Industrie Fiammiferi*, cited above, paragraph 47 of the judgment.

detailed and up-to-date rules. The professions are a key example of such a sector where some degree of self-regulation is necessary and useful.

Any form of self-regulation means however also that there is a conflict of interest. Where undertakings draft the rules which govern their activity there is a risk that some of those rules further mainly the narrow corporatist interests of those undertakings and not so much the wider interests of competitors, customers or consumers in general.

There is also the danger that the governments and public authorities of the Member States will not always be able or willing to prevent any abuse of regulatory powers in self-regulated sectors. In some cases they will be *unable* to prevent such abuses because they have effectively abandoned their regulatory powers to the economic actors in the sector. This issue is addressed through the ‘delegation’ branch of the *Van Eycke* formula. In other cases they will be *unwilling* to do so, because of the above-described phenomenon of regulatory capture. It is submitted that it is precisely this second issue which is addressed through the ‘reinforcement’ branch of the *Van Eycke* formula.

The proportionality approach with its two steps test is well suited to achieve the right balance between legitimate regulation of the professions in pursuit of public interest objectives and the need to ensure that self-regulation by the professions does not unnecessarily distort competition.

No undue encroachment on the freedom of the Member States to determine their economic policies

Against a proportionality approach it might be argued that it risks to apply in too many cases. In our modern societies almost all pieces of economic legislation are prepared with input from private actors. The proportionality approach might therefore be perceived by some as unduly encroaching on the freedom of the Member States to determine their economic policies.

The Court’s case-law appears however already today to provide for sufficient safeguards against too wide an application of the proportionality approach. According to the operative part of the Court’s judgement in *Meng* and *Ohra* the application Articles 10 and 81 EC presupposes ‘a link with *conduct of the kind referred to in Article 81(1)*’. Articles 10 and 81 apply therefore only if the State measure under examination

- (1) reinforces the effects
- (2) of an agreement between undertakings or a decision of an association of undertakings

(3) which may affect trade between Member States, *and*

(4) which once it has been made compulsory by the State has as its object or effect a restriction of competition.

In particular the first and the fourth condition appear to ensure that the proportionality approach will only apply in potentially problematic cases. ⁽¹⁾

The first condition of ‘reinforcement of effects’ implies that Articles 10 and 81 EC will only apply if the undertakings in question themselves prepare a measure which is then ‘reinforced’ by the State. Articles 10 and 81 will by contrast not apply where the measure is prepared by the State and the undertakings concerned are only consulted. The distinction between the former and the latter scenario is important because the danger of conflicting interests and of regulatory capture is greater in the former scenario, that is where the undertakings themselves ‘hold the pen’.

The fourth condition of ‘restriction of competition’ means that all State legislation prepared by private actors which does not restrict competition (e.g. on prices or output) to an appreciable extent is also automatically outside the scope of Articles 10 and 81 EC. For instance many technical rules or rules on ethical standards in the liberal professions have no appreciable effect on competition and would therefore be *a priori* outside the scope of Articles 10 and 81.

The proportionality approach would thus only apply in those cases where a State legislates on the basis of draft rules prepared by an association of undertakings and only in so far as the rules in issue as made compulsory by the State appreciably restrict competition and affect trade between Member States.

Conclusion

In the light of the above it is submitted that the proportionality approach

- is a more faithful expression than the automatic legality or the procedural approach of the fundamental legal principle established by the

⁽¹⁾ The second condition (‘agreement or decision of an association of undertakings’) means that Articles 10 and 81 EC does not apply for example where individual undertakings or several uncoordinated undertakings submit draft legislation to the State. The third condition (‘effect on trade’) means that all State legislation which does not have an appreciable effect on trade cannot fall under Articles 10 and 81 EC.

Court that Articles 10 and 81 EC prohibit the Member States from depriving Article 81 of its effectiveness;

- provides for balanced outcomes and prevents both under and over enforcement;

- given the requirements to show '*reinforcement*' and a link with '*conduct of the kind referred to in Article 81(1) EC*', would only apply to those categories of economic regulation for which the risks of regulatory capture and conflict of interest are particularly high.

Public service compensation in practice: Commission package on State aid for Services of General Economic Interest

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Introduction

One of the first initiatives within the Framework of the State Aid Action Plan has been the launch of the Commission package on state aid and the financing of public service, so-called services of general economic interest, on 13 July 2005 ⁽²⁾.

In its July 2003 Altmark judgment ⁽³⁾, the Court stated that public service compensation is not state aid if it fulfils four conditions: The public service should be clearly defined; the parameters of the compensation should be objective and established in advance; the compensation cannot exceed costs; and the company in charge of the mission should be either chosen through public procurement 'which would allow for the selection of the tenderer capable of providing those services at the least cost to the community', or, if not, the costs of providing the public service must be based on the costs of a 'typical, well-run undertaking'.

Where these conditions are met, there is no state aid, and no notification is therefore necessary. But since a large share of public service compensation probably does not meet the Altmark criteria, notably because no tender has been made — the fourth criterion — this could result in the illegality, due to lack of notification, of an enormous number of public compensation schemes.

In order to reduce the burden of notification and provide guidance, the Commission presented a draft package on Services of General Economic Interest and public service compensation in early 2004, which, after consultation with Member States, the European Parliament and the other EU institutions has now been adopted. The Commission package is based on Article 86 EC, the legal basis for Decisions on Services of General Economic Interest. The package consists of a Commission Decision, a Framework and a modification of the Transparency Directive.

The Commission **Decision** limits the notification burden on Member States, by exempting all public service compensation that respect certain substantive conditions (and in particular the absence of overcompensation) and whose amounts are under a certain threshold: € 30 million EUR compensation, € 100 million turnover. Further, it completely exempts hospitals and social housing from notification, since the amounts of compensation for these two types of public service would fall above the threshold in almost all cases, and therefore create an enormous notification burden. The Decision proposed thereby drastically reduces the notification burden on Member States and would increase legal certainty for many public service financing schemes.

Where public service compensation does not meet the substantive criteria or goes above the thresholds foreseen in the Commission Decision, and the notification obligation therefore remains, the guidelines issued in the proposed Community **Framework** for Public Service Compensation should give guidance to the Member States and their public authorities on how the Commission will assess their compatibility. These guidelines constitute a codification of the existing Commission practice in applying Article 86.2 EC.

Finally, the package modifies the existing **Transparency Directive** to ensure clear separation of the operators' public service costs and costs for commercial services, to enable clear assessment of the costs of public services.

Simplification and clarification

The objective with the current package is to set up a framework which will guarantee the financing of public service, and at the same time avoid unnecessary distortion of competition. With the Package, the Commission accepts the compensation necessary for running public service, but on the other hand does not justify over-compensation, which would increase the risk of cross-subsidies, often influencing already liberalised markets.

In reality tenders are not widely used for selecting public service providers, particularly for small services of general economic interest in municipalities. According to the 4th criterion of the Altmark

⁽¹⁾ The author works for the European Commission, Directorate-General for Competition. The present document only reflects the author's personal opinion and should not be held to represent the views of the European Commission or of the Directorate-General for Competition.

⁽²⁾ Commission Press Release — IP/05/937 — 15.7.2005, 'State aid: Commission provides greater legal certainty for financing services of general economic interest'.

⁽³⁾ Judgment of the Court, C-280/00, 24.7.2003.

judgment⁽¹⁾, the compensation for many small services could therefore be state aid, since presumably they often exceed the ‘average costs of a well-run company’. The adopted package offers a pragmatic, non-bureaucratic solution to this by exempting such state aids from the notification requirement as long as compensation is not higher than the cost of providing the public service. Compensation not exceeding the actual costs of providing the public service is seen as compatible with the Treaty, without going into a discussion on the efficiency of the organisation carrying out the public service. The Commission is concentrating on the most distortive forms of state aid, while avoiding to meddle unnecessarily in essential small local and regional services. While this eases the notification burden substantially, it does not mean that clear overcompensation below the thresholds is not still illegal state aid. And although notification is limited to larger amounts of compensation, there may well be cases in practice where competitors will point to potential overcompensation and raise complaints.

Hospitals and social housing are entirely exempted from the notification obligation: running a hospital, or real estate investments for social housing, results in very high amounts of aid per undertaking. This means that aid would almost always be above thresholds, and almost all hospitals would have to be notified to the Commission, a huge bureaucratic burden. The risk of the money not going to a public service is limited, since compensation for public hospitals and social housing quite clearly goes to the cost of providing a public service.

Of course this does not mean that Member States can freely grant state aid: the exemption from notification granted for smaller amounts of aid, hospitals and social housing by the Decision only applies if all the conditions are met, in particular no over-compensation and a clearly defined public service mission. The modified Transparency Directive helps to ensure that any commercial (non-public-service) activities would have to clearly be accounted for separately, to avoid cross-subsidies.

It will remain a task for the Member States to define what ‘public service’ includes, as well as how they want to provide these services. Public authorities can issue a tender for specific services, and thereby ensure that their citizens get the quality they would like at the best possible price. If the Member State, municipality or region wants to, it can decide to issue a tender for some of the services provided e.g. by public hospitals today. The public authorities can of course also decide to continue providing the public service entirely itself, in

⁽¹⁾ *op cit*, C-280/00.

this case through public hospitals. Where the costs of providing the public service are not excessive, this will most likely be compatible with the state aid rules. Private hospitals may also be in charge of public service missions, and private hospitals can therefore receive the same compensation for carrying out public service — and benefit from the exemption from notification in the Decision.

Evolutionary nature of ‘Services of General Economic Interest’

The concept of public service or services of general economic interest is a dynamic concept. Member States define in detail what public service includes at local, regional or national level. The number of areas included in the scope of public service has clearly evolved, as the political and quality demands on public service have evolved. Utilities such as telecommunications, gas and electricity are now organised in a way where different providers compete, while still using the same network. The guaranteed provision of public service remains one of the core tasks of public authorities, although the scope of public services and the way public authorities choose to organise their provision has evolved.

Not all public services are economic, but it is not straightforward to reach a ‘once and for all’ definition of what is an economic activity and what is not. For core state areas such as national security and defence there are some clear limitations. While the Court of Justice has set these limits case by case⁽²⁾, and has also exempted e.g. primary schools from the scope of ‘economic activity’, almost all other activities will be considered as economic, whether profit-making or not⁽³⁾. The competition rules should encompass all economic activity that can potentially affect the internal market, competition policy looks at all economic activity affecting trade and at prohibiting potentially distorting subsidies. The scope of these rules also includes not-for-profit activities. This ensures that while public service should be guaranteed for citizens, the way public service is organised does not distort competition through e.g. subsidies between the public service activities and non-public-service activities of a company operating in both fields. One important part of this control is therefore an *a priori* definition of the public service in question, and the parameters for its provision, before the granting of a contract, in-house or through a public tender. Last but not least, there must be a guarantee

⁽²⁾ E.g. Judgment of the Court 16 June 1987 in Case 118/85, *Commission v. Italy*; as well as Judgment of the Court 12 July 2001, *Smits and Peerbooms*. C-157/99.

⁽³⁾ Court Judgment *Ambulanz Glöckner*, 25 October 2001, C-475/99.

that compensation for the public service does not exceed the costs of providing it. Thereby potential distortion of the market is prevented, while public service provision can still be ensured — at the quality level decided by the public authority in its contract with the provider.

However, the fact that the activity in question is an economic activity does not necessarily mean that state aid rules apply. For many small public services the risk of distortion of the market is so limited that the Commission does not see a need for control. The *de minimis* rules of the state aid competition rules mean that very small amounts — less than € 100 000 over three years — are directly exempted from the scope of the state aid rules. According to the Regulation on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ⁽¹⁾ this amount is due to be increased in 2006.

Further, with the introduction of relatively high thresholds for notification in the Article 86 Decision, it is clearly indicated that the Commission considers most small and local public services as having a very limited risk of distorting competition. While this does not exclude overcompensation and hereby illegal state aid below the thresholds, it does indicate that it is the larger amounts of public service compensation that will be the primary focus of the Commission's interest.

While the undertakings entrusted with the tasks are subject to competition rules in general, the Treaty rules clearly underline that the competition rules apply only as long as this does not obstruct accomplishment of public service tasks. The Treaty's Article 86(2) seeks to protect the provision of public services, while at the same time underlining that in most cases competition rules do apply.

Member States choose how to organise public service

Public service is organised in each of the Member States at the local, regional or national level according to decisions taken there. Each society takes its own decisions on how to organise public services, by the public service itself or through tenders or outsourcing of the tasks. There has been some evolution over the last decades in which tasks are carried out by the public authorities itself, and which services are outsourced to private entities. But the most important core of the right to decide how to organise public services remains: it is up to Member States and their public authorities to define the quality level and through that the cost level of

public services for their citizens. Certain sectors such as network services are clearly affected by the liberalisation policies of the European Community, such as e.g. electricity and gas. However, within the limits of this legislation, the provision and organisation can be organised in the way chosen by the Member State authorities. This can be done through tenders or through clear definitions of the public service, its parameters and its costs. The Commission limits itself to controlling that the compensation paid out for public service does not exceed the costs of providing this service.

Network liberalisation and Public Service Obligations (PSOs)

A number of sectors of the European economy have already been liberalised, such as air transport, telecommunications, gas and electricity, and the process continues with postal services liberalisation and rail transport liberalisation. While the economic advantages for consumers now having a choice between different providers can be a clear benefit, not least for the improvement in customer-friendliness of the service providers but also through the possibility to shop around for a better price, a minimum public service level must be ensured for all citizens. This has been ensured through the legislation for all sectors being liberalised, to guarantee a continued provision of high quality public service for all citizens no matter what their geographical location would be. Some Member States have gone further than others in ensuring a high basic level of public utilities at a limited price. Funds granted from Member States to expand e.g. broadband networks to outlying areas may be considered included in the scope of Services of General Economic Interest, where Member States wish to ensure that a high level of public service can be guaranteed for all citizens, also in outlying areas ⁽²⁾.

Public Service Compensation and Public Procurement

With the package adopted, the Member States and local authorities can continue to grant the public support needed for well-functioning services of general economic interest, and in most if not all cases there will be no problem with the competition rules.

The experience of Member States, local municipalities, as well as the opinions issued by the Euro-

⁽¹⁾ EC Regulation No 69/2001 of 12 January 2001, OJ L 10, 13.1.2001, p. 30.

⁽²⁾ See EC Competition Newsletter, Spring 2005, 'State aid rules and public funding of broadband', Hencsey/Reymond/Riedl/Santamato/Westerhof, State aid case N-381/2004 'projet de réseau de télécommunications haut débit Pyrénées atlantiques'.

pean Parliament, the Committee of Regions and the Economic and Social Committee underlines that an important part of the practical issues with public service compensation lies in the public procurement rules. The degree to which Member State and local authorities are required to launch a public tender are defined in the public procurement rules, which set the thresholds for when a public contract must be tendered ⁽¹⁾. The future interpretation of the public procurement rules will be an important element in defining to which degree public services will be provided by public authorities themselves or through contractors bidding for a tender. Local authorities play an important role when interpreting the tender rules for all public service contracts.

In the Court's July 2003 *Altmark* judgment two possible scenarios are mentioned: When public contracts are made through a tender, and when they are not. When a tender is used, this guarantees that the relevant quality defined in the tender is procured at the lowest price offered. When no tender is launched, on the contrary, no such guarantee exists. As long as Member States respect the tender rules, in most cases this will ensure no overcompensation takes place, thereby preventing distortions through e.g. cross-subsidies. Where there is no tender, the need of clearly spelling out what the public service includes becomes a crucial way to make control that compensation does not exceed costs possible. The Commission does limit

itself to control abuse, and only obliges Member States to notify compensation of SGEI when the amounts are higher than € 30 million or the turnover over € 100 million, or where not all the conditions in the Decision are met, notably no overcompensation.

It is unlikely that all Member States will be very keen to oblige local authorities to use tender procedures for all public service contracts. It is also clear that many municipalities enjoy the freedom of being able to choose their own providers in most cases. From a state aid point of view, this is normally not a problem, since in most cases it can be assumed that the compensation for the public service does not exceed costs. But in case a municipality chooses a provider for a large contract, and it becomes clear that the contract has not been given to a provider that can carry it out at the market price, the possibility of a complaint still exists.

Commercial providers of public service may often be interested in bidding for the contracts, when they feel they would have been able to get the contracts had there been a tender. These companies have an own interest in complaining where these contracts do not become available, to increase their own business, but are often holding back. Some crucial public services will no doubt be kept in-house by regions and municipalities, but it is unlikely that the already enormous market for commercial providers of public service will not grow substantially over the next decades, in most cases to the benefit of both the consumer and the tax-payer.

⁽¹⁾ Directives 2004/17/EC and 2004/18/EC define the thresholds for Public Procurement obligation for different types of Services.

The revised system of case referral under the Merger Regulation: experiences to date

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This article reviews the functioning of the system of case referral from the Commission to Member States and *vice versa*, now that the revised Merger Regulation ⁽²⁾ has been in place for over one year ⁽³⁾. The article attempts to summarise, in a largely factual manner, the experiences to date, and to highlight some of the substantive, procedural and practical issues which have arisen during this period.

While this article does not purport to draw any broad conclusions from this early experience, it is possible, however, to at least tentatively conclude that the revised system of case referral appears to be enjoying considerable success, in terms of the extent to which it is being availed of by merging companies and by European competition authorities, in terms of the nature of the cases concerned and their suitability as candidates for referral, and in terms of how the system has been operating at a practical level.

A. Overview

Since the entry into force of Council Regulation 139/2004 on 1 May 2004, a Commission Notice on Case Referral ⁽⁴⁾ has been adopted, and each of the four provisions in the Regulation relating to the referral of cases from the Commission to Member States and *vice versa* (Articles 4(4), 4(5), 9 and 22) have been resorted to. To summarise briefly, between 1 May 2004 and 30 June 2005 (the reference period for the purposes of this article; hereafter 'the reference period'), the Commission had received:

- 5 requests for referral pursuant to Article 4(4); all 5 requests were acceded to, and the cases transferred in their entirety.
- 34 requests for referral pursuant to Article 4(5); 2 of these requests were subsequently vetoed by Member States; 2 further requests

were withdrawn when it became clear that the case concerned was not reviewable in 3 or more Member States; the remaining 30 requests resulted in the cases acquiring a 'Community dimension'. This represents roughly 10% of the cases notified to the Commission during this period ⁽⁵⁾.

- 5 requests for referral pursuant to Article 9 ⁽⁶⁾; 4 requests were acceded to, 3 in their entirety and one partially; 1 request was deemed to have been withdrawn.
- 1 request for referral pursuant to Article 22; this joint request by 4 Member States was acceded to.

B. Article 4(4)

Procedure

In order to ensure that the pre-notification referral system works effectively, especially in view of the tight deadlines provided for in Article 4, the Commission and the Member State/s concerned by an Article 4(4) request have generally taken up direct contact as soon as such a request seems likely.

The Commission also encourages parties contemplating making such a request to approach the Commission and the Member State/s concerned by a likely Article 4(4) request informally beforehand. The Commission will in particular advise parties contemplating making such a request on the legal requirements for referral, and on the categories of cases which the Commission considers appropriate for referral as set out in the Notice on Case Referral. A draft Form RS may sometimes be provided to the Commission. To date, parties have frequently availed of this opportunity to approach the relevant authorities informally before lodging Article 4(4) requests.

Following receipt of the formal request, and before sending the Form RS to Member States, the Commission generally carries out a 'completeness check' on the Form to ensure that it contains no obvious omissions. The Commission has also

⁽¹⁾ Unit responsible for Merger Policy and Strategic Support at DG Competition.

⁽²⁾ Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004) [the 'Merger Regulation'].

⁽³⁾ Council Regulation 139/2004 entered into force on 1 May 2004.

⁽⁴⁾ Commission Notice on Case Referral in respect of concentrations; OJ 2005/C 56, 5 March 2005, p. 2.

⁽⁵⁾ 316 merger notifications were lodged with the Commission between 1 May 2004 and 30 June 2005.

⁽⁶⁾ In May 2004, 2 further requests were received pursuant to Article 9 of the old Merger Regulation, Council Regulation 4064/89: M.3271 *Kabel Deutschland/Ish* and M.3373 *Accor/Colony/Desseigne*.

developed the practice of accompanying the Form RS which it transmits to Member States ‘without delay’ by a short memorandum indicating whether the Commission — based on a preliminary examination of the application — feels that the case is an appropriate one for referral, often with reference to the Notice as appropriate, providing the contact details of the case team at the Commission, and offering the Member States concerned the option of discussing the case in a phone conference ⁽¹⁾; the date generally suggested for such a conference is about 10 days following the transmission of the Form RS ⁽²⁾.

If the Member State confirms that it agrees to the referral within the prescribed deadline, the Commission generally intends to take a decision accepting or refusing the referral, as it has done in relation to the requests filed to date, rather than allowing the 25 working day deadline provided for in Article 4(4), 4th sub-paragraph, to elapse. If the Member State does not agree to the referral, the case proceeds in the normal manner, with the parties filing Form CO on a date of their choosing.

Nature of cases referred

All 5 of the cases referred to Member States pursuant to Article 4(4) during the reference period were only liable to have an impact on competition in the Member State concerned, and each case was referred in its entirety. 2 cases were referred to Finland; one concerned only local Finnish markets, while the second involved several markets which appeared to be mainly Finland-wide in scope. One case, with an impact confined almost exclusively to the UK, was referred to that Member State; similarly, a case impacting only provincial markets in Spain was referred to that Member State, and a case with no impact outside of Germany was likewise referred to that Member State.

Substantive standard for referral

There appeared to be some early reluctance on the part of merging firms to avail of Article 4(4), perhaps arising from a fear that the making of such a request might be viewed as in some manner ‘self-incriminating’ with respect to the operation’s likely impact on competition.

⁽¹⁾ It should be stressed that such a note is an informal communication between competition authorities containing no more than the preliminary views of the Commission services concerned. It is not a view expressed by the Commission itself, and does not in any way pre-judge the outcome of the referral procedure.

⁽²⁾ While the Form RS is generally transmitted to Member States on the date of its receipt, the memorandum generally either accompanies it or follows it a day or two later.

In one early case, the merging parties had apparently given serious consideration to lodging an Article 4(4) request but, after approaching both the Commission and the national authority concerned, chose not to do so, apparently because of a certain uncertainty as to whether the substantive criteria set out in Article 4(4) were met and the consequent risk of the request not succeeding, together with the delay this would have entailed. The case in question appeared to be an appropriate candidate for referral. In that regard, the Commission would like to re-iterate its interpretation of the substantive criteria in Article 4(4), and its view that the standard to be met in terms of a possible impact on competition is not a very exacting one; the criteria set out in the Notice on Case Referral — at paragraphs 16 *et seq.*, but notably at para. 17 — make this clear.

The requesting parties must, according to the Notice, show that ‘the transaction is liable to have a potential impact on competition ... which may prove to be significant, thus deserving close scrutiny. Such indications may be no more than preliminary in nature, and would be without prejudice to the outcome of the investigation.’ The Notice goes on to state that ‘the parties are not required to demonstrate that the effect on competition is likely to be an adverse one’, pointing to Recital 16 to Regulation 139/2004, which states that ‘the undertakings concerned should not ... be required to demonstrate that the effects of the concentration would be detrimental to competition’. What the requesting parties should do is ‘point to indicators which are generally suggestive of the existence of some competitive effects stemming from the transaction’. The existence of ‘affected markets’ within the meaning of Form RS would, for example, generally be considered sufficient to meet the requirements of Article 4(4).

It should moreover be added that there is, in the Commission’s view, a difference in the interpretation which the Notice gives to the criteria in Article 4(4) and to those in Article 9(2)(a). At para. 35 it is indicated that, for the latter standard to be met, the requesting Member State must demonstrate a ‘real risk’ that the transaction is likely to have a significant adverse impact on competition. This difference in the substantive standard applied is, in the Commission’s view, justified in policy terms: post-notification referrals, with all of the additional time and resources which they necessitate, should only be contemplated in cases where there is a real possibility that intervention will be necessary; pre-notification referrals, on the other hand, are primarily designed to ensure that the operation is examined by the authority best-placed to carry

out the investigation, and so only cases which are obviously non-problematic should be considered ineligible for a referral request.

Addressees/language of Article 4(4) decisions

The Regulation is not explicit concerning who should be the addressee/s of decisions taken by the Commission pursuant to Article 4(4) ⁽¹⁾. Consequently, the Commission has adopted the practice of addressing the decision to both the Member State/s to which referral is being made and the party/parties which made the referral request. The official version of the decision/s should be drafted in the language of the Member State/s to which referral is being made. If the referral request was made in a different language, a translation into this language will normally accompany the official version of the decision.

C. Article 4(5)

Procedure

The procedure followed by the Commission in relation to requests lodged pursuant to Article 4(5) is for all intents and purposes identical to that which it follows in relation to Article 4(4) requests (see above for details).

However, requesting parties are in particular encouraged by the Commission to make a thorough research before filing, if necessary by taking direct contact with the relevant national authorities, to ensure that the Form RS is accurate and complete as regards the Member States which it identifies as 'competent' to review the case in question.

2 requests withdrawn

During the reference period, of the total of 34 requests filed pursuant to Article 4(5), 2 of these requests were withdrawn. In one case, the Form RS had not yet been transmitted to Member States when the request was withdrawn. In both instances, the reason for the withdrawal was the non-fulfilment of the condition precedent for

requests pursuant to Article 4(5), namely that the case should be reviewable in 3 or more Member States ⁽²⁾.

2 requests vetoed

During the reference period, 2 of the requests filed pursuant to Article 4(5) resulted in Member State 'vetoes', as provided for in the 3rd sub-paragraph of Article 4(5). In one case, the vetoing Member State felt that there were not sufficient reasons to justify the referral of the case: neither a European-wide market nor a series of national markets were in its view affected. In the other case, the vetoing Member State felt that the competitive and economic focus of the transaction lay entirely within its own territory, i.e. that the overlap in terms of market share was essentially limited to that country and that, despite the parties' contention to the contrary, the market should be regarded as being national in scope ⁽³⁾.

Nature of cases referred

The remaining 30 requests filed pursuant to Article 4(5) during the reference period resulted in the concentrations concerned automatically acquiring a 'Community dimension'. 2 of the cases referred were still pending at the time when this article was being written.

3 of the referrals resulted in a decision adopted in application of Article 6(1)(b) and Article 6(2) of the Merger Regulation (clearance with commitments): M.3465 *Syngenta/Advanta*; M.3570 *Piaggio/Aprilia*; and M.3692 *Reuters/Teletext*. In M.3465, multiple national markets were impacted by the transaction and the commitment obtained was EU-wide in scope (the divestment of one of the merging parties' European business, i.e. the 'overlap'); in M.3570, multiple national markets were impacted by the transaction, although the commitment obtained was confined to the Italian market (the only one in which competition concerns were identified); in M.3692, the scope of the relevant geographic market was left open in the decision, but the decision makes it clear that it was probably Europe-wide or world-wide in scope, and the commitment obtained was worldwide in coverage.

⁽¹⁾ There is an apparent discrepancy between what is said in the Case Referral Notice (para. 79, i.e. that the undertakings should be the addressees, with copy to the Member State concerned), and the somewhat ambiguous wording of Article 4(4), 4th sub-para., 2nd sentence («The Commission shall inform the *other* MS and the persons or undertakings concerned of its decision» (emphasis added); this seems to imply that the Member State concerned should be the addressee).

⁽²⁾ In one of the two cases, the requesting parties belatedly came to the realisation that the operation was not reviewable in a Member State they had originally identified as competent; in the other, following informal contacts with a national authority, the requesting parties belatedly came to the realisation that the operation was not reviewable in that Member State.

⁽³⁾ The vetoing Member State in that case was, moreover, of the view that the requesting parties had provided inadequate information in Form RS.

The remaining 25 cases resulted in clearances pursuant to Article 6(1)(b); 10 of these 25 decisions were adopted in conformity with the simplified procedure ⁽¹⁾. In all but one (M.3582) of these 25 cases, at least some of the markets impacted by the transaction were wider than national; in many of these cases, however, the definition of the relevant geographic markets was ultimately left open (i.e. the precise scope of the market is left undefined), as is common practice in Commission decisions adopted pursuant to Article 6(1)(b) ⁽²⁾. In M.3582, while the definition of the relevant geographic market was ultimately left open, it seemed likely that multiple national markets were impacted by the transaction; these markets were characterised by common brands and by centralised manufacturing and distribution.

Impact on multi-jurisdictional filing requirements in the EU/EEA

Based on the number of Member States which the requesting parties identified in Form RS as being the ones in which these 30 proposed transactions would have otherwise been reviewable, it can be concluded that 214 separate national reviews would have taken place, in lieu of the 30 Commission investigations. That amounts to an average of about 7 national filings for every Article 4(5) request.

Article 4(5) and Article 7(3) derogation requests

In one case, the parties requesting referral via Article 4(5) approached the Commission to explore the possibility of obtaining an Article 7(3) derogation from the 'stand-still' obligation. The Commission indicated that this would not be possible. Indeed, while Article 7 does not specify that a merger must have a Community dimension for it to be eligible for a derogation, it is submitted that it is clearly implicit that it should.

⁽¹⁾ See the Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004; OJ C 56, 5.3.2005, p. 32. In some instances, it was apparent from the outset that the case was unlikely to give rise to competition concerns, and the Commission signalled this in the Note to Member States accompanying the transmission of Form RS; in such cases, the rationale for resorting to the Article 4(5) procedure is generally to avoid the burden of multiple national filings.

⁽²⁾ Market definitions (in terms of product or geographic scope) can be left open (i.e. the precise scope of the market can be left undefined), when competition concerns would not arise on the basis of all reasonably plausible alternative market definitions.

D. Article 9

Nature of cases referred

During the reference period, the Commission acceded to 2 referral requests pursuant to Article 9(2)(a) and 2 referral requests pursuant to Article 9(2)(b). One request to the Commission pursuant to Article 9(2)(a) was deemed to have been withdrawn.

The referrals made pursuant to Article 9(2)(a) consisted of referrals to Spain (M. 3275) and Germany (M.3674). In both instances, the affected markets were exclusively in the referring Member States, and the whole case was thus referred. Moreover, in both instances, the affected markets were no wider than national.

The referrals made pursuant to Article 9(2)(b) consisted of referrals to the UK (M. 3669) and Germany (M.3754). In the former case, the affected markets were exclusively located in the UK, and so the whole case was referred ⁽³⁾; in the latter case, only a partial referral was made. In both instances, the Commission concluded that the markets referred were 'non-substantial parts of the common market'; in the former case, the markets referred were for local care-home services in the UK, and in the latter case the referred market concerned the supply of asphalt mix in Hamburg.

A request by Germany for the Commission to refer case M.3178 *Bertelsmann/Springer* pursuant to Article 9(2)(a) was deemed to have been withdrawn by the Member State in question pursuant to Article 9(5), when it failed to issue 'a reminder' to the Commission before the 65 working day deadline provided for in that sub-paragraph had elapsed. The Commission had expressed the view to the Member State in question that some of the product markets affected by the operation were wider than national in scope.

E. Article 22

Nature of case referred

Only one referral request was made pursuant to Article 22 during the reference period: M.3796 *Omya/Huber*. This was a joint request, initiated by Finland, and subsequently joined by Sweden, Austria and France. The Commission accepted the joint request and requested a notification on Form CO of the merging parties; the case was still pend-

⁽³⁾ In its press release accompanying the decision in this case (IP/05/128 of 2 February 2005), the Commission noted that 'In view of the limited, and clearly local competition impact of this transaction, the Commission considers that this case could have been an appropriate candidate for a pre-notification referral request of the notifying parties.'

ing when this article was being written. The referral request pointed out that the operation appears to affect markets which are wider than national in scope.

Requests by 'non-competent' Member States

The Commission accepted the joint request in M.3796 notwithstanding the fact that the case apparently fell outside of the scope of the merger control laws in 2 of the referring Member States. This is consistent with the Commission's interpretation of Article 22(1) and (2) ⁽¹⁾, as explained at para. 65 of the Commission Notice on Case Referral ⁽²⁾. The historical background to Article 22 is that it was intended to allow Member States without merger control legislation to request examination of a transaction (the 'Dutch clause'). This remains a legitimate rationale for requests under Article 22, and nowhere in the Article is there a reference to, or a distinction made between, Member States who are not competent to make a referral despite having merger control laws and Member States who are not competent to make a referral because they have no merger control law at all.

Deadlines for making or joining a request

During the reference period, the possibility of an Article 22 referral request being made by one or more Member States was moreover contemplated in relation to another proposed merger. Informal contacts took place involving the Commission and the relevant national authorities, but the Member States concerned ultimately decided not to make a referral request. One of the issues which arose in the course of these discussions concerned the deadlines for initiating or joining Article 22 referrals, and in particular the interpretation of the second sub-paragraph in Article 22(1) ('Such a request 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').

⁽¹⁾ Article 22(1) allows speaks of Member States requesting examination of «any» concentration meeting the 2 substantive criteria in Article 22(1); Article 22(2) allows «any other» Member State to join the initial request; Article 22(3) sets out the 2 criteria which must be fulfilled before the Commission may accept/refuse to take the case from all those requesting (including any joiners), and those criteria (which are the same as those in 22.1) do not include the need for the requesting Member States to be themselves competent to review the case.

⁽²⁾ Para. 65 of the Case Referral Notice clearly implies that Member States which are not competent under their national merger control laws may request the examination of a concentration, or join a request, under Article 22. If that were not the intention, a reference to Article 22 would have been added in the second sentence of that paragraph.

The Commission takes the view that, for jurisdictions in which notification is voluntary (such as in the UK), this provision should be interpreted as meaning that where notification is sought by the national authority or contemplated by the merging/acquiring firm/s (despite not being mandatory), the 15 working days should run from the date of notification, thus putting these jurisdictions on an equal footing with those in which notification is mandatory. Where no notification is sought or contemplated, then it is submitted that 'made known' should be interpreted as implying sufficient information to enable a preliminary assessment to be made of the existence of the criteria set out in Article 22(1) ⁽³⁾.

One other issue relating to deadlines arose in the context of an informal consultation treated by the Commission services during the reference period, and that concerned the question of whether it is possible for a Member State to join a request, notwithstanding the fact it has itself been notified of the case for more than 15 working days. The Commission takes the view that this is possible under the Regulation; to conclude otherwise would significantly restrict the scope of referrals under Article 22, by making it difficult to have a request joined by many Member States unless the requesting Member State is one of the first to be notified by the merging parties. It is submitted, however, that it would be difficult for a Member State to join a request if the case had already been cleared under its national law.

F. Logistical issues

The Commission is generally satisfied with the practical arrangements which are now in place for the transmission of documents under Articles 4, 9 and 22. It should in particular be noted that the Commission actively encourages requesting parties to file Form RS in electronic form ⁽⁴⁾. When the Commission receives a Form RS in this format, it normally sends the request through to the 25 Member States within a few hours.

⁽³⁾ See para. 50 of the Case Referral Notice, at footnote 44.

⁽⁴⁾ If the Form RS is filed in electronic form, the Form RS on the CD Rom does not have to be signed (The Merger Registry endeavours to send the least voluminous version of any document, and scanned documents tend to be voluminous). The Merger Registry will accept such unsigned forms if the original has been signed and sent to the Commission; the Registry will then certify to the Member States that the Commission is in possession of a signed original.

Procter & Gamble/Gillette: the role of economic analysis in Phase I cases

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In July 2005, the European Commission has approved, subject to conditions, the acquisition of Gillette by Procter & Gamble. The merger creates one of the world's biggest consumer goods producers with a combined turnover of roughly € 50 billion. Although the companies are active in many markets, the Commission's investigation showed that their activities overlap to a limited extent, mainly in the oral care sector. However, since the merger combines two leading global producers of branded consumer goods, the Commission examined carefully potential anticompetitive effects arising from the parties' large combined products portfolio. The market investigation has, however, shown in this particular case that even after the transaction the parties would not be in a position to dictate conditions on retailers to the detriment of the consumers. The only remaining competition concern in the sector of battery toothbrushes could be solved by the parties' commitment to divest of Procter & Gamble's battery toothbrushes business. The case is a good illustration of the importance of economic analysis in conglomerate mergers and discusses for the first time the notion of category captainship/management.

1. Introduction

Procter & Gamble ('P&G') is well-known for its branded products, in particular in the field of household, beauty, baby and family care products. P&G's brands include 'Ariel', 'Pringles', 'Oil of Olay', 'Tampax', 'Always', 'Pampers', 'Fairy', 'Head & Shoulders' or 'Pantene'. Gillette is a multinational manufacturer of consumer products, offering blades and razors, oral care products and batteries, under brand names such as 'Gillette', 'Oral B' or 'Duracell'. After the merger the combined entity would own 21 brands with a turnover of more than one billion dollars.

After the transaction, Gillette will become a wholly-owned subsidiary of P&G.

2. Possible dominance?: The investigation of horizontal concerns

Although both companies are active on a large number of markets, their activities overlap only on a relatively limited number of product mar-

kets. The overlaps concerned the oral care sector (markets for toothbrushes, toothpaste, dental floss, mouthwashes, whitening preparations), the personal care sector (antiperspirants/deodorants, shaving formulations, male fragrances, shower gels) and small household appliances. However, the only significant overlap appears in the markets for toothbrushes.

a) *From simple manual to High Tech: Toothbrush market definitions*

The product market definition for toothbrushes has been subject to an extensive market investigation. The Commission has previously considered the relevant product market for manual toothbrushes as separate from powered brushes (i.e. rechargeable and battery driven toothbrushes), however left the exact product market definition open. According to the parties the market for toothbrushes should be divided into two different product markets: on the one hand the market for manual and battery toothbrushes and on the other hand the market for rechargeable toothbrushes.

The Commission's investigation showed, however, that manual toothbrushes exert only negligible competitive constraints on the other toothbrushes markets. Manual toothbrushes were therefore assessed separately from battery and rechargeable toothbrushes. Regarding the market(s) for battery and rechargeable toothbrushes, a number of arguments militate in favour of two separate relevant markets. Most customers said that they would not switch to stocking rechargeable toothbrushes if prices of battery toothbrushes were increased significantly. Furthermore, brushing efficiency of rechargeable brushes seems to be superior to battery brushes (mainly because battery brushes lose power over their lifetime).

However, since the rechargeable market is split between low end and high end (premium) products, the separation between battery and rechargeable toothbrushes markets is blurred. On the demand side there is no difference between the low end rechargeable and the battery toothbrushes as prices are similar. Gillette (being rather on the premium battery market) has an average price for battery toothbrushes at € 10 (varying between

5 and 20 according to the quality and the Member States). The low end rechargeable toothbrushes are priced from € 20 whilst the top end rechargeable are priced between € 100 and 150. This continuum of prices between high end batteries and low end rechargeable is reinforced by the fact that these toothbrushes are sold together in the same category product mainly on the same shelves, and are difficult to distinguish for the end consumers (similar appearance, both types having replaceable head-ends).

However, the Commission has decided to leave it open whether battery and rechargeable toothbrushes belong to the same product market or if a joint product market for powered toothbrushes has to be defined, since no competition concerns would occur under either market delineation.

b) Geographic market definition: Markets are still national

The market investigation has confirmed that European retailers still negotiate on a national level with the national sales representatives of their respective suppliers. Even bigger retailers do not negotiate with suppliers from another Member State or even on a European-wide basis. The Commission has therefore decided to define national toothbrushes markets. This market delineation is further corroborated by substantially different market shares and significant price differentials between different Member States (e.g. for battery toothbrushes with prices for the same product from € 1.8 to € 8.2 and an average price difference of around 30% between Member States). Similarly, P&G's and Gillette's pricing policy is set at a national level. The market investigation has also confirmed that consumer preferences are still diverging between different Member States (e.g. Southern countries being less technology driven than Northern countries). As a result, the main competitors' sales strategy varies in different Member States, and toothbrushes are sold under many different brand names in different Member States.

c) Competition concerns: Parties dominating power brushing in Europe?

P&G is currently only active in the production of battery toothbrushes sold under the brand name 'SpinBrush' and the co-brands 'Blend-a-Dent', 'Blend-a-Med', 'Blendi', 'Crest' or 'AZ'. Gillette produces the full range of powered toothbrushes (battery and rechargeable products) under the 'Oral B' brand.

On a combined market for powered toothbrushes (battery and rechargeable toothbrushes) as well as on a separate battery toothbrushes market, the

parties would hold high market shares with significant increments in a large number of Member States. In the case of a combined powered toothbrushes market, the merger would combine the clear market leader with the current number 3 in most markets and eliminate a credible competitor to the market leader. In the case of separate markets, the merger would combine the current number 2 and 3 in the battery toothbrushes market, eliminating a potential entrant to the rechargeable toothbrushes market.

From a dynamic point of view, the relative strength of the parties in the market is further corroborated by the fact that the parties have increased substantially their EEA-wide share over the last two years (from [25-35]% in 2002 to [45-55]% in 2004 in a hypothetical battery market and from [45-55] to [65-75]% in a powered toothbrushes market) while their main competitors have lost market shares during this period.

Moreover, competitors have reported that the barriers to enter the market for powered toothbrushes are high compared to other consumer goods. This is not only because Gillette and P&G hold a large number of important patents for powered toothbrushes and have good access to the shelves of the retailers, but also because any new entrant to the oral care market needs to establish a good reputation for its products in order to be successful on the powered toothbrushes market. The market investigation has shown that building a competitive brand image implies not only significant promotion costs, but establishing good relations with European dentists whose recommendation is, according to the market test, a key factor for the success in the powered toothbrushes market.

The competitive concerns are not limited to the horizontal overlaps in the parties' battery toothbrushes activities. It will also strengthen Gillette's position on the rechargeable segment/market. Many competitors have explained that the battery segment can be regarded as an 'entry segment' to the more profitable rechargeable toothbrush business, since it helps acquiring the necessary knowledge on rechargeable toothbrushes. The parties' ability to offer the full range of both low-end and high-end powered toothbrushes and to use the 'Oral B' brand name for low-end products will strengthen their position on the battery segment. This could deter new entrants to the battery market, which would, subsequently, also deter new entrants to the rechargeable market (since the battery market is seen as entry segment for the rechargeable market which has even higher barriers to entry). Indeed, market entry to both, battery and rechargeable toothbrushes could become more difficult after the

merger, since a new entrant would have to compete with a 'full-liner' who offers the full range of products with a well-established brand name.

d) The solution: SpinBrush divestiture

In order to solve the competition problems identified above, P&G committed to divest its entire SpinBrush toothbrushes business in the territory of the EEA. P&G committed also to grant a two-year licence for the co-brands used on these toothbrushes ('Crest', 'Blend-a-dent', 'Blend-a-Med', 'Blendi' and 'AZ') and not to re-introduce the licensed brands in the countries for which the license has been granted within a period of at least four years after the termination of the license agreements. As the commitment covers the whole of Procter & Gamble's battery toothbrush business, it eliminates the competition problems on the markets for powered toothbrushes (battery and/or rechargeable toothbrushes).

3. Foreclosure possible?

The investigation of non-horizontal concerns (bundling, category management)

Given the large number of well-known brands both parties are able to offer after the merger, the Commission has also carefully investigated whether anticompetitive 'conglomerate effects' can be expected as a result of the merger. It focused, in particular, on the possibility of foreclosure of competitors to the detriment of the end consumer. The market investigation covered i.a. potential competition problems that might occur as a result from offering bundled products, rebates or promotions. The Commission has also examined whether the parties' involvement in the retailers' management of shelf allocation decisions ('category management') might enable them to obtain control over their customers' shelves, thereby causing harm to competitors and consumers.

a) Foreclosure through bundling

The Commission has examined whether the merger would enable the parties to impose weak brands on their customers, to foreclose competitors from access to the retailers' limited shelf space or to hinder entry of new products into the market, using bundling practices. In particular, the Commission has investigated whether the parties might be able to oblige their customers to buy 'weak' products together with a strong 'must stock' product ('pure bundling') or if they grant better conditions for the joint purchase of bundled products ('mixed bundling'). In particular rebates (rebates across-the-board and incentive bonuses) and pro-

motions have been mentioned by complainants as one possibility to enhance the parties' presence on the shelves.

Regarding in particular pure bundling, anticompetitive conglomerate effects are more likely to arise when the two merging parties offer goods which are highly complementary in demand. The broad range of products offered by the parties cannot be regarded in general as complementary in demand.

In terms of bundling rebates, the parties submitted data demonstrating that rebates granted by them to smaller or larger retailers or even among same size retailers do not vary significantly within the same Member State. The market investigation has shown that P&G grants rebates predominantly based upon concepts such as a 'mixed truck-load' rebate scheme (the customer will benefit of the highest rebate only if it purchases from the most productive factory of the parties with the lowest cost of transport). The parties and some retailers reported that incentive bonuses to introduce new products are at present relatively limited compared to the overall rebates granted. Since the parties have already a large portfolio today, this situation is not likely to change in the future. Moreover, the retailers have indicated that even in the case of increased margins for branded products they would not consider to stop selling private label products, with which they can achieve even higher margins than with branded products.

In terms of bundling promotions, the retailers confirmed that cross-promotions are mainly organised in the same product category (for example washing powder plus softener and usually on a 'buy one get another one' basis). Indeed, it does not make sense economically to combine promotions between the whole variety of many differentiated products offered by the parties (e.g. between feminine care and male wet shaving). Moreover, the risk of anticompetitive effects is mitigated by both the existence of strong competitors as well as countervailing buyer power of the main customers.

Indeed, there is significant competition between other branded product suppliers having a sufficiently broad product range. Therefore retailers are not dependant on one single company with a broad product portfolio. Furthermore, retailers are able to exercise significant countervailing buyer power.

Retailers can exert pressure on the parties by threatening to change supplier, to start/extend private labels sales or by sponsoring new entry through active in-store promotion. The present case has shown that private-label products are delisted less often than the parties' branded products.

Since retailers know the prices of the goods offered by the parties, they have the advantage of being in a position to fix the prices for their own private labels in reaction to the producers of branded products. In contrast, these producers are not able to readjust their prices to the retailers' private label prices. Therefore, the retailer has the capacity to counteract efficiently any significant price change of the leading brands with its own private labels, whilst the parties suffer from an asymmetry of information vis-à-vis prices for private labels.

Moreover, retailers perform an important 'gate-keeper' function for suppliers since they serve as a 'one-stop-shop' for the parties' products. If a retailer refused to carry a brand of the parties, the brand would risk disappearing from the customers' awareness. As a consequence, it would be detrimental to a leading brand of the parties to be excluded from a major retailer for a longer period, as it would entail significant losses in customer awareness, whilst the costs would be relatively minor for the retailer (whose sales with this brand represent only a small fraction of its turnover). It should also be noted that the parties' overall sales represent on average not more than 2% of the retailers' sales, while for the parties certain retailers represent 10% and more of the sales in a given country.

Most retailers protect their bargaining position through a 'multiple sourcing' strategy. Such a strategy reduces the risk that the retailer becomes dependent on a particular supplier and allows for more cost-effective switching to other suppliers. Retailers indicated that they will never renounce to a multiple sourcing strategy and to the ownership of own private label products that compete with branded ones. Also, they have largely confirmed that margins they achieve from private labels are higher than in case of branded products. Retailers indicated that they would delist any brand that is not performing well including the parties' brands. Regardless of the fact that delisting products of important suppliers might entail a risk of losing customers and entail costs, the market investigation has shown that, the retailers' delisting policy applies also to P&G's or Gillette's so called 'must stock' brands.

As a conclusion, the transaction is not likely to lead to foreclosure of competitors as a result of bundling non-complementary products. This conclusion is also corroborated by the Commission's market investigation, which confirmed that the previous merger of P&G and Wella has not resulted in any anticompetitive practices arising from the parties' enlarged portfolio.

b) Foreclosure through category management

The Commission has examined if the policy of category management or 'category captainship', might facilitate anticompetitive behaviour of the parties post-merger.

Category management is a management policy associating suppliers and retailers in order to enhance business results of product categories on a store-by-store basis. The idea of category management was presented to the food industry in mid-1990s and gradually extended to broader category of consumer goods. WalMart was the first retailer introducing a demand driven policy that followed closely customers' needs and habits. It allowed WalMart to optimise the so called stock-shelves cycle, thereby reducing its capital costs. While grocers had first turned to external consultants, they started soon to ask their suppliers for (free) advice on how to improve the assortment of their products in order to better meet customer demand and to increase sales.

At present, category management focuses on several main pillars, namely efficient assortment (e.g. what products or type of products should be stocked), efficient shelving (e.g. how to lay out the assortment on the shelves and to find the ideal number of brands and quantities of these brands). Sometimes it includes also recommendations on efficient pricing (how to price the assortment in accordance with the profile of the target shopper) and efficient promotion (how frequently to promote the category of products).

A particular form of category management is also generally labelled as 'category captainship', since in the beginning of category management ⁽¹⁾, retailers determined one so-called 'category captain' to offer 'exclusive' advice during a given period. Category management is offered by leading suppliers as a free service to retailers. In practice, the task of a category captain is to provide retailers with information on product and shopper habits in relation to a specific category as defined by the retailer. This will be done regularly upon request of the retailer (e.g. every year, two years). A category manager will provide a detailed study (the so-called 'planogram') on how to ideally place and assort the products on the shelves. The retailer can then turn to follow the category manager's advice. He can, however, also follow the advice of other key advisers, such as independent consultants. It is up to the

⁽¹⁾ Today, many retailers do no longer rely on the exclusive advice of one single supplier but engage more than one supplier in their category management strategy, in particular through submitting the proposals of the category manager to other competitors for review.

retailer to apply the agreed recommendations in its stores; there is no intervention of the category captain in the shelves to physically place its products or its competitors' products, and the retailer is solely responsible for placing products on the shelves. The effects of plan-o-grams on margins and sales are regularly reviewed by the retailers.

Some third parties mentioned the possibility that a category manager could favour its own products, either without any knowledge of the retailer or with the agreement of the retailer. This could enable the category manager to better place its products on the shelves thereby increasing its overall output in one category to the detriment of its competitors. The category management position might as well lead to a reduction of brands and therefore of customer choice which could ultimately result in rising prices. Another potential concern with category management for the Commission was that in some cases large retailers with strong private-label presence may share an interest with the parties in excluding other manufacturers of branded goods.

The Commission has investigated whether the transaction could allow P&G and Gillette to increase their involvement as category managers in the oral care sector to the detriment of the consumer. While up to the merger both parties did not offer the full range of oral care products (Gillette being weak in toothpaste and P&G in toothbrushes), the combination of the parties' product portfolios will make them more eligible as category managers in the oral care sector post-merger.

The Commission tested therefore in its enquiry the impact of existing category management by the parties vis-à-vis competitors' overall sales and prices. It compared the evolution of market shares and sales of P&G, Gillette and their competitors in cases in which the parties were category captains and when they were not. Furthermore, the Commission examined the evolution of prices in product categories as well as the evolution of the number of competitors and brands on the shelves and whether delisting of competitors' brands happened when the parties were category captains. The Commission considered as well possible 'mitigating' circumstances, e.g. whether and to what extent the plan-o-gram was implemented or whether parties had lost the position as category manager in the past.

According to the answers to the investigation, it appears that the main beneficiaries of category management are brands that sell well not necessarily those of category captains, as well as private labels, and that the relative losers are the remaining competitors (i.e. those supplying non-leading brands). This is especially true at the so-called

'recommendation-level'.⁽¹⁾ It is also true after implementation of the plan-o-gram, though private labels benefit more than leading brands. This shows that the retailers favour their own private label products even more than foreseen in the 'recommendations', thereby reducing the benefits by the leading brands.

Moreover, as concerns the possibility that category managers could provide 'biased' recommendations to retailers, the market investigation has shown that there is no significant information asymmetry between retailers and suppliers which could be abused. While ten or fifteen years ago retailers did not have sufficient data to verify the category manager's proposal, most retailers have very sophisticated sales and customer data nowadays.

Another potential concern with category management for the Commission was that in some cases large retailers with strong private-label presence may share an interest with the parties in excluding other manufacturers of branded goods. Such exclusionary practices require a credible commitment by the retailer not to carry other suppliers' products. By way of example, the retailer can purchase the full-line from the parties and contractually commit to pay damages if he carries brands from other suppliers. Alternatively, when the parties are category managers, the retailer may forego a discount if he fails to follow the parties' recommendations. However, as it was shown above, the market investigation has shown that retailers often deviate from the recommendation of their category manager. Furthermore, exclusivity contracts are not prevalent in the product categories affected by the merger where multi-sourcing is the norm and only underperforming brands get delisted.

Indeed, most of the parties' competitors and some of the retailers, through their private labels, provide a full range of oral care products, sometimes similar or even broader than the parties' range, which prevents the parties from forcing retailers to buy a full line of their own branded products. The Commission's market investigation has demonstrated that most of the retailers are willing to keep at least one competitor and one private label brand alongside the leading brand. Retailers have applied a similar multiple sourcing strategy in the case of the merger between P&G and Wella, in which the parties' combined market shares were even higher than in the present case. Therefore retailers will be able to defend their private label market shares against parties' recommendations in favour of their own brands.

(1) Recommendations are the result of an agreement between suppliers and the retailers upon the plan-o-gram before its implementation.

Moreover, a category manager cannot prevent its own products from being delisted. Indeed, customers have confirmed that P&G and Gillette 'must stock' brands have in some cases been delisted at the time when these two undertakings were category captains. If products of competitors were actually delisted, this was due to their underperformance and not to the mere recommendation of the category manager.

Regardless of the actual impact of category management, already the hypothesis that the parties would be more often eligible as category managers post-merger was only supported by a part of the customers. Even if the merged entity might be more eligible as category captain than before, nothing indicates that the parties would have a more important role in category management than their main competitors, especially taking into account that their current position in category management is relatively modest given their incomplete product portfolio in the oral care sector.

Moreover, the market investigation has shown that category management does not lead to the elimination of competitors. In addition category management is likely to be beneficial for both retailers and consumers. The market investigation for the products in question in this case has shown that the overall sales in a given category increased as a result of the implementation of category management (e.g. by allowing retailers to better compare best practices in the retail sector, better placement of products which meet better the shoppers' demand). In addition, category management tends to reduce listing fees, which are favourable to larger suppliers. Indeed, category management represents a management policy according to which shelf allocation decisions

reflects end-consumers' demand and possibly not, as in the past, the willingness of a supplier to pay listing fees. As category management is based on shoppers' habits, it leads as well to higher customer satisfaction as it meets better demand expectation. Furthermore, category management allows retailers to achieve economies of scale as it reduces stocks and ensures that the optimal quantity of products is presented timely and directly on the shelves. Finally, category management enables suppliers to achieve economies of scale through more efficient promotion as the suppliers are able to better anticipate the demand and to tailor their promotion.

In conclusion, category management policy would be seen as providing an advantage to the brands that meet the shoppers' needs (best selling brands in general). Although an abuse of the position as category manager cannot be excluded in some cases ⁽¹⁾ when it might lead to foreclosure vis-à-vis competitors, category management may also be largely pro-competitive, as it makes it easier for retailers to stock the most demanded brands and easier for consumers to find them in sufficient quantities on the shelves.

4. Conclusion

This case shows that even in the limited time of a first-phase procedure, the Commission is ready to launch an extensive and thorough investigation that addresses both horizontal as well as non-horizontal competition concerns in order to clarify the likelihood of potential competition harms as soon as possible. In particular the investigation of the various questions related to the non-horizontal effects of the merger required a careful economic analysis which was carried out in close cooperation with the Chief Economist Team.

⁽¹⁾ See Ruling of the US Supreme Court in *Conwood Co. v United States Tobacco Co* (2003).

During the United Kingdom Presidency of the Council of the European Union, the Office of Fair Trading organised the European Competition and Consumer Day on the subject of *'Better markets — Better choices'*, 15 September 2005 in London



Commissioner
Neelie Kroes



Sir John Vickers



Rt Hon Alan Johnson,
MP



Mr Jonathan Evans, MEP, Sir Callum McCarthy,
Dr John Fingleton

Photos provided by the
Office of Fair Trading

We would like to bring to your attention a few quotations in order to give a better vision of the three main themes treated during the sessions: I) Retail financial services, II) Private healthcare markets and III) Competition and consumer policy future priorities.

Sir John Vickers, Chairman, Office of Fair Trading

Opening remarks: 'good consumer and competition policies have one and the same goal — to help markets work well for consumers and for all the fair-dealing enterprises that serve consumers well. Where markets suffer from misleading and deceptive advertising, from cartels, from oppressive sales methods, from anticompetitive mergers, from unfair contract terms, from abuse of monopoly power, or — I would stress — from undue or misguided government intervention, they do not work as well for consumers, or as competitively, as they should and can.'

'What ultimately counts is whether you the customer — whether as a business customer or a public purchaser or as a final consumer (which all of us in this room are) — have well-informed choice between competing alternatives when you are deciding whether and what to buy. The uniting theme for today's conference is therefore choice. Better markets offer better choices.'

Mrs Neelie Kroes, Member of the European Commission in charge of Competition

Referring to targets of the Lisbon Agenda: 'Our citizens expect — and rightly so — to see real and positive results in exchange for the often difficult process of economic and structural change. They want to see the profits of improved market operation being passed on for the good of individuals and society in general. That can be achieved through generating the funds needed to guarantee a high standard of social cohesion and welfare. It can also be through giving individuals a good quality of life and better, more desirable, products and services at lower prices.'

Concerning the Financial Services enquiry: 'we need to address the concerns of consumers. The Commission has so far mainly looked into wholesale and capital markets, which are crucial for market liquidity and performance. But we know from consumer associations and individual complaints that many are not happy with the financial products they get, with the prices and fees they pay, and with the choice they have between banks and insurers.'

Conclusion remark: 'Competition is a key driver for competitiveness. This European Commission will use competition policy instruments — old and new — to encourage markets to deliver their full potential, for the benefit of European consumers and the long-term sustainability of Europe's way and standard of life.'

Dr John Fingleton, Chairperson, Irish Competition Authority

'Competition has a central role to play in efficiency, innovation, customer focus, and rapid pass-through for consumer and economy. Competition complements better regulation, from barriers to competition towards value and informed choice for customers.' (note from the editor: Dr. John Fingleton has become the new OFT Chief Executive since October 2005).

Sir Callum McCarthy, Chairman of the Financial Services Authority (UK)

'Any sensible regulator should be seeking first to encourage efficient markets, as the best means of providing goods and services to consumers. Only after market solutions have been exhausted should regulatory initiatives be contemplated.' 'The problem of financial capability is immense, in terms of both the basic requirements of literacy and numeracy which underpin financial capability; and in terms of specific financial knowledge. We at the FSA are seeking to deal with this problem by initiating a programme, involving government employers, schools and colleges, banks and insurance companies, designed to improve the present very poor level of financial capability.'

Mr Jonathan Evans, Member of the European Parliament

Mr Jonathan Evans, MEP, who has been European Parliament Rapporteur on the modernisation of EU competition policy highlighted the direct link between an efficient competition policy and the interests of consumers both in terms of prices and the availability of goods and services. He regretted that too often in the European Parliament, national protectionism had influenced the response to many of the legislative proposals in the Commission's Financial Services Action Plan. Directives had thus been amended, adjusted and rendered much less effective. The Commission's recent Green Paper correctly anticipated the lack of market interest in further legislation. He therefore welcomed the announcement of the cooperation of the Internal Market and Competition Directorates in pursuing sectoral inquiries in the fields of energy and financial services as an alternative and more effective means of creating a true European single market in these areas. He cautioned however against the enquiries becoming diverted from their objective of developing the EU single market into an over-prescriptive and bureaucratic exercise.

Mr. John Sunderland, President, Confederation of British Industry

Presenting his opinion on the importance of competition future priorities he requested: 'I would like also caution against overuse of sectoral inquiries and market investigations. When they are launched they can have a chilling effect on the market being investigated. A poorly managed inquiry is a waste of valuable resource and a substantial cost to the taxpayer. The scope of the investigation needs to be clearly defined at the outset to avoid 'mission creep'. There should be a sort and strict timetable for producing a report; markets can change rapidly. And the proposed questionnaire should be 'road tested' with some sample companies to avoid overkill and the collection of redundant data.'

Mr. Phil Evans, Principal Policy Adviser, Which? The UK consumer association

'Markets are made up of consumers that drive firms. How and why those consumers behave should frame how the competitive parameters for that market are set. Priorities for the future: 1) Keep consumer and competition policy together in the OFT and strengthen the consumer side. 2) An EU super-complaints mechanism. 3) Enhance private rights of action across the EU.'

The European Competition and Consumer Day concluded with a broad consensus between the speaker's messages that could be summarised as follows: Competition and Consumer policies could work together improving efficiency and knowledge of markets, bringing education and information to consumers best choices. Better regulation has to avoid overlapping between the national and the European levels and needs permanent impact assessment.

***The next European Competition day
will be held under the Austrian Presidency
of the Council of the European Union
on the 19 June 2006 in Vienna.***

Commission launches inquiries into the energy and financial service sectors

Augustijn VAN HAASTEREN, Directorate-General Competition, unit B-1, and George Stephanov GEORGIEV, formerly Directorate-General Competition, unit D-1

General

On 13 June 2005, the Commission adopted the decisions launching sector inquiries into the energy and financial services sectors pursuant to the Commission's powers under Article 17 of Council Regulation (EC) 1/2003. The objective of the inquiries is to examine the underlying reasons why markets are not fully functioning in these sectors.

Policy context

The sector inquiries are part of the Commission's efforts to re-launch the Lisbon Agenda with its goals to boost economic growth, increase employment and transform the European Union into *'the most competitive and dynamic knowledge-based economy in the world'*. To help put the Lisbon Agenda back on its tracks, the Commission also counts on a more pro-active application of the competition rules and sectoral screenings to ensure open and competitive markets in Europe ⁽¹⁾.

The sector inquiries provide an opportunity to evaluate the success of recent measures to promote competition. In the energy sector, EU Directives adopted in the late 1990's and more far reaching legislation ⁽²⁾ in 2003 were intended to introduce an internal market for electricity and gas and have in practice spurred significant liberalization in the industry. In financial services, the Financial Services Action Plan ⁽³⁾ and the Green Paper on Financial Services Policy (2005-2010) ⁽⁴⁾ set out a number of policies for optimizing the functioning of the sector and implementation of many of them

⁽¹⁾ Communication to the spring European Council. Working together for growth and jobs; a new start for the Lisbon Agenda, COM(2005) 24 of 2.2.2005. See in particular pages 8 and 19.

⁽²⁾ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176 , 15.7.2003 p. 37-56. Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC. OJ L 176 , 15.7.2003, p. 57-78.

⁽³⁾ Financial Services. Implementing the framework for financial markets: action plan. Communication of the Commission, COM (1999) 232 of 11.5.1999.

⁽⁴⁾ Green Paper on Financial Services Policy (2005-2010) COM (2005) 177 of 3.5.2005.

has begun though legislative measures and other initiatives. The sector inquiries are a useful tool to examine the effectiveness of these measures in a thorough and systematic way.

Legal background

The legal basis for launching a sector inquiry is provided in Regulation 1/2003. Article 17 thereof states that *'[w]here the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors.'* Essentially, the Commission can open a sector inquiry if it has concerns that competition may not be working as well as it should but the reasons for that are unclear.

The Commission can request, or require by decision, all necessary information from undertakings and associations of undertakings, with scope for fines under Article 23 and 24. Furthermore, the Commission can request information from governments and national competition authorities, take oral statements from natural or legal persons, and undertake inspections in the framework of the inquiry or, in accordance with Article 22, ask a national competition authority to conduct such an inspection on its behalf.

The targeted use of sector inquiries fits with the overall direction of DG Competition's enforcement priorities under the Antitrust Modernization Package. Specifically, sector inquiries allow the Commission to take a more proactive stance in defence of competition, generate in-depth industry knowledge, and open more focused infringement cases. Indeed, should the need arise, the Commission can use the information collected in the context of the sector inquiries in infringement proceedings against individual companies. Finally, because of the pan-European nature of most sectors, a Commission investigation covering EU Member States is the best way to assess the effectiveness of competition in a given industry.

While sector inquiries fit well with the overall goals of modernization, this is not the first time the Commission is using them as an enforcement tool. Prior to the entry into force of Regulation

1/2003, the Commission's sector inquiries were covered by the provisions of Article 12 of Regulation 17/62. Examples of previous sector inquiries carried out by DG Competition include the three-stage inquiry into the telecommunication sector launched on 22 October 1999 as well as the sector inquiry into New Media (3G) launched on 30 January 2004.

Procedural issues

The current sector inquiries into energy and financial services consist of a series of questionnaires sent to relevant market participants across the EU. The scope and the depth of the questionnaires were determined after careful consideration of the characteristics of each industry. Leading up to the inquiries, DG Competition conducted consultations with industry associations, consumer groups, other Commission services (including DG Transport and Energy and DG Internal Market), and with National Competition Authorities and National Regulatory Authorities and their European representatives in order to ensure the integrity of the fact-finding process.

Much effort has been made to request data in a specific and clear manner so that respondents do not spend unnecessary resources in gathering and supplying the information. Finally, both Sector Inquiry Teams have dedicated staff to communicate with addressees and provide detailed answer to any outstanding questions.

While the legal basis and the procedures for carrying out the two sector inquiries are similar, the survey design and the economic questions asked by the two teams vary because of the different nature of the two industries covered. A brief overview of each follows:

Specific economic issues — energy

The inquiry into the energy sector focuses on the recently liberalized electricity and gas industries. Market integration has been disappointingly slow and has so far failed to make a significant dent in the often high levels of concentration that are a characteristic of both sectors. Important price rises have occurred recently and customers are complaining about the inability to secure competitive offers from suppliers. These elements are indications that the markets do not function optimally.

For the electricity sector, emphasis is put on the price formation mechanisms on the electricity wholesale markets, electricity generation and supply and factors determining generator's dispatching and bidding strategies. Special attention is given to whether electricity generators possess significant market power and can influence elec-

tricity wholesale prices. Econometric analyses are likely to be part of this assessment. In addition, a closer look will be given to entry barriers and barriers to cross-border flows such as those that may arise from long term supply agreements in certain Member States and the legal and operational regimes for the interconnectors that link national electricity grids.

In gas, specific emphasis is put on the terms in long-term import contracts and swap agreements and barriers to cross-border transit flows of gas. The balancing requirements for gas network users and gas storage will also be investigated closely as well as down-stream long term contracts and the effects they may have on switching costs and market entry.

The gas and electricity inquiries examine different issues because competition in these sectors is in different stages of development and because they have quite different production structures. Nevertheless, the links between these sectors will not be ignored. Indeed, gas is an increasingly important primary fuel for electricity generation and more competitive gas markets have an immediate beneficial impact on those for electricity.

Both inquiries were launched simultaneously immediately following the Commission's decision to open the inquiries. A total of 3228 questionnaires were sent out, 1279 gas- and 1959 electricity-related questionnaires. The first analysis of the replies has already led to further questions to gather more detailed information on specific issues.

Specific economic issues — financial services

The Financial Services Sector Inquiry focuses on retail banking, including payment cards, and business insurance. The goal is to examine whether national and cross-border competition functions fully in these areas and whether markets are functioning in a fully competitive manner and so ensure non-distorted pricing and high quality financial products and services to consumers and SMEs.

Each of the three areas raises different economic and competition concerns. In the area of payment networks, the Sector Inquiry Team intends to examine whether cooperation within networks can lead to market power, the determinants of the fees charged to consumers and retailers, and whether these fees are excessive. Furthermore, the inquiry will examine whether the structure of networks in different countries and the differences in the regulatory structures across countries have anti-competitive effects.

In the area of retail banking, the focus is on the differences in prices for compatible products across the EU, the barriers to market entry and supply of certain products and services, and the degree of effective choice for consumers and SMEs. The main issue here is whether retail financial markets deal with information asymmetries between consumers and banks in an efficient way and whether competition in those markets can become more effective.

Finally, some of the issues in the area of insurance include conditions for entry, such as access to risk data and distribution channels, the existence of possible vertical agreements between brokers or other insurance and reinsurance intermediaries and insurers, and the role of insurers' associations, coinsurance agreements and other horizontal agreements.

The inquiries in the three different areas are conducted with a phased approach, with the one into payment cards being at the most advanced stage. The information gathered in each of the sectors will be subjected to rigorous scrutiny and examination, including econometric analysis where practicable. For this reason, the Commission is requesting historical data covering market participants from the EU Member States over several years. In some cases, statistical sampling methods were used in order to decrease the burden on industry. For example, in the area of payment cards the team addressed some 200 card issuing and acquiring banks instead of potentially thousands of EU market participants. The sampling was done in such a way as to ensure that a proportionate number of large, medium and small institutions from all EU Member States were included. To further facilitate the process, all questionnaires are distributed in electronic format.

Future steps and expected outcomes

The Commission expects to present reports on the findings of both the Energy and Financial Services

Sector Inquiries and in this context may provide all stakeholders with the opportunity to comment. A preliminary report on payment cards is due by the end of 2005, whereas the final reports on retail banking and business insurance are expected for the end of 2006. The final report on the energy sector inquiry is also due at the end of 2006.

The preliminary findings on the energy sector inquiry will be presented by Commissioner Kroes to the Energy Council on 1 December 2005. At this occasion, also the Commission's analysis on the creation of an internal market for energy will be discussed. It is hoped that the preliminary findings can therefore also play a role in assessing the effectiveness of the current legislative framework in the liberalisation of the gas and electricity markets. A public presentation of a further report is planned for February 2006 and will be followed by a 2 months consultation period. The final report of the inquiry is due in the second half of 2006.

It is important to understand that sector inquiries are first of all an information-gathering exercise that provide the Commission with in-depth knowledge about markets and are therefore 'upstream' of proceedings in specific cases. The knowledge gained about markets can nevertheless form the basis of specific enforcement initiatives at a later stage.

It is DG Competition's goal to continue to be transparent throughout the process. In this spirit, the Sector Inquiry Teams provide regularly updated information on the current state of the investigation on the Directorate's website. The two teams will also continue to maintain open channels of communication with National Competition Authorities, National Regulatory Authorities, industry and consumer associations, and other interested parties. The Sector Inquiries are both an ambitious and a collaborative project that seeks to ensure that the full potential benefits of EU-wide competition are realized for all European consumers.

AstraZeneca: the first abuse case in the pharmaceutical sector

Niklas FAGERLUND and Søren Bo RASMUSSEN,
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1. Introduction

On 15 June 2005 the Commission adopted a decision ('Decision') fining the Swedish company AstraZeneca AB and the UK company AstraZeneca Plc (together 'AZ') 60 million euros due to their infringements of Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

The infringements involve misuses by AZ of public procedures and regulations in a number of EEA states aimed at excluding generic firms and parallel traders from competing against AZ's anti-ulcer product Losec.

In 1979, Astra AB (currently AstraZeneca AB), a Swedish research based company, had filed patent applications in Europe in respect of omeprazole (the active substance in Losec). Losec's basic patent protection therefore by and large expired across Europe in 1999. Losec is one of the most successful products in pharmaceutical history with annual sales reaching around six billion euros towards the end of the 1990s.

AZ's first abuse involved misuses of the patent system; or more specifically of a Council Regulation adopted in 1992⁽¹⁾ under which the basic patent protection for pharmaceutical products can be extended ('SPC Regulation'). The idea underlying the SPC Regulation is to compensate pharmaceutical companies for the often long period which elapses between the start of the term of the basic patent and the point in time when the product receives a market authorisation. The second abuse concerned misuses of procedures relating to the authorisation of the marketing of pharmaceutical products. The fine takes into account that some features of the abuses can be considered as novel.

2. The first infringement — misuse of the patent system

2.1. The infringement

The first infringement of Article 82 of the EC Treaty and Article 54 of the EEA Agreement constitutes a single and continuous abuse and consists of a pattern of misleading representations made

⁽¹⁾ Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ L 182, 2.7.1992, p.1).

by AZ before patent offices in Belgium, Denmark, Germany, the Netherlands, Norway and the United Kingdom and before national courts in Germany and Norway.

The misleading information was provided by AZ in the context of its two rounds of applications (in June 1993 and December 1994) to several patent offices within the EEA for extra protection for omeprazole (the active substance in AZ's product Losec) in the form of so-called supplementary protection certificates (SPCs). Under the SPC Regulation the basic patent protection for active substances in medicines can be extended by a maximum of five years.

The Decision raises no objections to AZ's incorrect interpretation of the relevant legislation. Therefore, the proceedings and outcome in *Hässle AB v. ratiopharm GmbH*⁽²⁾ concerning the interpretation of the relevant provisions of the SPC Regulation are not decisive for the finding of an abuse in this case and any lack of clarity concerning the interpretation of the SPC Regulation cannot constitute an objective justification for the behaviour.

The Decision considers that the conduct did not constitute normal competition and that it cannot be explained as the result of alleged errors or unauthorised behaviour by patent agents and counsel acting on behalf of AZ.

2.2. The effects of the infringement

Through the misleading information in connection with its SPC applications for omeprazole, AZ obtained extra SPC protection in several countries. Such intellectual property protection constitutes the principal barrier to entry for generic versions of an original medicine (in this case Losec). Thereby, the entry of cheaper generic versions of Losec was delayed, entailing additional costs for health systems and consumers.

AZ's competitors were forced to bring lengthy and costly litigation to invalidate AZ's SPCs. In some countries AZ was able to bring patent infringement proceedings against generic firms by invoking the SPCs it had obtained through its misleading representations. In addition, AZ's conduct caused uncertainty, delays and disruption of generic firms' preparations for market entry.

⁽²⁾ Case C-127/00 *Hässle*, in particular paragraph 79.

2.3. *The use of public procedures and regulation to foreclose competition*

The Decision finds that the special responsibility of a dominant undertaking also covers the use of public procedures and regulations. The use of such procedures and regulations may be abusive in specific circumstances where there is a clear intent to foreclose competition on the part of a dominant company, in particular where the authorities or bodies applying such procedures have little or no discretion. Such a regulatory context existed in this case as the patent offices largely accepted the data submitted by the SPC applicants at face value. Moreover, limited information on applications for and grants of SPCs was available to the competitors.

The Decision observes that the acquisition of a right may constitute an abuse. Behaviour in the process leading up to the acquisition of a right may therefore also constitute an abuse. Considering that AZ's initial misleading representations were made well before the grant of the rights in question, the finding of an abuse cannot affect the subject-matter of the said rights.

2.4. *The existence of other remedies (apart from competition law)*

The existence of other specific remedies cannot by itself exclude the application of Article 82 even if they may cover aspects of the exclusionary conduct. The Decision finds that there is no reason to limit the applicability of competition law to situations where such conduct does not violate other laws and where there are no other remedies. The purpose of competition law is to sanction behaviour with anticompetitive objects or effects. Such behaviour may also give rise to liability under other laws regardless of any anticompetitive effects it may have. Moreover, the scope of remedies under patent laws is very limited in this case. There would be no sanctions apart from the annulment of the SPCs. For example, no sanctions would be imposed against failed attempts to obtain SPCs through misleading information.

3. **The second infringement — misuse of procedures relating to the marketing of pharmaceutical products**

3.1. *The infringement*

The second infringement of Article 82 of the EC Treaty and Article 54 of the EEA Agreement constitutes a single and continuous abuse (from 19 March 1998 until the end of 2000) consisting of

AZ's requests for the deregistration of its market authorisation for Losec capsules in Denmark, Norway and Sweden combined with its withdrawal from the market of Losec capsules and launch of Losec MUPS tablets in those three countries.

A key purpose underlying the conduct was to exclude competition from generic firms and parallel traders. The Decision does not object to the withdrawal of Losec capsules from the market and/or the launch of the Losec tablets as such. The core of the second abuse consists in the selective deregistration which removed the reference market authorisation on which generic firms and parallel traders arguably needed to rely at the time to enter and/or remain on the market.

AZ deregistered its market authorisation for Losec capsules selectively only in countries where it thought this strategy would block or delay generic market entry or parallel imports.

The Decision finds that through its conduct, AZ sought to extend *de facto* the protection afforded by patents, SPCs and data exclusivity well beyond the period provided for in the applicable rules considered reasonable by the legislator.

Patents, SPCs and data exclusivity are designed to reward innovation, while the purpose of a market authorisation is not an entitlement to exclude competitors but the right to market a pharmaceutical product.

While the Decision does not contend that the purpose of a market authorisation is to facilitate entry of generic products, it states that in the specific circumstances of this case, the deregistration of a market authorisation may be an element of the abuse.

The Decision finds that the conduct did not constitute standard practice at the time. It also finds that there were no objective justifications for the behaviour. For example, AZ's requests for deregistration were not based on public health considerations. Nor can the conduct find any justification in the relevant pharmaceutical legislation in the light of the actual motives underlying the conduct.

Nevertheless, the Decision observes that single acts involving the launch, withdrawal or requests for deregistration would not normally as such constitute an abuse and that — due to changes in the relevant EC pharmaceutical legislation — the second abuse cannot be repeated.

3.2. *The effects of the infringement*

Through its strategy, AZ aimed to prevent and in part succeeded in preventing the authorisation of generic versions of Losec as well as excluding

parallel trade in Losec, artificially partitioning the internal market. Thereby, the entry of cheaper generic and parallel imported versions of Losec was delayed, entailing additional costs for health systems and consumers.

3.3. The use of government procedures and entitlements as well as the relevance of the regulatory context

The second abuse is not an abuse of intellectual property rights. The abuse concerns the use of public procedures in a regulatory context characterised by limited or no discretion on the part of the authorities concerned. As mentioned (see point 2.3 above), such behaviour can be qualified as abusive in specific circumstances if there is a clear intent to exclude competitors. Moreover, dominant companies have a special responsibility to use specific entitlements, whether private or public, in a reasonable way in respect of market access for other parties.

4. The relevant market comprising proton pump inhibitors

The relevant market comprises national markets for so-called proton pump inhibitors (PPIs) sold on prescription which are used for gastro-intestinal acid related diseases (such as ulcers). AZ's Losec was the first PPI. The Decision concludes that a PPI market can be established in the seven EEA markets concerned (Belgium, Denmark, Germany, the Netherlands, Norway, Sweden and the United Kingdom) from at least 1993.

The Decision finds that during the relevant years in the countries concerned the previous generation of anti-ulcer products (H2 blockers) did not exercise a significant competitive constraint on the PPIs. This conclusion is based on the 1997 Notice on the definition on the relevant market.

Throughout the 1990s there was a clear one-side substitution pattern whereby PPIs progressively replaced H2 blockers in respect of all acid-related diseases and conditions. Evidence of substitution in the recent past will normally be fundamental for product market definition. Over this period PPIs were also in general considerably more expensive than the H2 blockers.

The Decision specifically takes into account the special features of the pharmaceutical sector, such

as the regulatory context including price regulation. The Decision finds that pharmaceutical companies offering therapeutically superior products (such as Losec) to the authorities are generally able to extract higher reimbursable prices than those set for previous generations of less effective medicines.

The Decision also takes account of the relevant products' characteristics and uses, non-price factors relevant to the competition in pharmaceutical prescription markets as well as the impact of certain actual events on the market ('natural events') (such as the lack of impact on prices of and demand for PPIs following the entry of cheaper H2 blockers).

5. AZ's dominance on the national PPI markets concerned

The Decision finds that AZ held a dominant position on the PPI market in Belgium, the Netherlands, Norway, Sweden (from 1993 until the end of 2000), Denmark and the United Kingdom (from 1993 until the end of 1999) and Germany (from 1993 until the end of 1997).

The Decision's findings on dominance are based on a number of factors including AZ's high market shares and position as incumbent on the PPI market.

The first mover in a pharmaceutical market is generally able to obtain and maintain higher prices than later entrants to the market. AZ, as the first mover into the PPI market, was indeed in general able to obtain and maintain higher prices than later entrants onto the PPI market (such as Takeda and Byk Gulden). The ability to maintain a higher price constitutes evidence of market power as it reflects the company's bargaining power vis-à-vis national buying organisations or the ability (to the extent that a company can price freely) to charge a price premium above the reimbursement level.

The Decision also considers the issue of monopsony buyers (i.e. national health systems) and price regulation. It observes that the bargaining power of monopsony buyers is considerably reduced vis-à-vis companies offering genuinely innovative new products (such as Losec). Moreover, the monopsony buyers are not in a position to control entry to the market.

Action against Deutsche Telekom supports the development of competition in German broadband markets

Dirk GREWE, Directorate-General Competition, unit C-1

The European broadband markets are one of the key drivers of growth in the electronic communications sector. Experiences in the EU Member States show that competitive broadband markets lead to high broadband penetration which increases the competitiveness of the Member States and thus makes an important contribution to reaching the goals of the Lisbon agenda.

During the last years, the level of competition in the broadband markets of the biggest EU Member State Germany has been insufficient. The incumbent operator Deutsche Telekom (DT) has had well beyond 80% and thereby one of the highest shares in the EU15 retail broadband markets and an even higher share in the respective wholesale markets. In parallel, the broadband penetration in Germany has been relatively low and recently fallen behind EU25 average for the first time. ⁽¹⁾

Besides the fact that there has only been minor competitive pressure from other broadband infrastructures (e.g. cable TV) and irrespective of the fact that DT has offered its competitors only a limited number of access forms to provide broadband services ⁽²⁾, the relatively low level of competition in the German broadband markets can above all be explained by DT's anti-competitive behaviour as regards the access to its local loop. ⁽³⁾

This is why the Commission has not only adopted its prohibition decision of 21 May 2003 against Deutsche Telekom ('Deutsche Telekom') ⁽⁴⁾ and subsequently concluded the so-called 'QSC settlement', but recently taken action against DT in order to safeguard the latter settlement, in which

- ⁽¹⁾ See Commission press release IP/05/642 of 1 June 2005.
- ⁽²⁾ DT had not provided a DSL resale offer until mid 2004 and, according to preliminary findings of the German telecoms regulator Bundesnetzagentur, DT does not offer its competitors bitstream access yet.
- ⁽³⁾ The local loop is the physical circuit between the customer's premises and a telecommunications operator's local switch. Its frequency spectrum can be split into a low frequency range for the provision of traditional voice telephony services, and a high frequency range enabling the provision of broadband access via xDSL. When both are rented out to new entrants, this amounts to full local loop unbundling, whereas the renting out of the mere high frequency range leads to shared access / line sharing. The wholesale line sharing fees are subject to the approval of the German telecoms regulator Bundesnetzagentur.
- ⁽⁴⁾ OJ L 263 / 9 of 14 October 2003. See also Commission press release IP/03/717 of 21 May 2003. The decision is under appeal before the CFI as case T-271/03.

DT had committed itself vis-à-vis the Commission to terminate a presumed margin squeeze as regards broadband access.

Following this action, DT changed an application to the German telecoms regulator Bundesnetzagentur (BNetzA) ⁽⁵⁾ for the approval of wholesale fees it charges its competitors for shared access to the local loop (line sharing). BNetzA subsequently approved fees which are not only in compliance with the Commission's action, but further improve the conditions for the provision of broadband services in Germany which had resulted from the initial 'QSC settlement'.

The initial 'QSC settlement' and its implementation

Following an initiative from DT, in February 2004 DG Competition concluded a settlement with DT in a case which had been opened following a complaint by one of DT's competitors in the German broadband markets, the Quality Service Communications AG (QSC). According to QSC, the margin between DT's retail tariffs for ADSL and the corresponding wholesale tariffs for line sharing had been insufficient to allow new entrants to compete with DT on the retail market for broadband access. Such retail broadband access allows consumers to use a wide range of electronic communications services, such as high speed internet access and voice services entirely provided over the internet protocol.

The conclusion of the 'QSC settlement' followed a preliminary investigation that was based on the methodology for assessing a margin squeeze as developed in the 'Deutsche Telekom' decision. In that decision, the Commission had found that it is contrary to Art.82 EC if a vertically integrated operator (such as DT) which is dominant both on a wholesale and the related retail market(s) charges its competitors prices for wholesale access which are either higher than its comparable, weighted retail prices or if they are lower than those retail prices but insufficient to cover DT's own product-specific costs for the retail service provision.

- ⁽⁵⁾ The BNetzA was previously known as Regulierungsbehörde für Telekommunikation und Post (RegTP). Its name was changed into BNetzA because the authority is now also regulating other network industries such as electricity, gas and railways.

On the basis of this methodology, DG Competition's services found indications that a margin squeeze existed also in the QSC case. To remove this competition concern, DT offered to terminate the presumed margin squeeze quickly and on a lasting basis, mainly by lowering its wholesale line sharing fees. Furthermore, DT committed itself to provide the Commission with all information to check that no margin squeeze would reappear.

Despite the fact that the 'Deutsche Telekom' decision could be seen as a precedent against DT, the Commission accepted these commitments in order to ensure that the presumed margin squeeze was terminated in a consumer-friendly manner (as it would not lead to higher retail prices) and in a competition-friendly manner (as it ensured that the presumed abuse could be terminated faster than by virtue of the adoption of a prohibition decision). Both factors were considered important in order to increase the level of competition on the broadband markets and ultimately broadband penetration in Germany.

After the conclusion of the settlement, market players were informed about its main points by way of a press release.⁽¹⁾

Subsequently, DT undertook different steps to comply with the settlement and, above all, applied for substantially lower wholesale line sharing fees.⁽²⁾ This application was accompanied by public declarations from DT that it intended to decrease its line sharing fees on a lasting basis in order to enable its competitors to develop the German broadband markets on an equal footing.

After BNetzA's approval of the reduced wholesale line sharing fees DT had applied for, the Commission was in a position to conclude that DT would lastingly comply with its commitments. The case was therefore closed in July 2004.

DT's new tariff application and DG Competition's reaction

While shared access had not taken up during the time when the presumed margin squeeze existed, i.e. before the conclusion of the 'QSC settlement',

⁽¹⁾ See Commission press release IP/04/281 of 1 March 2004.

⁽²⁾ In the settlement, it had been agreed between DT and the Commission that DT's compliance with the settlement should already be ensured by its application for line sharing tariffs and not depend on the final approval by BNetzA. This approach already considers that the responsibility of DT to comply with EU competition law will further increase in the future when markets which have been subject to sector-specific regulation will be deregulated.

after its implementation some operators have publicly announced to roll-out their broadband infrastructure in order to provide retail broadband services on the basis of line sharing. According to press reports, first respective steps have been taken in early 2005.

At the end of May 2005, DT however filed an application to BNetzA in which it applied again for those line sharing tariffs which had caused the presumption of a margin squeeze during the Commission's investigations. DT's application was accompanied by press statements that the reduced line sharing tariffs would not have led to a market take-up so that DT would intend to charge the tariffs which had been applicable prior to the settlement again.

Based on the monitoring which has been set up for the German broadband markets in general and for DT's lasting compliance with its commitments in concrete, DG Competition's services could however presume that DT's application did not respect the settlement anymore. In order to prevent from tariff structures which would most probably have destroyed upcoming business models on the basis of line sharing, the Commission services therefore quickly intervened and asked DT either to provide the Commission with its calculations according to which the tariffs applied for would not lead to a margin squeeze or to withdraw its application and replace it by an application being in compliance with the settlement. This action was coordinated with BNetzA that had to decide upon DT's tariff application in August 2005.

After receiving the calculations on which DT had based its tariff application and on the basis of prior calculations it had provided, DG Competition's services were able to verify that DT's tariff application *prima facie* would lead to a margin squeeze and constitute a breach of the settlement. In order to avoid the opening of formal proceedings which might have led to the adoption of another Art.82-decision, DT was therefore required to submit an application to BNetzA that would be in compliance with its commitments. DT did so by re-applying for the monthly line sharing tariffs which had been approved as a result of the 'QSC settlement' in 2004.

Final implementation of the settlement on a lasting basis — BNetzA's role

At the beginning of August 2005, BNetzA finally approved monthly and one-off line sharing tariffs which were lower than the ones DT had finally applied for in order to comply with the settlement.

In this decision, BNetzA conducted a margin squeeze test by verifying in a first step whether the line sharing tariffs which could be approved on the basis of DT's costs of efficient service provision would allow an efficient operator in the DSL retail market to compete profitably with DT. In a second step, BNetzA verified that these tariffs would also comply with the Commission's margin squeeze test as set out in 'Deutsche Telekom', i.e. enable DT's own downstream operations to trade profitably.

Although BNetzA's ex ante tariff approval and its respective margin squeeze test was based on a forward-looking approach, it is interesting to note that BNetzA implicitly referred to both ways to assess a margin squeeze which are described in the 'Access Notice' ⁽¹⁾, i.e. to focus (i) on the costs of the dominant undertaking and (ii) on the costs of an efficient competitor. While the Commission could already demonstrate / assume a margin squeeze on the basis of the more conservative option (i) in the 'Deutsche Telekom' decision and in the QSC case, BNetzA's 'cumulative approach' in

addition considers additional costs and less favorable economies of scale and scope of an efficient competitor.

By approving the new line sharing tariffs for two years, BNetzA has last but not least increased the certainty in the German broadband markets and ensured that the improved competitive conditions which resulted from the 'QSC settlement' will be secured on a lasting basis.

Against the background of positive experiences in other EU Member States such as France, it may therefore be expected that the improved conditions for the provision of broadband services via line sharing will lead to a significant market take-up and that they will positively influence the level of competition and penetration in the German broadband markets. In this context, it is worthwhile mentioning that the monthly number of fully unbundled local loops rented out to new entrants has no longer stagnated, but strongly increased after the implementation of the 'Deutsche Telekom' decision.

⁽¹⁾ Notice on the application of the competition rules on access agreements in the telecommunications sector, OJ C 265, 22.8.1998, page 2, no.117.

Coca-Cola: Europe-wide remedies in fizzy drinks

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1. Introduction

On 22 June 2005 the Commission adopted a commitment decision based on Article 9 of Regulation (EC) No 1/2003⁽¹⁾ addressed to The Coca-Cola Company ('TCCC') and three of its major bottlers⁽²⁾ (all together: 'Coca-Cola'), making the commitments which were submitted by Coca-Cola binding upon it.⁽³⁾ This commitment decision concerns the supply of carbonated soft drinks ('CSDs') in the EEA and prevents Coca-Cola from entering into exclusive supply arrangements, from practising growth and target rebates or from leveraging market power between various product categories. It brought to an end the Commission's in-depth investigation relating to concerns under Articles 82 of the EC Treaty and 54 of the EEA Agreement.

2. Procedure

After receiving several complaints alleging abuse of dominant position by Coca-Cola, the Commission undertook dawn raids on Coca-Cola's premises in Austria, Belgium, Denmark, Germany and the United Kingdom in 1999 and 2000. By 2004, the evidence gathered against Coca-Cola covered the 25 EC Member States, Norway and Iceland.

On 29 September 2004 the Commission opened proceedings under Chapter III of Regulation (EC) No 1/2003. From a procedural point of view, this had the effect to relieve the competition authorities of the Member States of their competence to act against Coca-Cola on issues dealt with by the Commission.⁽⁴⁾

In mid-October 2004 the Commission sent a so-called '*preliminary assessment*'⁽⁵⁾ to Coca-Cola. It stated the Commission's competition concerns and gave Coca-Cola the opportunity to remedy these concerns by submitting commitments. In November 2004 the set of commitments which Coca-Cola submitted in response was market tested through publication in the *Official Journal of the*

European Union, whereby interested third parties (e.g. consumers, customers and competitors) were invited to submit their critical observations.⁽⁶⁾

The Commission received observations from altogether 33 market players (19 retailers, such as supermarkets and restaurant/catering chains, and 14 beverage suppliers). These observations, on the whole, confirmed the effectiveness of the commitments in addressing the Commission's concerns. They aimed at enhancing the commitments, either by adjusting their scope or by improving their wording. By February 2005 Coca-Cola, informed of these observations by the Commission, submitted an amended commitment proposal.

In May 2005 the Member States, consulted on the draft commitment decision in the Advisory Committee on Restrictive Practices and Dominant Positions, unanimously issued a favourable opinion.

3. Relevant market, dominance and practices raising concerns

According to Recital 13 of Regulation (EC) No 1/2003, a commitment decision should not conclude '*whether or not there has been or still is an infringement*' but simply finds that '*there are no longer grounds for action by the Commission*'. As a consequence, the Commission's assessment of the market definition and of Coca-Cola's dominance and practices raising concerns is necessarily expressed in a way which is '*preliminary*', aiming at identifying competition concerns rather than establishing infringements.

3.1. Relevant market

In the Commission's preliminary assessment a CSD market was defined as consisting of cola-flavoured, orange-flavoured, lemon and/or lime-flavoured, other fruit-flavoured CSDs and bitter CSDs. Other beverages, such as packaged water and sport and energy drinks, were deemed to be outside the market. The CSD market definition was based on the fact that, as far as product characteristics and intended use are concerned, CSDs could be distinguished from other beverages. Moreover, the Commission's preliminary view of this market definition was supported by consumer substitution preferences between various beverage catego-

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

(2) *I.e.* Bottling Holdings (Luxembourg) sarl, Coca-Cola Erfrischungsgetränke AG and Coca-Cola Hellenic Bottling Company SA.

(3) See http://europa.eu.int/comm/competition/antitrust/cases/index/by_nr_78.html#i39_116.

(4) Article 11(6) of Regulation (EC) No 1/2003.

(5) Article 9(1) of Regulation (EC) No 1/2003.

(6) OJ C 289, 26.11.2004, p. 10.

ries and by Coca-Cola's internal analysis. This view was furthermore supported by an analysis of price differences, volume trends and consumer surveys.

In its preliminary assessment the Commission also reached the view that the distribution channel for consumption at home (*'take-home channel'* consisting of e.g. supermarkets, discounters, cash & carry) and the distribution channel for consumption on premise (*'on-premise channel'* consisting of e.g. restaurants, hotels, caterers) constitute two distinct relevant markets, as in the on-premise channel the sale of a CSD is linked to the provision of additional services, which is not the case in the take-home channel. In addition, the two channels also show significant price differences, a different use of package mixes and technical sales equipment, as well as a different role by the intermediaries.

In the Commission's preliminary assessment the geographic market was deemed to be national, because of varying consumption patterns from country-to-country and differences between national market shares. Furthermore, this view was backed by evidence on divergent consumer preferences, price differences and divergent national packaging and recycling systems.

3.2. Dominance

In its preliminary assessment the Commission took the view that TCCC and its respective bottlers are jointly dominant within the meaning of Articles 82 of the EC Treaty and 54 of the EEA Agreement on the CSD market in a number of countries and channels. The Commission reached this preliminary view since TCCC and its respective bottlers have *'the power to adopt a common market policy'* ⁽¹⁾ and to present themselves *'from an economic point of view [...] as a collective entity'* ⁽²⁾ in the CSD markets due to economic links between them, the policy making and communication process they have established, as well as the way the *'Coca-Cola system'* (TCCC and its bottlers) is presented and perceived on the market.

As to the dominance of TCCC and its respective bottlers, the Commission's preliminary assessment was based on strong market positions due to high market shares ⁽³⁾, unique brand recognition and the *'must stock'* nature of TCCC's strongest brands — protected from competition by barriers to entry in the form of sunk advertising costs preventing significant market entry. In addition, it was considered that there was no countervailing buying power that would likely pave the way for effective new entry, since, according to the evidence, most customers are in a weak position in the negotiations for the supply of TCCC-branded CSDs.

3.3. Practices raising competition concerns

The Commission's investigation into Coca-Cola's commercial activities, namely exclusivity related practices, target and growth rebates and assortment related arrangements, identified competition concerns by-and-large common to all three types of practices, namely the foreclosure of competitors, reduction of the variety of choice for the consumer and, consequently, avoidance of downward pressure on prices. Evidence indicated that one or more of the above practices existed in all the EC Member States, Iceland and Norway.

Exclusivity and exclusivity related practices

The Commission gathered evidence leading it to the preliminary view that some of the business practices of Coca-Cola would ensure them *de iure* or *de facto* exclusive supply of CSDs to customers. Their exclusivity agreements had sometimes directly prevented customers from being able to offer competing brands. Moreover, competing suppliers could also be denied access to outlets by virtue of the effects of Coca-Cola's financing agreements and technical sales equipment arrangements (in particular beverage coolers and fountain dispensers).

Through financing agreements, on-premise outlets may gain loans repayable by purchases of a certain quantity and assortment of CSDs. *De facto* exclusion of competitors might ensue in cases

⁽¹⁾ T-228/97, *Irish Sugar plc v. Commission*, [1999] ECR II-2969, para. 47 (appeal of this judgment dismissed by order of the Court, C-497/99P, [2001] ECR I-5333).

⁽²⁾ C-395 & 396/96P, *Compagnie maritime belge transports SA e.a. v. Commission*, [2000] ECR I-1365, para. 36.

⁽³⁾ According to 2003 data available at the time of the preliminary assessment, the market shares of TCCC-branded CSDs exceeded 40% and were more than twice the size of the market shares of the next competitor in the following countries: Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Hungary (only take-home channel), Italy, Latvia, Lithuania (only take-home channel), the Netherlands, Norway (only take-home channel), Poland (only take-home channel), Spain, Sweden and the United Kingdom. At the time of the preliminary assessment, data for Cyprus, Luxembourg and Malta was not yet available for 2003.

where such agreements are of unduly long duration, imply burdensome termination conditions or bundle different Coca-Cola beverages.

Beverage coolers and fountain dispensers represent by far the most attractive way of serving CSDs for certain types of operators. For example, fast-food restaurants prevalently resort to fountains since this facilitates and speeds up the service. Corner-shops satisfy impulsive demand, and beverage coolers are a superior mean to sell ready-to-drink CSDs in such outlets. If such sales equipment, reserved for Coca-Cola beverages only, is the sole CSD source in the outlet (often the case in small shops and gastronomy due to space constraints), access to such outlets would be foreclosed to competing suppliers.

Target and growth rebates

In the take-home channel, Coca-Cola has frequently offered considerable financial incentives to customers reaching individually specified purchase objectives, often by reference to the customer's purchases during a previous period. These provisions took the form of target rebates (individually set on the basis of a customer's past performance) and growth rebates (a form of target rebates implying sales growth), most of which were calculated on a separate quarterly basis with respect to total turnovers in colas and non-colas to reflect the conditions of an earlier undertaking to the Commission (1989) ⁽¹⁾.

However, notwithstanding quarterly reference periods and split into colas and non-colas, competition concerns linked to target and growth rebates persevered. Since they were calculated on the overall purchases of the customer, such rebates were considered likely to offer strong financial incentives for his not insignificant additional purchases once the threshold was approached. Coca-Cola customers incurred significant financial loss if they did not reach the threshold. Since smaller suppliers are generally likely to be unable to match the rebate due to their limited size they do not, for the customer, represent a real alternative to Coca-Cola's incentives. As a consequence, growth and target rebates increase the customer's switching costs and his loyalty.

Tying, assortment and space-to-sales arrangements

On some occasions Coca-Cola made the supply of the strongest TCCC brands conditional upon the purchase of less well-selling CSDs and non-CSD soft drinks. This could lead to foreclosure of rival

suppliers of CSDs and non-CSD soft drinks, since such tied purchases exhaust the customer's purchasing capacity within a flavour segment.

Coca-Cola also bundled wide ranges of 10 to up to 60 stock keeping units ('SKUs' — e.g. 0.33 l can of Coca-Cola Regular or 6-pack of Fanta Lemon in 2 l PET bottles) by considerable payments to customers purchasing these entire ranges, sometimes reaching 2% of all customer's CSD purchases from Coca-Cola. Since such ranges, generally distinguishing between cola and non-cola CSDs, included highly demanded SKUs (such as Coca-Cola and Fanta Orange), assortment related rewards paid out to customers were significant. The competition concern was that the turnover of the best selling SKUs was leveraged to favour customers' orders of less well-selling SKUs. Due to space constraints in outlets, e.g. supermarket shelves, access to sales space for rival suppliers would be rendered more difficult and costly.

In addition, through its space-to-sales arrangements, Coca-Cola financially enticed its retail customers to reserve a part of their total CSD shelf space to TCCC-branded products in proportion to Coca-Cola's sales share in the take-home channel. ⁽²⁾ Due to a large turnover of its three major brands, Coca-Cola Regular, Coca-Cola Light and Fanta Orange, a significant proportion of shelf space was assigned to Coca-Cola's products. Within the shelf space thus reserved, Coca-Cola allocated space in a manner to favour less-selling products, whilst such space would otherwise be allocated in function of the productivity of SKUs. This further deteriorates conditions for access to shops for rival suppliers of CSDs, especially those competing with Coca-Cola's less well-selling CSDs.

4. Decision making the commitments binding upon Coca-Cola

The Commission decision renders the commitments, which it considered sufficient to address its foreclosure concerns identified in the preliminary assessment, binding upon Coca-Cola. The binding nature of the decision also means that Coca-Cola could be sanctioned in case of breach. ⁽³⁾ In its decision the Commission equally finds that, in view of the commitments, grounds no longer exist for it to take action against Coca-Cola. Notwith-

⁽²⁾ For example, if Coca-Cola's share in overall CSD sales amounted to 60% and if it required that the shelf space reserved for the entire TCCC brand portfolio accounted for 90% of this share, Coca-Cola would be entitled to 54% of the total CSD shelf space for their products.

⁽³⁾ The Commission may impose a fine of up to 10% of Coca-Cola's turnover or periodic penalty payments (Articles 23(2) and 24 of Regulation (EC) No 1/2003).

⁽¹⁾ 19th Report on Competition Policy (1989), point 50.

standing, the Commission retains the power to investigate Coca-Cola's practices that fall outside the scope of the commitment decision. ⁽¹⁾

The commitments define their geographical scope and contain provisions relating to the take-home and/or on-premise channel. They also include rules as to the implementation of the commitments. A brief overview is provided below.

Geographical scope

The commitments will be applicable where, in the 25 EC Member States, Norway and Iceland, TCCC-branded CSDs (e.g. Coca-Cola, Fanta, Sprite) account, in the previous year for more than 40%, and double the share of the nearest competitor of national CSD sales in either one of the distribution channels. This provision enables the commitments to adapt to potential evolutions of Coca-Cola's market power.

Rules for the take-home and/or on-premise channels

There is a general ban on any exclusivity provisions or percentage-based purchasing commitments, nor is Coca-Cola allowed to interfere with other suppliers' commercial relationships with the customers. ⁽²⁾ On top of these commitments applicable to both channels, Coca-Cola will, with respect to financing agreements, limit the repayment period to 5 years and allow the customer to (a) repay any proportion of the loan due in cash where the loan is repayable by purchases of TCCC-branded CSDs and (b) to terminate and repay the outstanding balance without penalty. The length of availability agreement obliging the customer to make available certain TCCC products is limited to 5 years with annual termination options after the initial three years.

Rent-free beverage coolers supplied by Coca-Cola can only be exclusive if the outlet has other installed chilled beverage capacity to which the consumer has direct access and which is suitable for stocking CSDs other than Coca-Cola's. Where there is no alternative CSD capacity, the customer will be free

to use at least 20% of Coca-Cola's beverage cooler for any products of his choosing. When renting a beverage cooler the customer may in any event use at least 20% for any product of his choosing.

The fountain dispenser arrangements by Coca-Cola will not hinder outlets from offering rival CSDs, either through competing fountain dispensers or in packaged format. The duration of purchase commitments for dispensed beverages is limited to 3 years, with the option to terminate such commitments after the initial two years.

Coca-Cola will refrain from offering target and growth rebates.

The commitments ban tying the sales of Coca-Cola and Fanta Orange ⁽³⁾ to purchases of other beverages of Coca-Cola, and likewise prohibit assortment arrangements linking either of the said CSDs brands to additional beverages of Coca-Cola. Shelf-space reservations in the take-home channels (e.g. supermarkets) are to be done separately for Coca-Cola, Fanta Orange and other CSDs, respectively. In addition, caps are imposed on shelf-space available for Coca-Cola and Fanta Orange items.

Implementation

The commitments will be made binding until 31 December 2010. In countries where the commitments are applicable, all new agreements of Coca-Cola will have to comply with the commitments from the very notification of the decision. All agreements (including existing ones) will need to be aligned with the commitments by 1 January 2006. In the territories served by bottlers other than Coca-Cola ⁽⁴⁾, TCCC will use best efforts that those other bottlers also adhere to and implement the commitments where they are applicable. Such best efforts may also lead to termination of bottling agreements by TCCC, where the bottlers refuse to adhere to the terms of the commitments. An annual compliance report shall be provided to the Commission.

5. European-wide perspective of the Coca-Cola commitment decision

The Coca-Cola commitment decision was of particular relevance for the Member States, given its Europe-wide dimension and the fact that there were ongoing national investigations against Coca-Cola. Such national investigations came to a halt with the opening of formal competition proceedings at EC level. During the proceedings, Member

⁽¹⁾ For practices falling under the decision, revision pursuant to Article 9(2) of Regulation (EC) No 1/2003 is, under certain circumstances, possible.

⁽²⁾ Notwithstanding the exclusivity ban exclusive CSD supply agreements are exceptionally allowed in the on-premise channel provided that they result from sponsorship arrangements or from tendering procedures, the latter held either by public authorities or large private sector customers. In the case of private tenders, such exclusive supply may amount to maximum 5% of Coca-Cola's CSD sales in the on-premise channel and is limited to a maximum of five years giving the customer an annual option to terminate the supply agreement without penalty following an initial term not exceeding three years.

⁽³⁾ Unbundling of Fanta Orange is subject to a market share threshold throughout the commitments.

⁽⁴⁾ Cyprus, Denmark, Finland, parts of Germany, Iceland, Malta, Norway, Portugal, Spain and Sweden.

States remained associated to the EC proceedings (e.g. ongoing information exchange between the Commission and the Member States, consultation of Member States in the Advisory Committee).

By bringing the Coca-Cola case to an end with the Commission's commitment decision Member States regained their competence to act against Coca-Cola. In fact, Recital 13 of Regulation (EC) No 1/2003 stipulates that '*[c]ommitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make [a] finding [of infringement] and to decide upon the case*', since, as must be recalled, a commitment decision only finds that there are no longer grounds for action by the Commission without taking any

position on the existence of an infringement. This being said, Member States would not be allowed to run counter to the *effet utile* of the Commission's commitment decisions. ⁽¹⁾

6. Conclusions

The Coca-Cola decision shows that the commitment procedure introduced by Regulation (EC) No 1/2003 may also be used in cases involving a global player resulting in decisions bearing a Europe-wide dimension. During the coming five years, the European fizzy drinks markets will benefit from a set of clear and binding obligations incumbent on Coca-Cola which are aimed at increasing competition on the merits.

⁽¹⁾ Article 16 of Regulation (EC) No 1/2003.

Professional services: scope for more reform

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1. Introduction and background

The Commission's work in the professional services sector continues with the publication of its first follow-up report to the 2004 Report 'Competition in Professional Services' ⁽¹⁾.

The 2004 Report set out the Commission's thinking on the scope for reform and modernisation of professional rules and regulations governing the operation of six professions selected for detailed study by the Commission. These were lawyers, notaries, engineers, architects, accountants (including the related profession of tax advisers) and pharmacists. It was supplemented by the Stocktaking Exercise on Regulation of Professional Services in the ten new EU Member States, published in November 2004 ⁽²⁾.

The 2004 Report analysed in detail five key restrictions on competition: (i) fixed prices, (ii) recommended prices, (iii) advertising regulations, (iv) entry requirements and reserved rights, and (v) regulations governing business structure and multi-disciplinary practices. This analysis found that in a large number of Member States professionals were subject to rules and regulations which imposed fee scales, advertising restrictions and limits on inter-professional co-operation. It concluded that these were serving to restrict competition.

It urged all involved to make a joint effort to review and eliminate those rules which are unjustified. Regulatory authorities in the Member States and professional bodies were invited to voluntarily review existing rules taking into consideration whether those rules are necessary to attain the relevant public interest objective, and whether they are proportionate and justified. The 2004 Report also promised to report on progress in 2005.

Alongside this voluntary reform process, the Commission and national competition authorities have been carrying out relevant casework using the competition rules to promote change. One example of Commission intervention was against

the Belgian Architect's Association ⁽³⁾. The Commission concluded that the scale of recommended minimum fees operated by the Association was in breach of the EC competition rules because it could facilitate price co-ordination between architects.

2. 2005 Report 'Professional Services — Scope for more reform'

The Commission's progress or follow-up report, 'Professional Services — Scope for more reform' ⁽⁴⁾, was published on 5 September 2005. It consists of two separate documents. The first is a Commission Communication, 'Professional Services — Scope for more reform', and the second, annexed to the Communication, a Commission staff working document, 'Progress by Member States in reviewing and eliminating unjustified restrictions to Competition in the area of Professional Services'.

The Communication gives an overview of progress made by individual Member States in the review and removal of unjustified regulatory restrictions. It also provides details of enforcement action in this sector by national competition authorities and the Commission. It draws conclusions about the pace of reform and proposes a way forward. The Commission staff working document underpins the Communication and provides a detailed analysis of the information collected from Member States on reforms undertaken. It provides a critique of the justifications put forward by Member States for their continuing maintenance of restrictive rules, and highlights best practice.

3. Findings of 2005 Report

The Communication starts by stressing the importance of the sector economically to the EU economy both in terms of jobs and wealth creation and hence, why it is so important to make the sector as competitive as possible by removing regulation that is outdated and anti-competitive. Figures

⁽¹⁾ The Report is available at: http://europa.eu.int/comm/competition/liberal_professions/final_communication_en.pdf

⁽²⁾ Stocktaking Exercise on Regulation of Professional Services — Overview of Regulation in the New EU Member States dated November 2004, can be found at: http://europa.eu.int/comm/com4petition/liberalization/conference/overview_of_regulation_in_the_eu_professions.pdf

⁽³⁾ Decision of 26.6.2004, COMP/38.549 - PO / L'Ordre des Architectes belges, http://www.europa.eu.int/comm/competition/antitrust/cases/index/by_nr_77.html#138_549

⁽⁴⁾ The follow-up report is available at: <http://europa.eu.int/comm/competition/antitrust/legislation/#liberal>

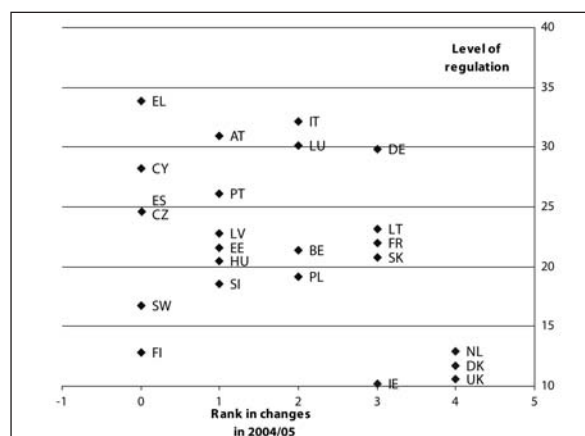
for 2001 show that 'business services' ⁽¹⁾ generated turnover in excess of 1 281 billion Euros, or approximately 8% of total turnover of the EU15 ⁽²⁾. Approximately one third of this can be attributed to 'professional services'. In employment terms, 'other business services' employed almost 12 million people in 2004 ⁽³⁾, or 6.4% of total employment. More competition in the sector would be good for the EU economy, consumers and business by promoting cost-efficiency, lower prices, better quality and new and more innovative services.

The Communication further notes that the Commission's work in this area should be seen within the wider context of the Lisbon Strategy which features improving regulation to promote competitive markets as a key strand of work for the future. The initiative can also be viewed as somewhat of a forerunner of the sector inquiries that have recently been initiated at EU level, aimed at identifying and removing remaining barriers to competition.

The report provides a balanced analysis of progress made by comparing Member States reported reform activity over the past 18 months against levels of existing regulation. The aim is for reported activity to be seen in the context of the level of existing regulation.

It does this using three figures. The first ranks Member States based on substantive reform activity undertaken. The second is an updated regulatory index showing the levels of current regulation across the EU in the six professions under consideration. This index was first produced in the 2004 Report and has been updated to reflect reforms undertaken since February 2004, and to include the new Member States. A third figure combines the data on reform activity and the regulatory index to show progress being made in reducing levels of regulation. This is shown below.

Comparison of Member States' reform activity against level of existing regulation



Note: Malta is not included due to missing information. Data on notaries is excluded for all Member States.

The report describes a mixed picture in terms of reform activity over the last 18 months:

- three Member States — Denmark, the Netherlands and the UK — are making good progress with ongoing reform programmes;
- five countries — France, Germany, Ireland, Lithuania and Slovakia — have made minor reforms and report that analytical work is underway to examine existing regulation;
- six other countries — Austria, Estonia, Hungary, Latvia, Slovenia and Portugal — have made minor reforms;
- four countries — Belgium, Italy, Luxembourg and Poland — have reported only that analytical work is underway; and
- in seven countries — Czech Republic, Cyprus, Finland, Greece, Malta, Spain and Sweden — no reform activity is reported. ⁽⁴⁾

What is particularly noticeable from these findings is that many of those countries with the highest levels of existing regulation, and who have the most to do in terms of reform, fall into the category of doing very little if anything.

The Commission's analysis suggests that progress in many Member States is being hampered by several factors, including a lack of national political support, little appetite for reform from the professions themselves, the weight of tradition and the inability of Member States to see the possibilities

⁽¹⁾ Category 72 'Computer Services and 74 'Other Business Services' of the NACE classification. Category 74 of the NACE classification includes legal, accounting and auditing activities; consultancy; market research; business and management consultancy; management activities of holding companies; architectural and engineering activities and related technical consultancy; technical testing and analysis; advertising; labour recruitment and provision of personnel; investigation and security activities; industrial cleaning and miscellaneous others.

⁽²⁾ Source: Eurostat, 'Developments for turnover and employment indices for services during the third quarter of 2004', Statistics in focus 11/2005. Data refers to the following 14 countries: BE, DK, DE, ES, FR, IE, IT, LU, NL, AT, PT, FI, SE and UK.

⁽³⁾ Source: Eurostat, Labour Force Survey, 2004.

⁽⁴⁾ It should be noted that although no reform activity is reported by Sweden and Finland over the last 18 months, both of these countries already have some of the lowest levels of regulation in the EU due to pro-competitive reforms made over the last two decades, and therefore have less to do in terms of reform.

for reform. It highlights the need for a partnership approach to reform between all players — national governments, regulators and competition authorities, and the professions themselves.

The Communication notes that the majority of national competition authorities, along with the Commission, are now actively engaged in promoting change. A range of work is being undertaken, such as a study by the Polish competition authority ⁽¹⁾ on factors hindering competition in five professions, and a report by the Irish authority ⁽²⁾ on restrictions affecting competition in the legal profession. Other authorities are engaged in detailed analytical work to examine existing regulation and identify areas in need of reform. The national competition authorities are also actively applying the EC competition rules to cases in their countries. Eleven cases are reported as being opened in the six professions selected for study since the publication of the 2004 Report. These developments are particularly important given that the vast majority of competition restrictions in this sector have

their origin and effect in a single Member State, and are therefore best dealt with by national competition authorities at national level rather than by the Commission.

4. What next?

The Communication concludes by calling on Member States to take urgent action to reform this sector. In practical terms, this means Member States taking national political responsibility for driving forward reform. To help with this it suggests that the issue of modernising the rules affecting the professions should be built into the National Reform Programmes for implementing the Lisbon Strategy. This will serve to give the initiative greater direction and political backing. The Commission itself will continue to act as facilitator, helping to spread best practice. It leaves open the possibility of the Commission taking further appropriate enforcement action using the EC competition rules.

⁽¹⁾ The report is available at: http://www.uokik.gov.pl/pl/ochrona_konkurencji/analizy_rynku/

⁽²⁾ The report is available at: http://www.tca.ie/professions/legal_report_executive_summary.pdf

Commission prolongs the consortia block exemption regulation in maritime transport

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A consortium is a grouping of shipping lines which co-operate to provide joint maritime cargo transport services. Such co-operation usually allow shipping lines to rationalise their activities and achieve economies of scale, thus improving the productivity and quality of liner shipping services. Provided the consortia are faced with sufficient competition, those advantages benefit exporting firms, the customers of shipping lines. Therefore the consortia block exemption automatically covers consortia which have a market share of below 30% on any market on which they operate (or 35% if operated outside a liner conference). Consortia exceeding the market share limits would not necessarily be unlawful, but would have to be assessed as to their compatibility with competition rules, notably Article 81(3), on an individual basis.

The consortia block exemption regulation was first adopted in 1995 and has been renewed in 2000. In May 2004, the Commission published a consultation paper with a view to renew the block exemption for another five years ⁽¹⁾. Hence, on 20 April 2005 the Commission adopted Regulation (EC) No 611/2005 ⁽²⁾ amending the block exemption regulation for liner shipping consortia ⁽³⁾. The amending regulation prolongs the block exemption until 2010 and introduces some minor changes to two rather technical provisions.

The consortia block exemption is closely linked to the block exemption for liner shipping conferences (Council Regulation (EEC) No 4056/86 ⁽⁴⁾).

In 2004, the Commission has published a White Paper ⁽⁵⁾ in which it proposes to consider repealing the block exemption for liner conferences. Due to the close links between the two block exemptions, the Commission believed that it is neither necessary nor appropriate to introduce substantial modifications to the consortia block exemption before the end of the legislative process concerning the conference block exemption.

The two amendments to the consortia block exemption regulation that have nevertheless been introduced by Regulation 611/2005 are not related to the review process of the conference block exemption. The amendments allow a consortium member to withdraw from a consortium agreement without financial penalty after an initial period of up to 24 months, an extension of 6 months compared to the current regime. In addition, this initial period now also applies where the parties to an existing agreement have agreed to make a substantial new investment in the maritime transport services offered by the consortium. Such an investment is considered substantial when it constitutes at least half of the total investment made by the consortium members. Finally, one of the basic conditions for the grant of exemption to a consortium, that is the existence of effective price competition within the consortium, has been amended: 'Individual confidential contracts' may now also be taken into consideration to demonstrate the existence of such competition.

⁽¹⁾ http://europa.eu.int/comm/competition/antitrust/others/consult_823_en.pdf

⁽²⁾ OJ L 101, 21.4.2005, p. 10.

⁽³⁾ Commission Regulation (EC) No 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia); OJ L 100, 20.4.2000, p. 24. Regulation as last amended by Regulation (EC) No 463/2004 (OJ L 77, 13.3.2004, p. 23).

⁽⁴⁾ OJ L 378, 31.12.1986, p. 4.

⁽⁵⁾ <http://europa.eu.int/comm/competition/antitrust/others/maritime/review/en.pdf>

Competition between stock exchanges: findings from DG Competition's investigation into trading in Dutch equities

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In May 2004, a new episode in competition between European equity trading platforms opened with the launch by the London Stock Exchange (LSE) of an alternative service for trading Dutch equities to the incumbent exchange, Euronext. After implementing two rounds of price reductions, however, Euronext was able to hold on to almost all of its market share of about 98%. In order to ensure that competition in trading was not hampered from the start through anti-competitive behaviour by the incumbent exchange, in July 2004 the Commission launched an *ex officio* investigation under article 82 into the circumstances of Euronext's response, with a series of surprise inspections.

In September 2005, it was decided to close the case without action. Nonetheless, the investigation was useful to clarify several key issues concerning competition in this rather complex field. In this article we set out the case team's thinking on the key facts of the case, on the understanding, of course, that, since no decision was adopted in the case, these orientations do not constitute a precedent for the future.

Facts of the case

The case concerned potential pricing and other exclusionary abuses by a company with almost 100% of the market up to that point, with the aim of preventing loss of market share following entry by a competitor. This could have led to a lessening of competition, ultimately to the detriment of investors and consumers.

Prior to LSE's challenge, Euronext implemented a digressive fee schedule based on number of trades executed, making use of pricing packages (similar to mobile phone package pricing). Prices in 2004 had been harmonized on all Euronext exchanges, meaning a net increase for many in the Netherlands some of whom collectively encouraged LSE to enter the market. Euronext implemented two rounds of reductions in their trading fees in the form of temporary rebates prior to the launch of the LSE's Dutch Trading Service (DTS). These reductions were limited to operations on Dutch securities.

The first set of price cuts — announced in April 2004 and valid till January 2005 — reduced the price for liquidity providers, with somewhat greater benefits going to larger members. Liquid-

ity is provided to markets mainly by brokers (principally the large investment banks) in the form of offers to buy or sell securities in a given volume at a given price. These brokers enable investors to trade immediately, and make their profits on trading fees and on the spread between the buy and sell prices.

The second scheme — announced just prior to DTS launch in May 2004 and valid until the end of July — reduced prices for liquidity takers, with no distinction as to size. Liquidity is mainly taken from markets by brokers acting on behalf of fundamental traders, i.e. investors. Banks dealing with retail investors are particularly likely to take liquidity. They may also take liquidity in the process of unwinding trades which they have internalized.

Market definition and dominance

The case team took the view that the relevant market for the purposes of article 82 should be defined as the market for on-exchange trading services in Dutch equities. More precisely, it considered that this consisted of a bundled offering by the incumbent exchange of trading services in relation to a range of instruments, and that in each case it was necessary to distinguish between the offering to suppliers and demanders of liquidity in that instrument, since the former create externalities (both for the exchange and for investors) whilst the latter consume these externalities. Trading services in a particular instrument constitute, therefore, a two-sided market, while the exchange as a whole realizes economies of scope by offering trading in a variety of instruments given that demand and supply of liquidity in the class of Dutch equities is intermediated by a set of members of the exchange who typically trade in most of the instruments offered. Potentially, however, a rival could capture liquidity in a single instrument without doing so across the board.

Several candidates for inclusion in the relevant market were considered and dismissed. Firstly, direct trading between market participants, without the use of an intermediating system, was considered not to involve the supply of any competing service to that offered by the exchange and, as such, only to affect the elasticity of demand for exchange services and not the market definition itself. The same was true of internalized trading,

whereby brokers offset buy and sell trades on their own books rather than passing them through to the exchange. This corresponds to a general principle that self-provision of a service which is not offered as a rival to an existing commercial service cannot widen the definition of the relevant market, even if it clearly influences the monopoly output and price.

In respect of alternative trading systems, the case team reasoned that the services available in the Netherlands, whilst they might provide a marginal competitive restraint on Euronext, left it with considerable market power. Taking the post-entry price as a proxy for the competitive one, it would clearly be in the interests of a hypothetical monopolist to raise prices from this back to the pre-entry level if he could do so. Similarly, on the face of the market data it seemed very unlikely that the lowering of prices had attracted any significant additional business onto the exchange which had previously been carried out using alternative systems, although a strict proof of this proposition would seem rather difficult to obtain because of the number of relevant variables that would need to be modeled and the lack of control environments. The regulated nature of an exchange, best execution requirements on brokers and the concentration of liquidity on the exchange's order book are all factors which differentiate exchanges from alternative systems and make it likely that customers in many cases do not have a viable alternative to the exchange.

The case team considered that the geographic market was the EU or wider. The services provided by Euronext for trading Dutch equities are consumed by entities (broker-dealer banks) domiciled in a number of member states. In this sense, the 'nationality' of the instrument traded is irrelevant to the market definition.

In respect of a dominance assessment, Euronext's very high market share was combined with the presence of numerous barriers to entry, including regulatory conditions, network barriers, the need for access to fungible clearing and settlement arrangements, the information advantages of incumbency and strategic considerations. The same arguments militate against widening the relevant market on the grounds of supply-side substitutability. Economies of scale and scope and network externalities also give rise to 'natural' monopolies, although these monopolies may be limited in scope and thus take the form of non-overlapping parallel monopolies for as long as markets remain segmented on the basis of the nationality of the firm issuing the security. Under conditions of natural monopoly, the threat of entry

does not typically constrain pricing⁽¹⁾. Finally, the case team found no evidence of sufficient countervailing buyer power in the Dutch market. Most significantly, the observed level of profits achieved by Euronext prior to entry was consistent with the existence of market power rents.

Assessment

The Commission considered the original pricing scheme and the two rounds of rebates by Euronext under the angle of foreclosure and predation. Although Euronext's intent does indeed seem to have been to exclude any significant loss of market share to LSE, the Commission's analysis came to the conclusion that, notwithstanding the lack of any relationship to costs, the pricing mechanisms employed could not be qualified as abusive for the following reasons:

- a) There are good reasons in this case to believe that a digressive fee schedule is welfare enhancing. This is because it stimulates marginal trading, making markets more liquid (with macroeconomic externalities on cost of capital and enhanced return to risk-equivalent investments). This form of pricing existed prior to LSE's entry, and is, furthermore, also used by most other exchanges.
- b) There was no evidence of individual targeting in the rebates, or of 'retroactivity' (i.e. they are just rebates on marginal prices and not on total sales). This applies both to their design and to their actual impact as observed ex-post.
- c) The selection which is operated in the rebate schemes is primarily between liquidity providers and liquidity takers, which can be viewed as differentiated pricing in a two-sided market. On the two sides of the market, incentives, and hence elasticity of demand, are indeed quite different, making this an economically defensible pricing strategy.
- d) In this industry, fixed costs are high while variable costs are close to zero. This raises the question of what the relevant standard might be for predation. Whether or not Euronext incurred avoidable losses also runs up against the question of what the relevant counterfactual is, given that they feared migration of the entire market. Under any reasonable standard, we concluded that Euronext's prices could not be deemed predatory. Euronext continued to make significant — if reduced — profits at the new prices. In addition, as long as DTS remains

⁽¹⁾ Cf. M. Motta, *Competition Policy*, 2004:74, drawing on Baumol, Panzar and Willig, *Contestable Markets and the Theory of Industrial Structure*, New York 1982.

in the market, Euronext has no perspective to recuperate the profits foregone. Intervention would risk sending a signal that dominant companies cannot cut prices, especially since there is no obvious clue in the literature or case law as to how to calculate a minimum price that Euronext should have respected.

- e) Most banks had already incurred the sunk costs of connecting to DTS, although they may have been dissuaded from investing in more sophisticated order routing tools. Many of them also did (and still do) actually trade on DTS in addition to Euronext, even though such trading remains marginal overall.
- f) LSE — whose launch offer for DTS was substantially below its UK prices — might have cut prices still further, and if it did not do so, this was probably out of strategic considerations (fear of provoking a price war from Euronext in their domestic market) which did not arise out of Euronext's reaction but characterized the market even prior to entry. For this reason also, a story relying on the precedent value of Euronext's reaction in deterring entry on other markets was not considered convincing.

General issues

The following general points from the investigation are also worth noting:

- a) The case team rejected the theory that competition between exchanges is impossible because of network effects which favour the incumbent — we concluded that these might be overcome under appropriate conditions, notably by technology.

- b) Whilst competition between exchanges has positive welfare effects, because of the position of clearing and settlement organizations it does not eliminate monopoly profits from the trading value chain. These are potentially a more serious source of welfare losses.
- c) There is a risk that operators whose home market is protected from entry (e.g. due to customized clearing arrangements) might be able to conquer foreign markets without this leading to the most efficient outcome. This argues that there is a need for a systemic approach to enabling competition in the sector.
- d) The clearinghouse, in this case, seems to have been willing to allow competition at the trading level notwithstanding the importance of the incumbent exchange both as a shareholder and as a customer. This might be explained by the fact that its own position in the value chain would be more difficult to dislodge if not tied to a single exchange.

As a postscript, the conclusion that competition between exchanges is possible and under some circumstances welfare enhancing does not imply it is to be expected (due to coordinated effects), nor does it exclude that the consolidation of exchanges may have greater welfare effects. It does not, therefore, identify an ideal model for a European capital market or a process to get there. It does, however, underline that inefficiencies in current arrangements are significant and that there is potential to generate welfare gains of a macroeconomic order from eliminating some of these inefficiencies.

Application of EC antitrust rules in the sport sector: an update

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This article concerns the application of EC anti-trust rules to the regulatory aspects of sport and sports activities, excluding broadcasting of sports events and distribution of sports goods. It provides an overview of the way in which the Commission applies Articles 81 and 82 of the EC Treaty to the sport sector in the light of existing jurisprudence and the Commission's decision-making practice.

1. Recent Court rulings

Recently, two interesting decisions were taken by the Court of First Instance ('CFI') in the field of sport. Since these decisions are subject to appeals, it remains to be seen what final position the European Court of Justice ('ECJ') will take in these cases.

1.1. Anti-doping rules in swimming

The *Meca-Medina* ⁽¹⁾ judgment was the first one where the CFI has stated that EC competition rules are applicable to sport. Sport cases previously decided by the CFI and ECJ all concerned the application of the EC Treaty provisions on the economic freedoms, such as free movement of persons or services.

In *Meca-Medina* two professional long distance swimmers had brought an action before the CFI, challenging the rejection decision concerning their complaint filed with the Commission in May 2001. ⁽²⁾ In their complaint to the Commission, the sportsmen challenged the compatibility of the anti-doping rules adopted by the International Olympic Committee ('IOC') and implemented by the swimming governing body FINA ('Fédération Internationale de Natation Amateur'), with Articles 81 and 82 of the EC Treaty. In particular, they contended that the definition of doping, the thresholds for defining the presence of a banned substance as doping and recourse to the Court of Arbitration for Sport (CAS) restrict competition and swimmers' freedom to provide services. The

Commission rejected the complaint stating, inter alia, that anti-doping rules were not caught by Articles 81 and 82 of the EC Treaty.

The CFI from the outset stated that even though the case-law on sport so far concerned the application of the provisions on free movement of persons and services, the same principles are valid also for the application of EC competition rules to sport. The CFI reiterated that EC Treaty rules are applicable to sport only in so far as it constitutes an economic activity. The anti-doping rules' did not pursue any economic objective, but was intended to preserve the spirit of fair play, a cardinal rule of sport. This objective of the anti-doping rules was said to be 'purely social'. In addition, these rules aim at protecting the health of athletes. These considerations put the anti-doping regulations out of reach of the limitations imposed by the provisions on competition. However, the CFI stated that although pure sporting rules cannot be caught by the Treaty provisions, it is true only in so far as those rules are not discriminatory and excessive. ⁽³⁾ Rules that discriminate or are excessive do not achieve their proper objective. However, this was not the case here.

1.2. Football players' agents

In the *Piau case* ⁽⁴⁾, the CFI upheld another Commission decision which concerned a complaint by Mr Piau against FIFA ('Fédération Internationale de Football Association') which the Commission had rejected. The case concerned FIFA rules governing the profession of football agents (in professional football, players may conclude contracts with the clubs through their agents). A contract in such case is valid only if the agent involved has a licence for his practice issued by the national football association, following the rules adopted by FIFA. In order to become a licensed agent, a person had to pass an interview, have an impeccable reputation, and deposit a bank guarantee worth approximately € 136,000 (200,000 Swiss francs). Mr Piau challenged the rules, arguing that they imposed a restriction on free competition with regard to services, and alleging that the rules

⁽¹⁾ Case T-313/02, *David Meca-Medina and Igor Majcen v Commission*, September 30, 2004, Fourth Chamber of the Court of First Instance.

⁽²⁾ COMP 38.158, non-confidential version of the decision is available in French only at <http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/38158/fr.pdf>. Press release IP/02/1211.

⁽³⁾ See par. 49 and 54-55.

⁽⁴⁾ Case T-193/02, *Laurent Piau v. Commission*, Judgment of 26 January, 2005.

restricted access to the profession by imposing obscure examination procedures, requiring a bank guarantee, and imposing sanctions.

On the basis of the complaint, the Commission initiated an investigation, in the course of which FIFA amended its rules by removing the most restrictive limitations (deposit was substituted by liability insurance, interview was replaced with a multiple-choice test, etc.). Since the initial concerns of the Commission were removed in that the amended rules were objective and transparent, the complaint was rejected for lack of Community interest, and the decision subsequently appealed to the CFI.

It was not questioned whether football clubs could be seen as undertakings within the meaning of EC competition rules, as the economic nature of their activities is rather evident. The CFI, however, accepted as well that as a grouping of clubs, national football associations are associations of undertakings in terms of Article 81 of the EC Treaty. Besides this, the associations carry out certain economic activities on their own, such as the sale of broadcasting rights or collecting revenues from sporting events, which, according to the CFI makes them 'undertakings' within the meaning of Article 81 just like the clubs. This in turn makes FIFA, a grouping and emanation of national football associations, subject to Article 81 of the EC Treaty as an association of undertakings. ⁽¹⁾

As opposed to *Meca-Medina* where anti-doping rules were seen by the CFI as purely sporting rules and hence falling outside of the scope of application of the Treaty provisions, FIFA rules concerned were considered to regulate an 'economic activity involving the provision of services'. The aim of a football agent is to introduce for a fee a player to a club or clubs to each other with a view of employment, which clearly does not pursue a purely sporting interest. In addition, as FIFA was not conferred the authority to adopt such rules in the general interest of sport by any public authority ⁽²⁾, the regulations under scrutiny do not fall within the scope of the freedom of internal organisation which is enjoyed by sports associations in general. The CFI questioned the legitimacy of FIFA's right to regulate the profession of football agents, a profession which is not specific to sport and which is of unequivocally economic nature, in general. However, further analysis was set aside as the CFI stated that the players' agent profession needs to be supervised by some authority, which, due to the absence of national laws in this respect

and internal self-regulation among the agents does not otherwise exist. The CFI upheld the Commission's conclusion that the rules in question did not produce anti-competitive effects, as the most restrictive rules have been modified by FIFA. The CFI also agreed with the Commission that, even if such anti-competitive effects existed, they could benefit from the exemption under Article 81(3) of the EC Treaty.

Finally, in respect of Article 82 of the EC Treaty, the Commission decision stipulated that FIFA did not hold a dominant position in the market for players' agents' services. However, the CFI considered that FIFA, as the emanation of the national associations and the clubs — the actual buyers of the services of players' agents — did operate on this market through its members, and that it held a dominant position. The CFI stated that an abuse could not be established, relying essentially on the same arguments as those used in relation to Article 81(3) of the EC Treaty. The CFI thus agreed with the conclusion in the Commission's decision according to which there was no infringement of Article 82 of the EC Treaty.

2. Existing jurisprudence on the application of EC law in the sport sector

Most decisions by the European courts have been based on EC law concerning the free movement of workers. Already in the 1970's, the Court of Justice ruled in *Walrave* and *Donà* ⁽³⁾ that sport was subject to Community law where it constituted an economic activity. This has been confirmed by the Court on several occasions later on.

The *Bosman* ⁽⁴⁾ ruling has played a significant role in guiding the Commission in its development of competition in the sports sector. This ruling confirmed that sport is subject to all relevant EC Treaty provisions as regards the economic activities it generates, and that those provisions could be applied on the basis of general principles taking into account certain special characteristics of the sector. In particular, the Court recognised as legitimate the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results, and of encouraging the recruitment and training of young players. The Court also reaffirmed that the free movement of workers provision does not apply to rules of a non-economic nature which exclude, for sporting reasons, foreign players from certain football

⁽¹⁾ *Id.*, see par. 72.

⁽²⁾ Which would be the case e.g. in the regulation of the profession of lawyers by the national bar association.

⁽³⁾ Case 36/74 *Walrave and Koch v. Union Cycliste Internationale* [1974] ECR 1405 and case 13/76 *Donà v. Mantero* [1976] ECR 1333.

⁽⁴⁾ Case C-415/93 *URBSFA v. Bosman* [1995] ECR I-4921.

matches, such as those between national teams of different countries, provided always that the restrictions concerned remained limited to their proper objectives ⁽¹⁾.

In *Lehtonen* ⁽²⁾, the Court considered that the setting of deadlines for transfers of (basketball) players may meet the objective of ensuring the regularity of sporting competitions. In order to be justified, this type of rules defined by sporting organisations may not go beyond what is necessary to achieve the legitimate aim pursued. In this case, this was the proper functioning of the championship as a whole.

The Court confirmed in *Deliège* ⁽³⁾ that the selection rules applied by a federation to authorise the participation of professional or semi-professional athletes in an international sports competition inevitably limit the number of participants. Such a limitation does not in itself restrict the freedom to provide services, if it derives from an inherent need in the organisation of the event in question.

It follows from these cases that EC law does not prohibit, in principle, sporting bodies from setting the framework for the way in which the sport is organised and practiced, even if this would have some secondary effects on the freedom of economic actors.

3. Application of EC competition law in the sport sector

3.1. General principles

As explained by the CFI in *Meca-Medina*, referred to above, EC competition law is applicable to economic activities generated by sport. In applying competition rules to sport-related economic activities, the Commission follows a number of general principles, which are described below.

Taking account of the special characteristics of sport

For the purposes of applying EC competition law, sports federations, clubs etc. are considered as undertakings only to the extent that they are carrying out economic activities. This is not different from other sectors. However, when these sport-

ing entities are engaged in economic activities, the Commission, in its assessment of the scope of application of EC competition rules, has taken into account notably the following factors:

- interdependence between sporting adversaries, which is a feature that is different from other industry or service sectors;
- the need to maintain a balance between the sporting adversaries (the so-called principle of solidarity);
- the need to preserve uncertainty as to results; and
- the degree of equality in sporting competitions; such as. certain rules in professional football, which aim at ensuring that smaller clubs are rewarded for their investment in training.

The *Lehtonen* case referred to above is a good example where the Court took account of this type of factors, e.g. the need to ensure the integrity of competitions. When assessing such rules, the Commission tends to look whether they are proportionate to the objectives pursued. Hence, the Commission considers that these rules are likely to fall outside Article 81(1) of the EC Treaty or likely to be exempted under Article 81(3) provided they do not go beyond what is strictly necessary to achieve that objective.

Applying the EC competition rules in a manner which does not question the regulatory authority of sporting organisations vis-à-vis genuine 'sporting rules'

Traditionally, a single federation exists to regulate a given sport and usually the international federation is officially recognised by the IOC. Regulations and rules drawn up by sports federations which lay down rules without which a sport could not exist, i.e. rules which are inherent to a sport or which are necessary for its organisation or for the organisation of competitions, should not, in principle, be subject to the application of EC competition rules. Such genuine sporting rules that are applied in an objective, transparent and non-discriminatory manner do not constitute restrictions of competition. This approach is in line with the judgement in the *Deliège* case, referred to above.

Preserving the social and cultural functions of sport

The draft Treaty on establishing a Constitution for Europe includes an article on sport according to which the European Union recognises the specific nature of sport and its social and educational function (Article III-282, section 5). This is already affirmed in the Declarations on sport annexed to the Treaties of Amsterdam and Nice, preceded by

⁽¹⁾ The following two cases concern the extension of the *Bosman* jurisprudence as regards the application of the non-discrimination principle to competitions between clubs: C-438/00 *Deutscher Handballbund eV v Maros Kolpak* [2003] ECR I-04135 and C-265/03 *Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* (OJ C 132/9 of 28 May 2005).

⁽²⁾ Case C-176/96 *Lehtonen et al v. FRSB* [2000] ECR I-2681.

⁽³⁾ Case C-51/96 and C-191/97 [2000] *Deliège v. Ligue de Judo* ECR I-2549.

the Commission's 'Helsinki Report on Sport'⁽¹⁾. The Commission therefore considers it appropriate to apply the competition rules in a way which preserves the essential social and cultural benefits of sport. In this context, certain exemption from the competition rules may, under certain circumstances, be justified if necessary to retain those benefits, e.g. arrangements which provide for a redistribution of financial resources to, for example, amateur levels of sport.

3.2. Decisions of the Commission

The cases where the Commission has applied Articles 81 and 82 of the EC Treaty in the sport sector can broadly be divided into two main areas: rules and regulations adopted by sporting federations on the one hand, and ticketing arrangements for major sports events on the other:

3.2.1. Regulation of sport

The principles indicated above have been applied by the Commission in assessing alleged restrictions of competition in the sport sector, as demonstrated by several decisions:

Multiple ownership of sporting clubs

In June 2002, the Commission closed its investigation concerning the rules of the Union of European Football Associations ('UEFA') which prevented a company or individual from directly or indirectly controlling more than one of the clubs participating in a UEFA club competition⁽²⁾. This case was initiated following a complaint which the Commission rejected. After careful analysis, the Commission concluded that although this UEFA rule was theoretically caught by the prohibition under Article 81(1) of the EC Treaty, it could be justified by the need to guarantee the integrity of sporting competition. The purpose of the UEFA multi-ownership rule was not to distort competition, but to guarantee the integrity of the competitions it organised, and in any case the limitation on the freedom of action of clubs and investors which the rule entailed did not extend beyond what was necessary to ensure the legitimate aim of preserving uncertainty of the results in the interest of the public. It follows from this decision that a rule may fall outside the scope of competition rules despite possible negative business effects, provided the rule is proportionate to the objectives pursued and is applied in a non-discriminatory way.

'Home and away' rule

The Commission adopted a decision in 'the *Mouscron* case'⁽³⁾ rejecting a complaint against UEFA concerning the UEFA Cup rule whereby each club must play its home match at its own ground. According to the Commission, this is a sports rule that does not fall within the scope of EC competition rules.

Some other important cases that were investigated by the Commission under EC competition rules ended in settlements with the parties, i.e. without formal decisions:

Formula One and other four-wheel motor sports

After several years of investigation of the Fédération Internationale d'Automobile ('FIA') and the companies involved in Formula One and other international motor racing series, the Commission closed the case after having reached a settlement in 2001⁽⁴⁾. This settlement was the result of lengthy discussions following the Statement of Objections that the Commission addressed to FIA in 1999⁽⁵⁾. In particular, the settlement provided that FIA would:

- limit its role to that of a sports regulator without influence over the commercial exploitation of the sport and thus removing any conflict of interest; and
- guarantee access to motor sport to any racing organisation that meets the requisite safety criteria and to no longer prevent teams and circuit owners to participate in other races.

The Commission's monitoring of the compliance by FIA/Formula 1 with the conditions of the settlement ended officially in October 2003⁽⁶⁾.

International transfer of football players

Following long discussions with the FIFA and UEFA, the Commission closed its investigations of the rules governing international transfers of football players ('transfer rules') in 2002⁽⁷⁾. The investigation was triggered by several complaints concerning the (1997) transfer rules, which were also subject of a Statement of Objections sent to FIFA in 1998. This led to discussions between the Commission and the parties, which were finalised in 2001 and formalised in an exchange of letters between the President of FIFA, Mr Blatter and Commissioner Monti. FIFA committed itself to modify its transfer rules on the basis of certain principles. Following the entry

⁽¹⁾ COM (1999) 644.

⁽²⁾ IP/02/942 of 27 June 2002.

⁽³⁾ IP/99/965 of 9 December 1999.

⁽⁴⁾ IP/01/1523 of 30 October 2001.

⁽⁵⁾ IP/99/434 of 30 June 1999.

⁽⁶⁾ IP/03/1491 of 31 October 2003.

⁽⁷⁾ IP/02/824 of 5 June 2002.

into force of the modified transfer rules in 2001, some complaints were withdrawn and the Commission rejected the remaining two (these two rejections of complaints were not appealed to the Court).

The main principles agreed upon during the discussions with FIFA and UEFA were:

- Measures to support the training of players, e.g. through training compensation for young players and a solidarity mechanism in order to redistribute a significant proportion of income to professional and amateur clubs involved in the training of a player;
- Establishing a transfer period per season;
- Specification of contractual arrangements between players and clubs, e.g. regulating duration of contracts and specifying when breaches of contracts are possible (including sanctions);
- Setting up of an arbitration body (dispute settlement system) with equal representatives of players and clubs; and
- Clarifying that arbitration is voluntary and does not prevent recourse to national courts.

It may be noted that FIFA has recently modified again its transfer rules, which entered into force in July 2005.

3.2.2. Ticketing arrangements for sports events

Another aspect of the sport sector which the Commission has looked into is ticketing arrangements for major sports events. Though mostly the same issues arise here as in ticketing arrangements for other events, there are some specificities in sports events which are mainly related to security and supporter segregation.

In assessing ticketing arrangements, the Commission has taken as its guiding principle that these arrangements should ensure that all consumers in the EEA have reasonable access to entry tickets. Particular attention has therefore been paid to territorial restrictions on ticket sales ⁽¹⁾ — taking into account the security issue —, package deals, hospitality arrangements and price restrictions. As far as package deals are concerned, accommodation and travel can be offered with tickets but access to tickets should not be made conditional on the purchase of other services. In addition, retail prices

⁽¹⁾ Ticket sale arrangements for the 1998 World Cup in France was subject of a Commission decision of 20 July 1999 (OJ L 5/55 of 8 January 2000) under Article 82 of the EC Treaty where the organising committee was considered to have imposed unfair trading conditions which discriminated against non-French residents.

for the tickets should be published separately from the prices for all related travel and accommodation charges. Finally, with regard to minimum prices for tickets, ticket distributors who do not act as agents but bear their own financial risk, should be allowed to sell tickets at a price below their face value.

Credit card exclusivity

The Commission has also examined credit card exclusivity arrangements in two cases: the VISA exclusivity for ticket sales via Internet for the Athens Olympic Games in 2004², and the MasterCard exclusivity for direct sales by the German Football Association (DFB) of tickets for the World Cup 2006.

Athens Olympic Games

In the Athens Olympic Games, tickets ordered via the Internet directly from the organising committee ('ATHOC') could only be paid for with VISA cards. DG Competition services took the view that this exclusivity did not constitute an infringement of Articles 81 or 82 if consumers had reasonable access to tickets via alternative sales channels that did not require payment with VISA card. Such an alternative supply channel for the general public was available in that tickets could be bought from any National Olympic Committee in the European Economic Area ('EEA'). Extensive market testing by the Commission confirmed that other payment methods were accepted in those sales channels. Where market testing proved that access to tickets was difficult, ATHOC agreed to make changes essentially by considerably improving the information to consumers on all options for the purchase of tickets and by intervening with the National Olympic Committees. The steps taken by ATHOC were considered satisfactory and the Commission did not receive any complaints on this issue. The case was subsequently closed without a decision.

Football World Cup 2006

This case was triggered by a complaint from a UK consumer organisation 'Which?' in March 2005 against FIFA, the German Football Association ('DFB') and MasterCard. When assessing the MasterCard exclusivity arrangements for tickets intended for the general public for the World Cup 2006, DG Competition followed the same guiding principle as in the Olympic Games case,

⁽²⁾ The VISA exclusivity issue was handled under an ex-officio procedure (Case COMP/38703), separately from the notification of the ticket sale arrangements for the Athens Olympic Games.

i.e. there should be reasonable access to tickets for all consumers in the EEA. In this respect it is worth noting that there are considerable differences between the two events. As opposed to the Olympic Games, the demand for the World Cup tickets intended for the general public as usual greatly exceeds the supply. Moreover, while most tickets for the World Cup are sold directly by the organising committee DFB, only half of the tickets for the Athens Olympic Games were sold by ATHOC, the other half was sold by the National Olympic Committees.

Direct ticket sales by DFB for the World Cup 2006 could be paid for with MasterCard credit card, direct debit from a German bank account or international (cross-border) bank transfer. However, in the latter case, there were allegedly significant costs for consumers particularly in countries outside the Eurozone, such as the UK. In light of the enormous demand for tickets and the importance of direct sales by DFB, DG Competition services were of the opinion that there needed to be a viable alternative to the direct sales by DFB to ensure reasonable access to tickets for the World Cup 2006 for those consumers who do not possess a MasterCard product. This alternative could take the form of (i) other payment forms for direct sales by DFB (i.e. more than one credit cards and/or bank transfers without dissuasive additional costs for the consumers) or (ii) other sales channels for which there is no credit card exclusivity.

Following discussions with DG Competition services, FIFA, DFB and MasterCard introduced changes in the ticket sale arrangements whereby more payment methods were accepted as of the Second Ticket Sales Phase which began on 2 May 2005. Fans based in non-Eurozone countries in the EEA could now pay for tickets by making a domestic bank transfer in their local currency. This added another payment method to the three payment methods that were already available. Consumers were informed of these modified arrangements and of the different ways of obtaining tickets on the web-site of the event. FIFA and DFB also took the initiative to make the enhanced payment arrangements available retroactively for the tickets sold during First Ticket Sales Phase, thus providing a consumer friendly and cost effective payment method for all ticket purchasers. In the light of these changes, the complaint was withdrawn and the case has been closed without a decision.¹

4. Conclusion

After the peak of cases at the end of the 1990's triggered by the *Bosman* ruling, the number of sports cases brought to the Commission under EC anti-trust rules has stabilised. Most anti-trust cases at present are complaints against rules or practices of international sports federations. In addition to their regulatory functions, these federations are often active in the market for the organisation of sporting events as well, either by laying down rules which member associations or clubs are required to follow, or by organising events directly themselves. With the increasing commercialisation and growth in the economic dimension of sport, it has become more difficult to distinguish between genuine sporting rules and those rules and/or practices which generate economic activities. While the existence of a single federation overseeing both regulatory and organisational aspects of a sport is common in Europe, it should be borne in mind that other scenarios can also be envisaged.

Since the modernisation of the EC anti-trust enforcement rules in May 2004, which abolished the system of notifications, undertakings, including sporting bodies — in as far as they exercise economic activities (e.g. ticketing arrangements for sports events) — need to ensure for themselves that they comply with EC competition rules. The existing jurisprudence and decisions of the Commission in the field of sport provide useful guidance in this respect. Also, post-modernisation with the direct application of Articles 81 and 82 of the EC Treaty by national courts and national competition authorities, gives the Commission the opportunity to mainly concentrate on cases which bring added value in comparison with the national competition authorities or private enforcement in national courts. These would mainly be cases which would give the opportunity further to clarify the distinction between economic activities generated by sport and genuine sporting rules (i.e. non-economic matters). Also, the Commission will continue to promote private action before courts where this is the most appropriate tool to solve conflicts between clubs / players / sporting federations.

The challenge lies in ensuring free and fair competition while, at the same time, taking into account the specific characteristics of the sport sector. In any event, the assessment whether a given rule or practice infringes the EC competition rules can only be made on a case-by-case basis.

⁽¹⁾ IP/05/519 of 2 May 2005.

The 'Pre-insulated pipes' judgment: the European Court of Justice confirms the legality of the Commission's Guidelines on fines

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Introduction

On 28 June 2005 the Court of Justice confirmed in substance the decision of the European Commission of 21 October 1998 concerning a cartel on the European district heating market ⁽¹⁾ and dismissed all appeals of several undertakings involved. This judgment was of particular importance for the Commission as the highest Community Court confirmed the existence of the cartel and ruled for the first time on the legality of the Commission's Guidelines on fines ⁽²⁾ and, in particular, the method of calculating the amount of fines the Commission has been using in its decisions since 1998.

Background

District heating systems are commonly employed in the more northerly European countries where the climate is severe. Water is heated in a central location and transported via underground pipes through a municipality or district to provide heat to individual residential and commercial buildings.

At the end of 1990 four Danish producers concluded an agreement on general cooperation on their domestic market and, from the autumn of 1991, two German producers regularly participated in their meetings. According to the Commission, it was in that context that negotiations took place leading, in 1994, to an agreement aimed at setting quotas for the whole of the European market. These quotas were allocated by the 'directors' club' (consisting of the chairmen or managing directors of the undertakings participating in the cartel) to each undertaking at both European and national level. The countries concerned included Germany, Austria, Denmark, Finland, Italy, the Netherlands and Sweden.

In 1995, the Swedish undertaking Powerpipe AB reported the situation to the Commission; it com-

plained that its activities on its domestic market were being hindered and that it was being forced from the sector by the cartel's activities.

Following its investigation the Commission adopted on 21 October 1998 a decision in which it established the existence of a series of agreements and practices which had the objectives of dividing the national markets among producers on the basis of quotas, forcing other producers from the sector, agreeing sales prices, allocating projects to pre-designated producers and manipulating tendering procedures and more specifically, hindering the activities of Powerpipe AB (the only substantial undertaking which was not participating in the cartel) in order to drive out a direct competitor.

Furthermore, the Commission stated that what was originally a 'Danish' and subsequently a 'European' cartel had the long-term objective of extending the control of participants to the whole of the European market, which had an appreciable effect on intra-Community trade. For that reason, the Commission, in its decision, imposed on the companies participating in the cartel fines amounting to approximately EUR 92 million in total.

Procedure before the Court of First Instance

In their actions before the Court of First Instance, the undertakings complained of misapplication of Community competition law, infringement of the rights of defence (in particular as regards access to documents) and the procedure for setting the fines.

The actions were almost wholly dismissed by the Court of First Instance ⁽³⁾. However, the fines imposed on two undertakings were reduced, in particular the by far largest fine of EUR 70,000,000 imposed on ABB Asea Brown Boveri Ltd ('ABB'), which had been the ringleader and instigator of the cartel. The Court of First Instance decided to

⁽¹⁾ Decision of the Commission of 21 October 1998 (COMP IV/35.691/E.4 — Pre-insulated pipes, OJ L 24, 30.1. 1999, p. 1).

⁽²⁾ Commission Notice on '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', published in the OJ on 14 January 1998 (OJ C 9, 14.1.1998, p. 3).

⁽³⁾ Judgments of Court of First Instance in Cases T-21/99 *Dansk Rørindustri v Commission* [2002] ECR II-1681, T-9/99 *HFB and others v Commission* [2002] ECR II-1487, T-17/99 *KE KELIT v Commission* [2002] ECR II-1647, T-23/99 *LR AF 1998 v Commission* [2002] ECR II-1705, T-15/99 *Brugg Rohrsysteme v Commission* [2002] ECR II-1613, T-16/99 *Lögstör Rör v Commission* [2002] ECR II-1633, T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881.

reduce the fine of ABB to EUR 65,000,000 because it did not dispute its participation in the cartel and had cooperated in providing the Commission with evidence after receiving the statement of objections. With regard to Sigma, a small market player, the initial fine of EUR 400,000 was reduced to EUR 300,000 on the ground that that undertaking only operated on the Italian market and not on the whole of the common market.

Procedure before the Court of Justice

Seven undertakings ⁽¹⁾ subsequently appealed to the Court of Justice. By their appeals these undertakings requested the Court of Justice to set aside the judgments of the Court of First Instance of 20 March 2002 in so far as they were concerned.

The main pleas concerned certain alleged breaches of the Rules of Procedure of the Court of First Instance, the liability of an undertaking for the anti-competitive conduct of another undertaking, the determination of the amount of fines and also the breach of the right to be heard and of the obligations to state reasons.

In its judgment of 28 June 2005 ⁽²⁾ the Court of Justice dismissed all appeals and fully upheld the judgments of the Court of First Instance.

Importance of the judgment/ Main points

In its judgment the Court of Justice confirmed for the first time the legality of the Commission's Guidelines on fines of 1998 and, in particular, the application of the method of calculating the amount of fines.

Whereas the appellants claimed in essence that they were entitled to derive a legitimate expectation from the Commission's previous decision-making practice in calculating the amount of fines, as it was at the time when the infringements were committed, the Court of Justice confirmed the observations of the Court of First Instance which had stated that *'the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in Regulation No17 [...] On the contrary, the proper*

application of the Community competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy.' ⁽³⁾

In this context, the Court of Justice underlined the wide discretion of the Commission in the field of competition policy in particular as regards the determination of the amount of fines ⁽⁴⁾.

Furthermore, on the basis of this reasoning the Court of Justice held that *'undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed. Consequently, the undertakings must take account of the possibility that the Commission may decide at any time to raise the level of the fines.'* Therefore, the new method of calculating fines were *'reasonably foreseeable'* for undertakings, such as the appellants, at the time when the infringements concerned were committed. The principle of non-retroactivity was not violated ⁽⁵⁾.

Moreover, the Court of Justice stated that in setting out in the Guidelines the method which it proposed to apply when calculating fines imposed under Article 15(2) of Regulation 17, the Commission remained within the legal framework laid down by that provision and did not exceed the discretion conferred on it by the legislature ⁽⁶⁾. The Commission is not required, when assessing fines in accordance with gravity and duration of the infringement, to calculate the fines on the basis of the turnover of the undertaking concerned ⁽⁷⁾.

With regard to the application of the Leniency Notice⁸, the Court of Justice held that a reduction can be justified only where the information provided and, more generally, the conduct of the undertaking concerned might be considered to demonstrate *'genuine cooperation'*. ⁽⁹⁾ Only where the conduct of an undertaking revealed such a spirit of cooperation, a reduction may be granted. ⁽¹⁰⁾

Finally, the Court of Justice rejected several complaints relating to a breach of the right to be heard and the obligation to state reasons and clarified or confirmed the law on a number of issues in a way that is favourable to effective anti-cartel enforcement.

⁽¹⁾ Dansk Rørindustri A/S, Hens/Isoplus group (Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH, Isoplus Fernwärmetechnik Gesellschaft mbH, Isoplus Fernwärmetechnik GmbH), KE KELIT Kunststoffwerk GmbH, LR AF 1998 A/S, Brugg Rohrsysteme GmbH, LR AF 1998 (Deutschland) GmbH, ABB Asea Brown Boveri Ltd.

⁽²⁾ Judgement of the Court of Justice in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P.

⁽³⁾ Point 169.

⁽⁴⁾ Point 172.

⁽⁵⁾ Point 229.

⁽⁶⁾ Point 252.

⁽⁷⁾ Point 255.

⁽⁸⁾ Notice on the non-imposition or reduction of fines in cartel cases (OJ C 207, 18.7.1996, p. 4).

⁽⁹⁾ Point 395.

⁽¹⁰⁾ Point 396, 399.

Merger Control: Main Developments between 1 May and 31 August 2005

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Recent cases — Introductory remarks

Between 1 May and 31 August the Commission received 113 notifications, an increase of over 15% compared to the previous four months and of more than 20% over the comparable 2004 period. The Commission adopted 100 final decisions in the trimester, up 10% from the previous period and nearly 20% from the comparable period in 2004. Of this total 87 transactions were cleared unconditionally under Article 6(1)(b) and 7 were cleared with conditions and obligations pursuant to Article 6(2). Of the unconditional clearances 50 were cleared in accordance with the simplified procedure. The Commission adopted four decisions after second phase investigations, two of the transactions concerned were cleared unconditionally (Article 8(1)) and two were cleared subject to conditions and obligations (Article 8(2)). There were no prohibitions in the period. One Phase II investigation was opened (Article 6(1)(c)). Also during the period the Commission took two referral decisions pursuant to Article 9. The most important decisions adopted during the period are summarised below or treated in separate articles.

A – Summaries of decisions taken under Article 6

Reuters/Telerate

The European Commission cleared the acquisition of the financial data provider Moneyline Telerate Holding ('Telerate') by its major global competitor, Reuters Limited ('Reuters'). The Commission's review of the operation highlighted competition concerns relating to financial market data platforms ('MDPs'), but the parties were able to address this concern by committing themselves to providing a global exclusive licence for Telerate's MDP product to US Hyperfeed Technologies, a provider of financial market data technology. The Commission worked closely with the US Department of Justice and co-ordinated efforts to find a suitable remedy that fully resolved the competition problem in market data platforms.

Reuters is one of the two main global providers of financial market data and multimedia news tailored for professionals in the financial services, media and corporate sectors. It is particularly strong in

the delivery of money market, equity and equity-related over-the-counter data, Reuters' activities are somewhat complementary to the activities of its major competitor, Bloomberg, which focuses on different asset classes in the financial market data segment and delivers its products without MDPs. Telerate is also a financial market data and news provider on a global scale, focusing on the distribution of real-time market data from many different sources.

The Commission investigated the competitive effects of the proposed transaction on the supply of real-time market data and MDPs. With respect to the former the Commission found no indication that the merger would significantly impede effective competition, since there would be sufficient fiercely competing suppliers in the market post-merger. The investigation did, however, reveal that the merging parties are the only major providers of MDPs world-wide, and that the combination of their proprietary platforms would lead to a nearly uncontested market position in the provision of MDPs. MDPs are the technological means that enable customers of real-time market data to integrate and deliver information from various data vendor sources. In order to remedy this competition concern, Reuters and Telerate proposed to grant a perpetual exclusive global licence for TRS (Telerate's MDP) to Hyperfeed. The licence agreement provides the appropriate legal framework for Hyperfeed to be able to establish itself as a viable and effective competitor to Reuters.

Effective use of the new referral system (Article 4(5) of the new Merger Regulation) allowed the Commission to examine this merger which otherwise would have been reviewed under the laws of twelve Member States.

Novartis / Hexal

The Commission authorised the acquisition of Hexal, a German producer of generic medicines, and its US sister company Eon Labs by Novartis, in a deal which creates the largest European producer of generic medicines. The clearance was subject to a number of conditions intended to safeguard competition and hence the interests of European consumers on a number of markets where the transaction

raised serious doubts. In order to remove the Commission's concerns, the parties undertook to divest four pharmaceutical products.

The operation, as initially notified to the Commission, raised serious competition concerns in the prescribed segment of the calcitonins (H4A) market in Poland, the OTC segment of the topical anti-rheumatics (M2A) in Germany and the prescription segment of the anti-gout preparations (M4A) market in Denmark. In the prescribed segment of the calcitonins market, both Novartis and Hexal have substantial market shares in Poland where their combination would lead to a very high combined market share. Hexal's generic product is considered as a strong generic. The merged entity could benefit from the new market structure by raising its prices.

In the OTC segment of the topical anti-rheumatics market in Germany, the operation would lead to the combination of the leading originator brand 'Voltaren' of Novartis with the leading generic 'Diclac' of Hexal. The Commission's market investigation also revealed that these medicines are seen as each other's closest substitutes by consumers.

In the prescription segment of the anti-gout preparations market in Denmark, the merged entity would have attained a very strong market position with a significant increment of market share. Only one active competitor, with a much smaller market share, would remain on the market.

As a result, the Commission considered that the transaction would give rise to serious doubts.

In order to remove the competition concerns, the parties offered the following commitments:

- as regards calcitonins: to divest Hexal's product Calcihexal in Poland;
- as regards topical anti-rheumatics: to divest Hexal's product Diclac in Germany;
- as regards anti-gout preparations: to divest the Apurin and Allopurinol products of Hexal in Denmark.

The Commission has considered that these commitments are appropriate to remedy the competition concerns. Therefore, subject to the full compliance with the commitments, the concentration has been declared compatible with the common market.

Lufthansa/Swiss

The European Commission has cleared under the EC Merger Regulation the proposed acquisition by German air transport company Deutsche Lufthansa of the Swiss International Air Lines. The Commis-

sion's clearance is conditional upon the parties' surrendering slots to competitors at Zurich and Frankfurt airports to be operated on 17 international routes.

In May 2005, Deutsche Lufthansa AG and Swiss International Air Lines Ltd. signed an agreement whereby Lufthansa will acquire the majority of the shares in, and sole control of, Swiss. Lufthansa, the principal airline in Germany, is a member of Star Alliance. Swiss, created in 2002 on the basis of an existing regional carrier Crossair, is the principle airline in Switzerland and will also join the Star Alliance.

The Commission's investigation, in co-operation with the Swiss Competition Commission, showed that the proposed acquisition by Lufthansa of Swiss would eliminate or significantly reduce competition on a number of intra-European routes, most importantly Zurich — Frankfurt and Zurich — Munich, and on some long-haul routes to the USA, South Africa, Thailand and Egypt. In reaching this conclusion the Commission took into account the impact of Lufthansa's close co-operation with members of the Star Alliance.

To address the Commission's concerns, the parties have committed themselves to surrender slots at the airports of Zurich, Frankfurt, Munich, Düsseldorf, Berlin, Vienna, Stockholm and Copenhagen. This creates the conditions for a total of up to 41 flights a day on the affected routes. In order to encourage market entry, a new operator may acquire so-called 'grandfather rights' over the slots obtained for the Zurich-Frankfurt and Zurich-Munich routes after a confidential period, provided that the new entrant offers the service in this route for at least three years. The aim of such a provision is to increase the value of the slots released, and, thereby, provide additional incentives for competitors to enter these routes.

The undertaking on slots is accompanied by measures requiring the airline partners to refrain during a limited period of time from increasing their planned flights frequencies on the affected routes to give the new entrant(s) a fair chance to establish itself/themselves as (a) credible competitor(s).

It must also be noted that the Swiss national authorities have assured the Commission that they would give traffic rights to other carriers wishing to stop over in Zurich en route to the United States or other non-EU destinations. Furthermore, the Swiss and the German authorities have assured the Commission that they would refrain from regulating prices on long haul routes. This is important because the Commission took into account the

existence of indirect, or network, competition on long-haul routes as a factor moderating the risk of elimination or reduction of competition.

The Commission considers that, subject to full implementation of these various measures, the transaction will not impede competition on the European and international aviation markets.

Wegener/PCM/joint venture

The creation of a joint venture between Dutch newspaper publishers PCM Holding ('PCM') and Koninklijke Wegener ('Wegener') through the combination of some of their newspapers was cleared by the European Commission under the EU Merger Regulation. The joint venture will publish a new national daily with local editions in the Randstad region.

PCM is active in the publishing of regional and national daily newspapers, free sheets, books and the development and sale of educational and professional software in The Netherlands. Wegener is active in the publishing of regional daily newspapers, free sheets and special interest magazines as well as the development and sale of internet products and of graphical products and services in The Netherlands. In the direct marketing sector, Wegener subsidiaries are also active in Belgium, France, the UK and Scandinavia.

The joint venture combines one of PCM's national daily newspapers (Algemeen Dagblad), all its regional newspapers (Rotterdams Dagblad, Rijn en Gouwe and De Dordtenaar) and two of Wegener's regional newspapers (Utrechts Nieuwsblad/Amersfoortse Courant and Haagsche Courant/Goudsche Courant). The operation will result in the publication of a new newspaper, with an innovative 'national-regional' format. Its 19 different editions will have both a common national segment and local news. Outside the Randstad region, a purely national edition will be available. The main focus of the new paper will be on the Randstad region except, for the time being, Amsterdam. The Commission has analysed the impact of the transaction from the point of view of both readers and advertisers.

As regards readers, although the combination of the parties' activities is significant, the impact of the transaction will be limited to the disappearance of PCM as a potential competitor to Wegener with possible regional editions of its national newspapers. However, based on the results of the investigation, the possibility of PCM becoming such a competitor to Wegener does not seem to be very likely.

As for the advertising market, it is expected that Wegener, PCM and the joint venture would together have a market share of around 50% of national advertising in The Netherlands. The transaction raised serious doubts as to the possible alignment of their activities in this market. However, the commitment of the parties that Wegener shall refrain from selling or offering advertisement space in its own newspapers jointly with advertisement space in the daily newspapers of PCM or the joint venture will eliminate the competition concerns.

Pernod Ricard/Allied Domecq

The European Commission has cleared under the EU Merger Regulation the proposed acquisition of Allied Domecq plc by Pernod Ricard SA. The Commission's clearance is conditional on the sale by Pernod Ricard of the Scotch whisky brands 'Glen Grant', 'Old Smuggler' and 'Braemer' and the Portuguese brandy brands '1920' and 'CR&F'. It is also conditional upon the termination of certain distribution agreements relating to the 'Tullamore Dew' Irish whiskey brand and, for Portugal only, distribution of 'Moët & Chandon' Champagne.

United Kingdom-based Allied Domecq produces and distributes a range of wines and spirits worldwide, including 'Ballantine's' whisky, 'Beefeater' gin, 'Courvoisier' brandy, 'Kahlua' and 'Malibu' liqueurs and 'Stolichnaya' vodka. The French company Pernod Ricard also produces and distributes wines and spirits world-wide. The main spirits brands of Pernod Ricard include 'Chivas Regal', 'Clan Campbell' and 'The Glenlivet' Scotch whiskeys, 'Martell' cognac and 'Ricard' aniseed.

In April 2005, Pernod Ricard launched a public bid for the whole of Allied Domecq. At the same time, Pernod Ricard agreed to sell to Fortune Brands certain Allied Domecq brands and production and distribution assets, and, in addition, Pernod Ricard's Larios brand. The Allied Domecq assets which Fortune Brands was acquiring included 'Canadian Club', 'Courvoisier', 'Maker's Mark', 'Sauza' and 'Laphroaig' spirits brands, California wines (including the 'Clos du Bois' brand), and the Allied Domecq distribution networks together with a number of local brands in Spain ('DYC', 'Centenario', 'Castellana', 'Fundador'), in the UK ('Harvey's', 'Cockburn', 'Teacher's') and in Germany ('Kuemmerling', 'Jacobi'). The Commission approved the sale of Allied Domecq and Pernod Ricard brands and distribution assets to Fortune Brands in June. Specific safeguards were foreseen for the interim period until the transfers to Fortune Brands have been completed.

The Commission's investigation showed that the acquisition by Pernod Ricard of the Allied Domecq whisky brands would give rise to competition concerns as the merged entity would have a particularly strong position in a number of national markets, in particular in the Scotch whisky and Irish whiskey categories. In addition, the Commission found competition concerns in Portugal, where Pernod Ricard would have dominated the supply of brandy and champagne.

To address these concerns, Pernod Ricard undertook to sell off 'Glen Grant', 'Old Smuggler' and 'Braemer' whisky and the '1920' and 'CR&F' brandy, and to discontinue the agency agreements for distribution of 'Tullamore Dew', Irish whiskey and for distribution of 'Moët & Chandon' and 'Dom Perignon' Champagne in Portugal. The Commission has concluded that the commitments given by Pernod Ricard are sufficient to remove the competition concerns identified by the Commission during its investigation.

Royal P&O Nedlloyd / AP Møller-Maersk A/S

The European Commission cleared under the EU Merger Regulation the proposed acquisition of the shipping company Royal P&O Nedlloyd (PONL) by AP Møller-Maersk A/S (Maersk). The Commission's clearance was conditional upon the divestiture of PONL's business on the trade between Europe and South Africa and the withdrawal of PONL from several conferences and consortia.

The merger will create the world's largest shipping company, deploying over 800 container vessels and creating a world wide turnover of roughly € 28 billion. A P Møller-Maersk A/S owns the shipping container lines Maersk and Safmarine and is also active in container terminal services, harbour towage, tankers, logistics, oil and gas exploration, air transport, shipbuilding and supermarkets. PONL is mainly a container liner shipping company. It is also involved in container terminal services, logistics and air transport. The parties' activities overlap mainly in the container shipping business and to a lesser extent in the terminal services business.

The Commission's market investigation focused on the shipping trade routes to and from Europe to determine whether the parties' market shares and the links created by their participation in various conferences and consortia with their competitors would result in anti-competitive effects whereby markets could be shared and prices increased to the detriment of shippers and final consumers.

Under the European Union's competition rules applicable to shipping, liner conferences (groupings of shipping companies engaged in regular

scheduled services) benefit from antitrust immunity which was granted nearly 20 years ago. Shipping lines grouped in consortia also benefit from an antitrust exemption. After a two year investigation, in October 2004 the European Commission issued a White Paper concluding that the exemption for liner conferences should be abolished because it no longer results in efficient and reliable services that meet shippers' requirements.

This merger creates links between Maersk and the conferences and consortia of which PONL is a member. Where their combined market shares give rise to competition concerns the Commission has made its approval of the merger conditional on the withdrawal of PONL from these conferences and consortia so as to sever the ties that would link the parties to competitors.

Another area of concern was trade between Europe and Southern Africa, especially the transport of refrigerated goods in reefer containers where the parties' combined market share is higher than 50%. Maersk offered to divest PONL's business dealing with the transport of cargo from South Africa to Europe. These undertakings removed the Commission's competition concerns.

B – Summaries of decisions taken under Article 8

The Blackstone/Acetex and Johnson and Johnson/Guidant cases are discussed elsewhere in this newsletter.

Bertelsmann/Springer/joint venture

The creation of a rotogravure printing joint venture by German media companies Bertelsmann AG and Axel Springer AG was approved by the European Commission. The joint venture will combine five printing facilities in Germany and one UK site currently under construction. The Commission's in-depth investigation has shown that the concentration will not significantly impede competition in the common market or any Member State. The decision concluded the first full in depth investigation under the new Merger Regulation 139/2004 which entered into force on 1st May 2004.

Bertelsmann AG is a German media company with worldwide activities in broadcasting, music, publishing and printing. Its printing activities are currently operated by its subsidiaries Arvato and Gruner+Jahr. Axel Springer AG is a German media company with its main activities in newspaper and magazine publishing and printing. The joint venture combines the five existing German rotogravure printing facilities of Arvato, Gruner+Jahr and Springer and the new site which is currently

being set up by Arvato in the UK. Bertelsmann's rotogravure facilities in Spain and Italy will not be contributed to the new company, nor will the Parties' offset printing activities.

The transaction was notified to the Commission on 4 November 2004. In response to a referral request by the German Bundeskartellamt, the Commission decided to deal itself with the case given the merger's Europe-wide effects in some markets.

After a first phase investigation, and in view of the particularly strong position of the parties on the German market for rotogravure printing of magazines, the Commission had serious doubts as to the compatibility of the proposed concentration with the common market and opened proceedings in December 2004.

The in-depth investigation confirmed the Commission's initial findings that for high printing volumes of magazines, catalogues and advertisements rotogravure printing is not substitutable by the offset technique. On the German market for rotogravure printing of magazines the parties' combined share amounts to nearly 50%. However, the investigation showed that despite high market shares the joint venture will not be able to increase prices as its competitors could readily expand their capacity allocated to magazine printing and thereby exert effective competitive constraints. In addition, potential competitors in particular from the Netherlands, France and Italy will further constrain the competitive behaviour of the joint venture in this market.

On the other affected product markets, no competition concerns arose on either national or wider markets. The Commission also investigated the impact of Springer and Bertelsmann's vertical integration into magazine publishing which, however, is not altered by the notified concentration.

Siemens/VA Tech

The European Commission approved under the EU Merger Regulation the proposed takeover of the VA Tech group of Austria by Siemens of Germany, subject to the condition that Siemens divests itself of VA Tech's hydro power business and ensures the independence of metallurgical plant builder SMS Demag. The Commission decision follows an in-depth investigation into the takeover.

Siemens and VA Tech operate throughout the world in a number of similar sectors. Their products are used in areas such as power stations, electricity supply networks, trains, steelworks and large buildings. They are market leaders in some of the relevant products. The Commission opened an in-depth market investigation because it had

serious concerns that the proposed transaction, as notified, would have impeded effective competition within the EEA.

In particular, VA Tech Hydro is the European market leader for key components used in hydro-electric plants, such as turbines and generators. The Commission found that a merger with Siemens' hydro business would have resulted in competition being significantly impeded in the EEA. Siemens' commitment to sell VA Tech's hydro power business, operated by VA Tech Hydro, to a suitable purchaser will prevent this from happening.

In metallurgical plant building, Siemens has a 28% shareholding in SMS Demag, which the Commission found to be VA Tech's main competitor in the building of steel plants. Siemens had exercised a put-option (effective 31 December 2004) to sell its stake to SMS, the parent company of SMS Demag. The transfer of the shares has, however, been delayed due to a legal dispute relating to their valuation. Under the commitments given by Siemens, Siemens' representatives on SMS Demag's shareholder bodies will be replaced by trustees, thus ensuring the company's independence from Siemens until the shares in question are transferred.

In a separate decision designed to ensure that a structural link between the competitors Bombardier and Siemens in the market for trams was brought to an end, the Commission released Bombardier from its obligation, laid down in the Commission's decision to clear Bombardier's takeover of ADtranz of April 2001 to purchase certain traction systems for trams from VA Tech.

In light of the commitments given by Siemens, the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or a significant part of it.

C – Summaries of decisions taken under Article 9

MAG/Ferrovial Aeropuertos /Exeter Airport

Following a request from the UK Office of Fair Trading (OFT) under the EU Merger Regulation, the European Commission decided to refer the competence to assess the impact of the joint acquisition of Exeter Airport by the Macquarie Airport Group (MAG) and Ferrovial Aeropuertos to the UK competition authority. The acquiring parties currently also have control of Bristol Airport. The Commission has decided to refer the case as the

concentration threatens to affect significantly competition in the South West of England in respect of airport infrastructure services to airlines.

MAG, a UK based company, belongs to the Macquarie Group and is a global private equity fund with investments in airports and associated infrastructure. In the EU, Macquarie Group companies also jointly control the Rome Airports and Brussels Airport and have shares in Birmingham Airport and Copenhagen Airport. Together with Ferrovial, MAG jointly controls Bristol Airport. Ferrovial is also active in the management of airport infrastructure concessions. Apart from its stake in Bristol Airport, Ferrovial has investments in Sydney Airport, Belfast City Airport and Antofagasta Airport.

In its request for referral, the OFT stated that the South West of England may be a distinct market for the supply of airport infrastructure services to airlines. As the parties already control Bristol Airport, the acquisition of Exeter Airport would mean that their share of the market in this area could be high enough to potentially raise competition concerns. In addition, the OFT received comments from third parties raising concerns about the acquisition. Consequently, the OFT has filed a referral request pursuant to Art. 9(2)a of the Merger Regulation. According to this provision, the Commission can refer the case to a member state competition authority, when a concentration threatens to affect significantly competition in a market within a Member State, which presents all the characteristics of a distinct market.

The Commission's investigation indicated that the product market was the provision of airport infrastructure services to airlines and that the

geographic market could be as small as the South West of England (Bristol, Exeter, Bournemouth, Plymouth, Newquay, and Southampton). Under such a market definition, the market shares of the two airports would indeed be high enough for the notified concentration to potentially affect competition. In the circumstances the Commission considered that further investigation is warranted and that the UK authorities are best placed to carry out such an investigation.

Strabag/Walter Bau

The Austrian company Bauholding Strabag SE (Strabag) notified the Commission of its intention to acquire parts of the bankrupt German construction company Walter Bau-AG (Walter Bau). In May 2005 Germany's Federal Cartel Office pointed out that the planned acquisition would affect competition on the Hamburg regional market for asphalt, which has all the features of a distinct market and does not constitute a substantial part of the common market. In the Hamburg region Walter Bau has an interest in an asphalt mixing plant. NMW, which also has a shareholding in this plant, controls four of the other eight plants in the region. As Strabag is also active in the supply of asphalt in the area there was a risk that antitrust rules could be breached and a dominant market position created. The Federal Cartel Office therefore applied for a referral of the case in relation to this market. The Commission found that this case satisfies the conditions for a referral. The Federal Cartel Office will examine whether the merger complies with national competition law. The remainder of the operation was cleared by the Commission under the Merger Regulation.

Johnson & Johnson/Guidant: potential competition and unilateral effects in innovative markets

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1. Introduction

Following an in-depth investigation, on 25 August 2005 the European Commission authorised under the Merger Regulation the planned \$ 24 billion (around € 18 billion) acquisition by US healthcare group Johnson & Johnson (J&J) of its competitor Guidant, a US company specialised in cardiovascular medical products, subject to a number of conditions designed to address the competition concerns identified in the course of the investigation.

Both J&J and Guidant are active worldwide in the development, production and sale of vascular medical devices. Their products are used by physicians in procedures to treat vascular diseases both in the heart (coronary arteries) and in peripheral parts of the human body (e.g. carotid, renal, femoral arteries). The firms are direct competitors in respect of a number of vascular devices and are among a limited number of leading companies in this field in Europe and worldwide.

The case presents a number of noteworthy aspects both of a substantive and procedural nature.

To begin with, the investigation confirms the gradual shift in emphasis in the Commission's analysis when it comes to mergers between differentiated products. Consistent with the new Commission guidelines on horizontal mergers, in the assessment of the effects of the merger more emphasis was put on the issue of closeness of substitution and the relevance of the competitive constraint being removed, rather than on the conventional concepts of single dominance and market definition.

The decision, in line with the most recent precedents such as Procter/Gillette and GE/Amersham, also confirms that the Commission is adopting a cautious attitude when assessing the risk of foreclosure effects stemming from bundling strategies. As in past cases, the key questions the Commission had to address were: is it feasible and rational to engage in bundling strategies, having regard to the features of the market-place (the characteristics of the products and the possibility to bundle them, the purchasing practices of customers and their bargaining power, etc.)? And if so, can a bun-

dling strategy bring about a foreclosure effect, i.e. can this strategy be replicated by other competitors in a successful way?

The case is also interesting as it deals extensively with the issue of the removal of a potential competitor and the manner in which this should be assessed in the context of merger control.

From a procedural standpoint, the case is a good example of fruitful cooperation between the Commission and the US FTC in handling a merger investigation with a view to reaching a consistent outcome with respect to some common issues. In particular, one of the most complicated issues in the case that the Commission had to address involved the patent situation in the US as regards coronary stents. It was argued by some competitors that the merger would enable the parties to significantly strengthen their patent portfolio in the US in the field of Drug Eluting Stents (DES), and that foreclosure in the market for DES in the US as a result of that situation could in turn cause detrimental spill-over effects in Europe. Given the alleged link between the US and Europe, and the fact the claim put forward by the competitor had a direct and primary impact in the US, the Commission cooperated closely with the FTC in order to deal with the issue.

Another notable aspect of the case has to do with the magnitude of the Commission investigation given the large number of markets affected by the merger. As markets for vascular devices have a national geographic scope due to non negligible differences across European countries of reimbursement schemes, procurement processes, prices, the Commission had to deal with several hundred 'affected markets' within the meaning of the Form CO. This required an extensive investigative effort in order to collect the view of competitors and customers across Europe; the latter, namely hospitals, traditionally have a poor response rate to the Commission's market inquiries. In line with the recent EC case law (see *Babylist*), no national market was neglected in the investigation. However, after a first round of investigation and information requests addressed to customers based in virtually all the countries of the EEA, the Commission concentrated its inquiry on the largest European countries mostly affected by the merger. It is

also worth mentioning that in the assessment of the impact of the merger on coronary and vascular stents, a key contribution to the investigation came from a small number of eminent experts who were interviewed by the Commission.

As to the substance of the case, the investigation focused on three major areas: coronary drug eluting stents and accessories, endovascular stents and accessories used in peripheral arteries and cardiac surgery. The latter area posed only relatively straightforward competition concerns relating to significant horizontal overlaps for a specific product (Endoscopic Vessel Harvesting devices) and will not be presented in detail in this article, that will focus on the markets that constituted the core of investigation, i.e. the stents in coronary arteries (Interventional cardiology), in particular the coronary Drug Eluting Stents (DES), and the stents in vessels found in other parts of the body (endovascular stents).

2. Coronary stents in Interventional cardiology

2.1. Features of the market

Interventional cardiology involves minimally invasive treatment procedures designed to cure Coronary Artery Disease ('CAD'): a reduction of the blood flow to the heart muscle due to the gradual build-up of cholesterol against the coronary artery walls. CAD is the number one cause of death among men and women in Europe. The coronary arteries are reached by 'navigating' wires and catheters from a small cut at the level of the groin or arm through the blood vessels to reach the affected coronary arteries. The 'core' of the interventional cardiologist's kit is constituted by the stent, an expandable wire tube which is placed in an occluded coronary artery in order to remove the plaque and support the walls of the vessel. Stents have registered dramatic growth over the last few years, as they have proved to cure life-threatening cardiovascular diseases through non-invasive treatment. These devices are differentiated products, where quality of performance and innovation are key parameters. A recent breakthrough has seen the development of a new generation of stents, called Drug Eluting Stents (DES), which were first marketed in Europe by J&J in 2002. In DES, the metallic structure of the stent is coated with a polymer and a drug. The drug is gradually released locally to prevent the re-narrowing of the artery due to cell proliferation. DES are rapidly replacing the old generation 'bare metal' stents ('BMS') in a large number of operations, despite being approximately three times as expensive, and

are at the same time expanding the number of CAD pathologies that can be treated with interventional cardiology. Given the substantial differences in terms of manufacturing process, therapeutic effects and prices, it was concluded that DES and BMS constituted two separate product markets.

In the market for DES, there are currently only two major suppliers world-wide, J&J and Boston Scientific (BSX), plus a number of imminent entrants, including Guidant. BSX has recently taken the lead in Europe with a share of about 58%, with J&J counting for the rest of the market. Guidant's entry has been delayed due to difficulties in product development, although, at the time of the announcement of the merger its DES launch appeared imminent (likely to be early 2006). In the meantime, Guidant remains one of the leading BMS suppliers in Europe (whereas J&J is progressively withdrawing from this market with a market share on average below 5% at the EEA level) and is considered one of the most credible entrants in DES. Medtronic and Abbott are also in the process of launching their DES.

2.2. Competitive assessment

In its investigation the Commission had to assess whether by eliminating Guidant as a potential competitor, the merger would remove the major competitive constraint in the DES market with the other new entrants being unable to compensate for the loss of competition resulting from Guidant's elimination from the market.

The investigation showed that, notwithstanding some typical pro-competitive features, such as fast growth and innovation, the market place is characterised by a number of significant barriers to entry. Firstly, it is a highly innovative area with rapidly evolving products, which requires substantial investments in R&D. Secondly, the major medical devices suppliers hold numerous patents on the essential features of these products. Thirdly, the launch of a new innovative product entails very long and costly clinical trials to demonstrate their safety and efficacy. Fourthly, established suppliers are very well known by the customers and have dedicated and technically experienced sales forces. Additionally, they have close relationships with key opinion leaders in the medical profession, sponsoring research and carrying out their clinical trials at the most prestigious medical institutions. Finally, all major suppliers offer a wide range of products in interventional cardiology.

Moreover, the investigation revealed that cardiovascular devices' suppliers active on the marketplace had very different size and ambitions, as a result of which two leagues of players could be

distinguished. In the top tier, to which the merging parties belong, there is only a small number of large global companies competing on a worldwide level and having the following assets: top quality devices, primarily the stents, supported by good and abundant clinical data; strong relationships with customers and a good reputation as well as support from prestigious medical institutions and key opinion leaders; vast financial capabilities to finance massive R&D programmes; wide geographic reach — that is a strong and widespread presence in the three most lucrative markets, the US, Japan and Europe; a strong patent portfolio and broad product range. To date, the only firms which can rely upon the above assets are J&J, Guidant, Medtronic and BSX. In addition, Abbott, a big pharmaceutical company, has recently entered the market with the ambition to become a key player in vascular devices.

Against this background, in its market investigation the Commission first carefully scrutinised the position of the two incumbent players in the DES market to see whether the current market situation adequately reflected each player's real strength. In this respect, the investigation revealed that BSX's leadership in DES was likely to be more robustly challenged in the short/mid run, primarily by J&J, as well as by other new entrants.

Secondly, the Commission had to assess the prospect of success of the various new entrants in the DES market. This was essentially done by reviewing the clinical evidence available with respect to each new entrant's ongoing DES programme. To this end, the Commission relied upon the assistance of a small number of eminent physicians, selected from a list of names provided by the parties and the competitors, involved at the highest level in clinical trials of DES. Significant weight was also given to the large number of studies prepared by specialised consultants as well as to the periodic reports published by the major financial analysts.

With respect to Guidant the investigation proved that the merger removed one of the new entrants with the best prospect of success in the market for DES. In particular, Guidant could rely on the following assets: i) excellent stent platform, already established on the market; ii) good drug: Guidant's Everolimus drug belongs to the same family as J&J's sirolimus compound; iii) promising results of the first clinical trials on its DES; iv) great reputation of innovator; v) excellent sales forces; vi) strong customer base in BMS and accessories; and vii) strong product portfolio. The investigation also revealed that there were not yet compelling clinical data showing Guidant's drug efficacy as the sample of patients having been treated with Everolimus

was too small. Furthermore, Guidant's DES clinical trials were still at an early stage, and the availability of only indirect parameters (angiographic parameters) proving Guidant's stent efficacy.

The Commission concluded that, on balance, according to the prevailing view in the scientific and business community, Guidant would have been likely to become one of the key players in the market for DES, acting as a major competitive constraint vis-à-vis the two current competitors J&J and BSX.

However, the evidence collected in the investigation also showed that the other new entrants, above all Medtronic and Abbott, would be likely to exert a sufficient competitive constraint on the market for DES, compensating for the loss of competition resulting from J&J's acquisition of Guidant.

First, the evidence collected in the investigation indicated that Medtronic, together with Guidant, was well placed to enter the DES market successfully and gain a significant share in Europe. In particular, the investigation confirmed that Medtronic could rely upon the following assets: i) excellent stent platform already established on the market; ii) good drug; iii) imminent entry in the European DES market (which took place in July 2005); iv) good customer base, strong foothold in old generation stents (it is together with Guidant market leader in BMS in Europe) and accessories; v) excellent sales forces; and vi) strong product portfolio.

Moreover, Medtronic's trials were very advanced, had been undergone on a large sample of patients, and their results were positive based on clinical parameters which are more direct predictors of success. The market also signalled as a potential problem the issue of Medtronic DES' poorer performance than its competitors' DES as regards a specific angiographic parameter generally connected to the risk of restenosis (late lumen loss). However, the prevailing view was that this issue might ultimately have only modest negative implications, and essentially in the long term.

According to the findings of the investigation, Abbott, a big US pharmaceuticals company with significant financial strength, a deep expertise in pharmaceuticals (an important asset for the development of the next generation DES), and commercial experience with hospitals, was also considered a credible entrant with a very promising DES programme capable of exerting a non negligible competitive constraint in the marketplace.

Based on the above, it was concluded that the concentration would not significantly impede effective competition in the Common market and the EEA for DES.

2.3. *The role of Intellectual Property Rights*

The Commission's market investigation focussed on the intellectual property (IP) rights involved in the design of BMS and DES; some competitors argued that the merger would result in the concentration under single ownership of a very valuable portfolio of patents in the area of coronary stents in the US and to a lesser extent in the EU. It was alleged that as a consequence, entry to the DES market would become extremely difficult, the merging parties' incentives to license key patents to other players would be reduced and that problems in competing effectively in the US would result in competitors being forced to exit the European DES market.

2.3.1. *The background*

During its investigation the Commission found that the intellectual property landscape differed widely as between the US and Europe. In the USA, patent disputes and litigation are commonplace in the BMS and DES markets; they can be considered to be a cost of doing business. Patent disputes are often resolved through cross-licensing agreements between competitors. Court actions can result in the award of damages or occasionally in injunctions against the infringing products.

In Europe the market investigation revealed that patent coverage of these devices tends to be far narrower than in the US, the patents that do exist have earlier expiry dates than in the US, European courts tend to be less interventionist than their US counterparts and injunctions are rarer in the EU than in the US. Competitors indicated that European patents are not regarded as a significant impediment to operating in the coronary stent field.

2.3.2. *The importance of Rapid Exchange Technology*

One of the key patented technologies in the use of BMS and DES is the method by which the stent is placed inside the patient's coronary artery, or the 'delivery method'. Historically different delivery methods have been developed by companies operating in this field but the one that has gained greatest acceptance with physicians is that known as 'Rapid Exchange' or 'RX'. In the US the RX delivery system is covered by a number of patents, as a result of which only three firms, namely Guidant, J&J and BSX have the right to commercialise it thanks to cross licensing agreement. The fact that IP rights over RX constitute an impediment to entry in the US market for DES is illustrated by the fact that over 70% of US catheterization labo-

ratories use RX exclusively, the remainder using alternative technologies such as Over The Wire (OTW).

In contrast, in Europe there is no patent protection of the RX technology. Hence, coronary stent suppliers have encountered no problem in selling stents combined with the RX delivery system, which has therefore become a standard of care, the rate of use by physicians approaching 100%.

Against this background, in the course of the proceedings some competitors claimed that the merger would reduce the merged entity's willingness to license the RX technology in the US to those who lacked it and that a lack of access to RX in the US would result in competitors being forced to exit that market; this in turn would drastically reduce their profitability with the result being that their ability to compete effectively in the EU would be hampered.

The Commission devoted part of its market investigation towards assessing the plausibility of these arguments but was not ultimately convinced by them. Firstly there was no evidence that the merger changed the merging parties' incentives to license RX. As for the lack of access to RX rendering competitors unable to compete effectively in the US, the Commission also examined these arguments carefully. Aside from the problem of predicting what may eventually be the outcome of patent litigation in the US courts, the investigation revealed nonetheless that in this fast moving and innovative market, while a lack of access to RX reduced the attractiveness of interventional cardiology projects in the US, it was not realistic to assume that this would necessarily translate into direct and significant adverse effects on competition in Europe.

In fact, the Commission found that in the interventional cardiology business companies regularly develop and market products that risk infringing on competitors' IP rights portfolio; while litigation is frequent, injunctions preventing the sale of products are not issued very often, even in the US; and given the importance and fast pace of innovation in this industry, the IP landscape can change significantly over a short period of time, in directions that cannot be predicted in advance. Moreover, and more importantly, regarding the risk of negative spill-over effects from the US into Europe, it should be borne in mind that those suppliers lacking access to RX in the US, were about to launch their DES in Europe based on the RX delivery system. Therefore, it was not demonstrated that the IP rights' hurdles in the US could cause a tangible adverse effect on these suppliers' DES sales in Europe within a foreseeable and sufficiently close timeframe.

3. Endovascular stents

3.1. Features of the markets

Endovascular devices are used for the minimally invasive treatment of peripheral vascular diseases. These include the build up of plaque in peripheral vessels. Although less likely to be life threatening than coronary artery diseases, endovascular diseases have a life-limiting impact on patients.

The European endovascular stent markets are much smaller than the market for coronary stents, although they often show higher growth rates. Endovascular stenting is a relatively new way to treat arteriosclerosis of the peripheral arteries with a minimally invasive procedure. It is increasingly popular but its growth is limited by the existence of more established and cheaper traditional treatments, primarily surgery.

The Commission's inquiry has focused on the markets for endovascular stents.

3.1.1. Market definition

The Commission's inquiry revealed the presence of three separate markets for endovascular stents: balloon expandable (BX) stents, similar in design to coronary stents, self expandable (SX) stents for the carotid arteries, and SX stents for other peripheral arteries. SX stents are automatically deployed once placed in the target vessel and return to their original shape after a shock or contorsion. Carotid stents form a separate market due to the particularly strict regulatory and approval procedures they have to comply with. In fact, there is no substitutability between carotid and non-carotid SX stents.

The Commission's inquiry also indicated a clear trend towards more specialisation in the endovascular area, with a growing number of stents being dedicated to specific procedures (e.g. renal, femoral, iliac procedures). This process has led to a high degree of differentiation within the markets for BX stents and for non-carotid SX stents.

3.1.2. Innovation

The markets for endovascular devices in Europe show some features resembling those of the Interventional Cardiology area, although there are also notable differences. Indeed, innovation appears to play a more modest role in the markets for endovascular devices. One may explain the lower pace of innovation in endovascular as compared with interventional cardiology due to the overall smaller size of the endovascular market. Additionally, peripheral procedures are not as homo-

geneous as for interventional cardiology. Therefore, demand is more diversified and the expected return from investments in innovation lower.

3.1.3. Market share and concentration

Many European markets for endovascular stents are highly concentrated ⁽¹⁾. Although the number of active competitors is significant, not all players have the same strength or are present in all product or geographic markets. In a number of national markets, the first three suppliers accounted for between 70% and 95% of the market in 2004, and the first four between 85% and 99%. ⁽²⁾ Three companies represent the lion's share of the endovascular stents markets: J&J, BSX and Guidant. Guidant's market shares have consistently increased over the past five years, albeit from a relatively low base, while J&J's remained stable.

The merger would reduce the number of most significant competitors from three to two in a number of national markets. At the EEA level, the 2004 combined market share of the merging parties would exceed 60% for BX stents (HHI of around 4500 with a delta in excess of 2000), reach around 50% for carotid stents (HHI of around 3700 with a delta in excess of 1000) and above 35% for non-carotid stents (HHI of around 2700 with an increment of 600).

3.1.4. Closeness of substitution

As mentioned above, endovascular stents markets are characterised by a high degree of product differentiation. Clinical trials funded by stent suppliers as well as by independent bodies regularly compare the characteristics of different products along a number of dimensions that include efficacy and ease of use. These studies are carefully examined by practitioners (who most often decide which model the hospital purchases), who may also have strong personal preferences. In order to inquire on the closeness of substitution between J&J's and Guidant's stent, the market investigation asked physicians to indicate the closest alternative to the product they actually use. The investigation highlighted that the disappearance of Guidant would eliminate the competitor that was considered the closest substitute to J&J's stents across the whole range of products. The closeness of substi-

⁽¹⁾ The Commission has carried out its analysis at national level, coherently with the relevant geographic market definition. The EEA level figures quoted in this article at nevertheless a good summary of the competitive situation in most Member States, and have the advantage of being more easily presentable.

⁽²⁾ The most affected countries included Austria, Belgium, France, Germany, Italy, The Netherlands, Portugal and Spain.

tution between J&J and Guidant's endovascular stents was not matched by any other competitor in the market.

3.1.5. Entry barriers

Entry barriers represent a significant cost in the endovascular stent markets, both in monetary and time terms.

Firstly, the key to success in this area is the performance of the devices, whose reliability needs to be proved by lengthy and costly clinical trials. Moreover, a recent important trend in the endovascular stent markets is towards an increased product specialisation via ad hoc clinical trials. The costs associated with the research and development, clinical trials and marketing of a new dedicated stent are very high, and such effort can be undertaken only if the target market is sufficiently large to offer an acceptable return on the investment. At the same time, the specialisation process increases the financial and human resource investment necessary to offer a complete range of products.

Secondly, a supplier needs to build a strong relationship with the customer and brand reputation. Guidant enjoys a sound reputation among both customers and competitors and has a well-perceived quality image across its product range. This good reputation is mainly based on the quality of Guidant's products (25% of the customers who replied to the questionnaire considered Guidant to be a quality leader), but also on an experienced peripheral direct sales force, and an outstanding after-sales service, exemplified by its well-recognised training program targeted at practitioners.

Thirdly, the product range is an asset in this business. Suppliers indicated during the market investigation that having a broad product portfolio is a success factor in the peripheral business.

Finally, suppliers need to establish dedicated sales forces and secure a widespread presence on the territory. The market investigation stressed that a local presence is considered to be a determinant feature in being a credible supplier. These types of entry costs are not prohibitive in absolute terms, but they are significant if compared to the relative small size of many national markets. When looking at the investments to be made, the market inquiry listed several hurdles, such as the establishment of a new direct sales force, that is a key determinant of market success and would thus require the recruitment of sales people. Competitors stressed the importance to build relationships with customers to compete with well-entrenched large players and break through customer loyalty. Competitors have also explained that the existence of long-term tenders has for consequence to 'lock-

on the market for established companies'. Perhaps more important than costs, timely entrance is an essential element for success. Therefore, even a player with an established product portfolio may not be interested in expanding into new geographical markets, where few incumbents account for a large part of the sales.

3.1.6. Countervailing buyer power

As demand-side is principally constituted of hospitals, the parties claimed that they have strong countervailing buying power and practice multiple sourcing. However, the market investigation indicated that demand is highly fragmented relative to the size and concentration of suppliers. Multiple sourcing is a common practice, but the majority of hospitals tend to source from a limited number of suppliers. Moreover, given the closeness of substitution between the products of the two companies and the fact that hospital choice would have been severely limited, multiple sourcing could not have been an effective way to counter a unilateral price increase.

3.2. Competitive assessment

Given the characteristics of the endovascular stent markets outlined above, the Commission concluded that the merger would remove the most important competitive constraint on J&J. No other competitor was considered by doctors as close a substitute to J&J as Guidant. At the same time, no other competitor could match Guidant's assets in terms of perceived quality, sales force, training activity and relationship with physicians. Therefore, the elimination of Guidant would allow J&J to profitably carry out a unilateral price increase of its stents. Doctors would not switch to different products to an extent sufficient to counter the price increase.

The Commission concluded that the operation would give rise to significant non-coordinated effects and will substantially impede effective competition in the Common Market and the EEA for endovascular stents.

4. Accessories for vascular intervention

In addition to coronary and endovascular stents, the Commission assessed the effects of the merger in the markets for accessories, which are medical devices used to deliver and deploy the stents in the target vessels. ⁽¹⁾

⁽¹⁾ Accessories include Steerable Guidewires, Guiding Catheters and Balloon Catheters. Accessories for coronary interventions are different from accessories for endovascular interventions, although they perform a similar function.

Combined market shares for accessories varied significantly across countries, reaching in some cases very high levels (above 70%). This notwithstanding the Commission concluded that the merger would not pose a threat to effective competition. Unlike stents, accessories have very little specific IP content and are offered by a number of international and local suppliers. They are increasingly homogeneous and interchangeable products for which there are low barriers to entry and production scale-up. Finally, doctors customarily use different brands and can switch easily between them.

There was an important exception however: the market for coronary steerable guidewires presented consistently high (reaching 70% to 90%) combined market shares across European countries. Furthermore, the market investigation revealed that this accessory could not be considered a homogeneous good and that doctors did not switch frequently between brands.

The Commission therefore concluded that the transaction would impede effective competition in the EEA markets for steerable guidewires. As for the other accessories, the Commission concluded that the merged entity would not be in a position to build on its existing market position to unilaterally increase prices and that the concentration would not jeopardise effective competition in the EEA.

5. The risk of anticompetitive bundling strategies

In its investigation the Commission also assessed whether, due to the overall impact of the merger across complementary product markets, the transaction could give rise to foreclosure effects as a result of bundling practices by the merging entity.

In the field of interventional cardiology Guidant has an attractive portfolio of cardiac medical devices, it is market leader in steerable guidewires and one of the leading suppliers of BMS in Europe, while retaining a non negligible presence in all the other interventional cardiology devices. J&J is present across all the segments, and is strong in DES. The merger would give the new entity a stronger (all relevant segments are covered with a very significant presence, on average above 40-50%) and broader portfolio in the area of interventional cardiology across Europe. Also in the endovascular devices markets, the merger would strengthen the parties' product range across products.

In order to assess the risk of foreclosure effects stemming from the merger, the Commission con-

sidered whether the merging entity has the ability and the incentive to engage in bundling practices, and if so, whether such a strategy could give rise to foreclosure effects.

With regard to the ability of the merging entity to engage in bundling practices, the investigation revealed that package sales occur in the interventional cardiology and endovascular industry, although they are not a dominant feature (according to the Commission estimates, they constitute on average about 30% of the total sales in Europe). The investigation has also shown that tendering procedures involving single items are widespread and that hospitals generally resort to dual sourcing practices in order to avoid dependence from suppliers.

More importantly, as to the possibility for the merging entity to engage in such practices with a view to foreclosing its rivals, the investigation showed that a bundling strategy can be matched in a successful way by a number of competitors, primarily BSX and Medtronic.

The Commission also enquired into whether a bundling strategy could actually involve devices belonging to different areas, such as endovascular, interventional cardiology, and cardiac management system devices (defibrillators and pacemakers). On this point, the evidence collected in the investigation showed that a broader bundling involving products of different areas was hardly feasible as customers are generally not the same.

6. The remedies

In order to make the concentration compatible with the common market, the parties have committed to divest Guidant's EEA endovascular business (including stents and accessories), J&J's EEA Steerable Guidewires business. ⁽¹⁾

The EEA endovascular and steerable guidewires businesses consist of the inventories and the customer lists, the assignment of rights for use of trademarks, the license of IP rights, and the transfer of specifications relating to the design of the products. The business to be divested does not include any manufacturing or research facilities, because the production of J&J steerable guidewires is done by a third party on the basis of an OEM contract, and the production of Guidant endovas-

⁽¹⁾ The parties also committed to divest either J&J or Guidant Endoscopic Vessel Harvesting products in cardiac surgery. As noted above, the remedy in cardiac surgery results from fairly straightforward competition concerns and does not raise any particularly significant competition issues. As such, it is not discussed in this article.

cular devices is done in a single US plant for its worldwide products, and this also produces coronary products. The production of endovascular devices for the European markets is only a very small fraction of the plant's activity, which rendered the hypothetical divestment of the physical assets not proportionate to the competition concerns in this case.

The remedies include other commitments that will allow the purchaser of the business to set up an independent and competitive supply of the products being divested. This makes the remedies particularly suitable for established medical devices producers who can rely upon their existing physical assets for the production of the acquired products.

Italian cross-border banking mergers: A case for Article 21 of the Merger Regulation?

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On 29 March 2005 the Commission received the notification of the proposed acquisition by the Spanish bank Banco Bilbao Vizcaya Argentaria ('BBVA') of the Italian bank Banca Nazionale del Lavoro ('BNL') by way of public bid. The following day, the Dutch bank ABN AMRO ('ABN') filed a notification for the acquisition of the Italian bank Banca Antoniana Popolare Veneta ('Antonveneta') also by way of public bid. The two bids were also notified to the Bank of Italy, which under Italian law has to authorise takeover bids after verifying their compatibility with prudential rules. The Bank of Italy also has to authorise the increase of a participation in an Italian bank rising above certain thresholds.

Both operations did not raise any competition concerns and therefore were treated under the simplified procedure. They were authorised by the Commission on 27 April 2005 by way of simplified decisions.

After the clearance decisions by the Commission, BBVA and ABN claimed that the Bank of Italy created obstacles to their respective bids which constituted an infringement of *inter alia*, Article 21 of the EC Merger Regulation ('ECMR'). Article 21(4) ECMR states that the Commission has exclusive competence for concentrations with a Community dimension but that Member States may nevertheless take measures to protect legitimate interests other than those taken into consideration by the ECMR and compatible with Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests. Any other public interest must be communicated to the Commission and shall be recognised by the latter after an assessment of its compatibility with Community law.

ABN claimed that the Bank of Italy violated Article 21 ECMR because, by favouring a counter-bid by Banca Popolare Italiana ('BPI'), it applied a discriminatory treatment to ABN that created serious obstacles to its bid. According to ABN such a discriminatory treatment could not be justified under prudential rules. The Commission carefully examined ABN's arguments and sent requests for information both to the Bank of Italy and to BPI

to enquire about the alleged infringement. In the light of the replies to these requests and the available information, the Commission decided not to formally intervene under Article 21 (4), *inter alia*, because a direct link could not be established between the alleged discriminatory treatment and the failure of ABN's bid. ABN also lodged complaints for violations of national law before the Italian Stock Market Authority ('CONSOB'), the Bank of Italy and national courts. It now appears that ABN will finally be able to acquire Antonveneta through a share purchase agreement with BPI and a subsequent public bid.

BBVA also claimed that the Bank of Italy had violated Article 21(4) ECMR since the approval of its bid was conditional upon the acquisition of a shareholding above 50% in BNL. According to BBVA this condition was not justified under the prudential rules and could constitute an obstacle to an acquisition of control (i.e. control over BNL could have been acquired with a shareholding below 50%). The Commission's services indicated to the Bank of Italy that such a conditioned approval could, indeed, constitute a violation of Article 21(4). Following the Commission's intervention, the Bank of Italy stated that it did not condition its authorisation but it indicated that in case BBVA acquired a shareholding below 50% in BNL it would need to verify if, after the bidding process, BBVA would be able to exercise effective control over BNL. After the offering period, however, BBVA decided to abandon the bid given its limited success. The low adherence derived from the appearance of a mandatory counter-bid at a higher price, triggered by the conclusion of an agreement between other BNL's shareholders and the Italian insurance company Unipol.

The Commission continues to monitor the outcome of the national proceedings and it is not excluded that further steps could be taken under the ECMR in the light of new elements emerging. By instantly taking up these complaints the Commission has shown its willingness to act with regard to any possible infringement of European competition law related to cross-border consolidation.

State aid for hazardous waste treatment: the case of AVR, the Netherlands

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On 22 June 2005, the European Commission has approved € 47.3 million operating aid in favour of AVR of the Netherlands for hazardous waste disposal. € 2.4 million — compensation for the cost of acquisition of the hazardous waste — was not approved and has to be recovered from the beneficiary. The interesting features of the case lay in the application of Article 86(2) of the Treaty, concerning services of general economic interest, in the field of waste management and environmental protection. This article explains in further detail the underlying principles the Commission applied in its assessment.

The beneficiary and the measures

AVR (Rotterdam) is a waste management company owned by the municipality of Rotterdam with some 2000 employees and an annual turnover of around € 500 million. It is one of the four main competitors in the Dutch waste market and like these competitors, it operates internationally, having establishments in various Member States.

In 2002, the Netherlands concluded a contract with AVR to operate two rotary kilns and a special landfill site for the disposal of hazardous waste for the period 2002-2006. A newly created subsidiary, AVR-Nuts, would receive aid equal to the estimated operating deficits on these activities, € 1.5 million and € 2.3 million for 2002 and 2003 respectively. The actual losses were much higher, but no further aid was granted.

As the aid for future years would be higher than originally foreseen, the Netherlands abandoned its policy and agreed with AVR to close the kilns. For 2004 the operating aid was calculated at € 8.9 million and in addition, AVR was granted € 36.5 million to compensate for past investment and additional costs due to the early closure of the installations. The Netherlands had calculated that continuing the contract until the end of 2006 would be even more expensive.

A guarantee that the state will bear 30% of the cost of removal and decontamination following the closure of the furnaces also constitutes aid.

A significant part of the aid was paid to the beneficiary without prior approval by the Commission.

Background

Community law lays down the objective for Member States to become self sufficient in waste disposal and to have appropriate treatment of the waste near the source ⁽¹⁾. Member States may prohibit export of 'waste for disposal' and trade in such waste is subject to various controls. In contrast, Member States are not generally allowed to prohibit export to other Member States of 'waste for recovery'.

In the early 1990s, with a view to these objectives, AVR constructed the special landfill site and invested in several rotary kilns. The site is used for the appropriate disposal of hazardous waste that cannot be burnt ('C2-waste'); the rotary kilns are used for the appropriate disposal of hazardous waste that, despite a low burning value, still can be incinerated ('RK-waste'). This incineration requires co-fuelling, and in practice the most cost-efficient fuel consists in hazardous waste with a high calorific value. In terms of turnover and aid, the rotary kilns are far more important than the site.

Rotary kilns involve high fixed cost and maximising capacity use is crucial to recoup this cost. For this reason, the Netherlands systematically prohibited exports of hazardous waste for disposal. Originally, the authorities also prohibited certain exports of hazardous waste for recovery and applied a wide definition of waste for disposal, but the European Court of Justice condemned these practices ⁽²⁾. At the same time, producers further minimised the creation of the waste and options to recover hazardous waste, e.g. in the cement industry or for filling closed mines, have further developed. As a consequence, the supply of RK-waste decreased dramatically. Overcapacity as regards disposal facilities has become a wider phenomenon, affecting as well e.g. the UK, Germany and

⁽¹⁾ Article 5(1) and Article 7 of Council Directive 75/442/EEC of 15.7.1975 on waste, OJ L 194 of 25.7.1975, p. 39, Directive amended lastly by Regulation (EC) No 1882/2003 of the European Parliament and the Council (OJ L 284 of 31.10.2003, p. 1); Art. 4(3) of Council Regulation 259/93/EEC of 1.2.1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L 30 of 6.2.1993, p. 1, Regulation lastly amended by Regulation (EC) No 2557/2001 of the Commission (OJ L 349 of 31.12.2001, p. 1).

⁽²⁾ See in particular judgment of 25.6.1998 in case C-203/96, *Chemische Afvalstoffen Dusseldorp B.V. and others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, ECR [1998] I-4075.

Belgium. In this situation, AVR wanted to close the site and the kilns. By means of the aid, the authorities tried to prevent this from happening.

Affectation of trade, benefit for whom?

Although Member States may prohibit export of waste for disposal, the measures affected trade between Member States. First of all, not all such exports are prohibited. Secondly, the major market participants operate internationally, competing e.g. in the international markets for turn-key clean-up projects. Thirdly, the market for waste for disposal is inextricably linked to the market for waste for recovery: the same waste may change definition depending where and for which purpose it is offered. So in fact, trade between Member States is common practice in both markets.

In this particular case, the measures did not favour the suppliers of hazardous waste. The gate fees for C2 and RK-waste were higher than those practiced in neighbouring States, which was possible due to the export restrictions. Raising the fees was not a feasible and realistic option under normal market conditions, as more waste would be exported, mixed into other waste streams or be disposed in other legal and illegal ways and therefore it would not increase AVR Nuts' revenues. In fact, with the closure of the rotary kilns, it became easier for suppliers to benefit from the lower gate fees in Belgium and Germany.

Waste treatment a service of general economic interest?

Member States are free to define what they regard as services of general economic interest on the basis of the specific features of the activities, but this definition is subject to control for manifest error. For the following reasons, the Commission agreed with the Netherlands that the service constituted a SGEI:

- There is an obvious public interest in appropriate treatment when hazardous waste is disposed of. Moreover, there is the Community objective of self-sufficiency in the disposal of waste and given the limited domestic capacity, without AVR's rotary kilns exports of waste for disposal would have been inevitable.
- Public intervention was necessary: without the aid AVR would have closed the C2-depot and the rotary kilns already by the end of 2001.
- The measures do not infringe the 'polluter pays principle': as explained above, the suppliers of the waste were not favoured by low gate fees.
- The qualification as a SGEI does not circumvent the rules that normally apply. The environmen-

tal aid guidelines ⁽¹⁾ contain rules on operating aid to promote waste management (section E.3.1), but these rules are written in the first place with a view to operating aid granted to companies for dealing with waste that they produce themselves.

- By nature, the bulk of the C2 and RK-waste is being supplied by companies, but collection systems exist for hazardous waste from households, aiming at safe and easy disposal of any hazardous waste they may have, and part of the collected hazardous waste may be disposed of in the rotary kilns. So the service for which the aid is given had a general character and the aid did not favour a restrictive number of users of the services.
- There is no market failure to justify the SGEI, but the objectives of self-sufficiency in waste disposal and waste disposal close to the source of the waste are not less legitimate for that reason.

Altmark criteria respected?

The Netherlands argued that the measures would not constitute aid as they respected the criteria ensuing from the Altmark judgment ⁽²⁾. The Commission did not agree. AVR was not chosen pursuant to an open and transparent tender procedure. Moreover, the level of compensation was not determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with waste treatment capacity would have incurred. As a matter of fact, given the unique position of the C2-depot and the rotary kilns in the country, such a typical undertaking did not exist. The pre-calculation of the budgetary deficit rather reflected the particular conditions under which AVR Nuts operated these installations and the cost of similar installations abroad were not taken into account. Under such circumstances, the measures must be considered to provide a selective advantage in favour of AVR Nuts, and not merely a cost compensation that other companies in a similar situation could have received under similar conditions in case they would have been charged with the service obligation.

Precise definition, absence of overcompensation, proportionality

On the basis of a careful assessment of the usual criteria for aid for SGEIs, the Commission concluded

⁽¹⁾ OJ C 37 of 3.2.2001, p. 3.

⁽²⁾ Judgment of the European Court of Justice of 24.7.2003 in case C-280/00, Altmark Trans GmbH, Regierungspraesidium Magdeburg/Nahverkehrsgesellschaft Altmark GmbH, ECR. 2003, p. I-7747.

that most of the aid could be authorised. The definition of the service was sufficiently precise, which was not surprising as from the beginning the Dutch authorities intended to justify the aid on the basis of Article 86(2). They were assisted by consultancies to calculate the aid and to verify the transparency. Three particular issues can be highlighted.

The Commission accepted aid to compensate for the cost of closure. Without sufficient guarantees, one cannot expect an operator to engage into a multi-annual service contract that requires significant investments. The Commission also accepted aid to compensate for additional cost resulting from the closure of the rotary kilns earlier than foreseen. A Member State cannot be obliged to continue such a contract, especially if the Member State thus pays less than what it probably would have had to pay if the activities had been continued. For all these costs, however, the Commission required strict ex-post control.

The Commission considers that the measures adopted by the Netherlands for the major part complies with the requirement of proportionality. It is difficult to imagine by which other means the Netherlands could have ensured the availability of sufficient domestic capacity for disposing hazardous waste. The Commission examined in detail whether the Netherlands should have granted aid for one kiln only, instead of two. Did the second rotary kiln's contribution to the realisation of the objectives weigh up against the aid it required and against the potential disadvantageous effects on competition resulting from this? Some flexibility for this assessment is unavoidable, as the flow of C2 and RK-waste to arise could not be foreseen with certainty and because of risks in the avail-

ability of the installations. The actual importance of the second kiln may have been limited, but the Commission expects that the effects on competitors have remained relatively limited as well: there is no indication that maintaining two rotary kilns resulted in larger quantities of RK-waste incinerated.

Another subsidiary, AVR IW, executed much of the administration, but competed at the same time with other suppliers of hazardous waste. The Netherlands explained that AVR IW has not been able to abuse this position and the Commission, despite the third parties comments, neither came to this conclusion.

Aid for the acquisition of waste: disproportional

€ 2.4 million of the operating aid was earmarked for the cost of acquisition of the waste. This acquisition was also carried out by AVR IW, to whom this part of the aid was passed on. The Commission found that this aid was not justified: the sole beneficiary was AVR IW and its competitors did not receive similar compensation for their cost of acquisition. Moreover, the acquisition activities did not directly fall within the public interest that justified the aid, certainly not where it concerned waste acquired abroad. It may actually have encouraged disposal in the Netherlands over recovery in the Netherlands or elsewhere and under specific circumstances this may have been contrary to the principle of treatment near the source.

The Commission consequently ordered the Netherlands to recover this part of the aid from AVR IW.

State aid and 'private litigation': practical examples of the use of Article 88(3) EC in national courts

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Introduction

This contribution is about Article 88(3) EC Treaty which can be invoked directly by undertakings in national courts. In that sense it is a unique provision under State aid law. Recently, two applicants in the Netherlands went to court to request that the authorities respect the so-called standstill obligation under Article 88(3) EC and that State aid measures be suspended. Both requests were granted by the courts although the requests did not always advance smoothly. These two cases illustrate the difficulties judges and undertakings encounter but they also show to what extent Article 88(3) EC can be used by undertakings affected by State aid.

Background

Article 88(3) EC reads that a Member State must notify the Commission of any plans to grant or alter aid. Following a notification, the Commission conducts an assessment of the planned aid during which the aid cannot be implemented. This is the 'standstill obligation'.

According to the case law of the European Court of Justice (hereinafter: ECJ), the national courts must ensure compliance with this standstill obligation. More precisely, the role of the national court is to safeguard rights enjoyed by individuals due to the direct effect of the prohibition expressed in the last sentence of Article 88(3) EC. Moreover, the initiation of the formal investigation procedure by the Commission under Article 88(2) EC does not relieve national courts of their duty to safeguard rights of individuals, should there be a breach of the requirement of prior notification.

As a result of Article 88(3) EC competitors may first of all attempt at obtaining an injunction from a national court thus preventing the actual granting of the aid. The national court can, however, be of help in several other situations as well. It is not excluded that competitors who can prove that they have suffered loss as a result of the unlawful implementation of aid may have an action for damages in a national court against the Member State that granted such aid. A national court may also be required to declare prematurely granted aid unlawful and order the recovery of such aid, without being it necessary the court ruling on its compatibility. Finally, even where the Commission

finally finds that the aid unlawfully put into effect is compatible under Article 86(2) EC or 87(3) EC, the national court should declare measures adopted before such finding unlawful and order the State to recover the aid with interest.

National courts might have to interpret and apply the concept of State aid under Article 87 EC in order to determine whether the aid has been granted without observing the standstill obligation. In doing so, the courts can ask the Commission for information ⁽¹⁾ in line with the 'Notice on cooperation between national courts and the Commission in the State aid field'.

Recent cases in the Netherlands

The two courts rendered judgement in cases related to the development of an infrastructure. The first case is about the financing of a glass fibre network in Appingedam. The second case is related to the financing of a football stadium in Alkmaar.

Glass fibre network Appingedam

In the first case ⁽²⁾, a cable operator requested the competent district court to suspend a measure consisting of the financing of the roll out of a glass fibre network in Appingedam, until the Commission had taken a decision on the basis of Article 4 of the Procedural Regulation. The cable operator claimed that the municipality would grant money for the rollout of a glass fibre network and that it was likely that the municipality would provide other advantages such as loans and guarantees. The operator further argued that the measure distorted competition and had an effect on trade.

First, the district court affirmed that the foreseen measure had not been notified to the Commission. Secondly, the court is of the opinion that it has to be assessed by the Commission, whether the aid measure is compatible with the common market. The court concluded that in view of the facts and given the arguments brought forward by the applicant, it cannot be excluded that the measure concerned is free from any elements of unlawful State aid. While referring to the jurisprudence of the

⁽¹⁾ Commission notice on cooperation between national courts and the Commission in the State aid field, OJ C 312, 23.11.1995 p. 8.

⁽²⁾ The judgements can be found at www.rechtspraak.nl. This case is referred to as LJ-N AQ8920.

ECJ, the court concluded that if there is a doubt as to whether state aid is involved, measures should be notified by the Member State. Consequently, the municipality is supposed to notify its plans to the Commission in line with Article 88(3) EC. The municipality pledged to notify the measure, so the court did not order further measures to force the authorities to notify.

Football stadium Alkmaar

In another Dutch case ⁽¹⁾, this time regarding the financing of a football stadium in Alkmaar, the applicant had to make more efforts to obtain a suspension. First, the district court took the view that the question asked does not concern the unlawfulness of the State aid measure under Article 87(1) EC, as such question can only be answered by the Commission. Consequently, the question was limited to whether the measure should have been notified to the Commission or not.

The court however rejected the request by the applicant. It did recognise that with regard to the sale of land the municipality had to follow a procedure laid down in the 'Communication on the sale of land'. This procedure implied a notification which is however according to the court another notification than the one foreseen in Article 88(3) EC. The former notification is meant to inform the Commission of the facts of a sale of land, but is of another kind than the notification foreseen in Article 88(3) EC. Besides, the court stated that the Commission had, upon request by the Commission itself, already been informed of the measures. Therefore, the case is already known to the Commission and under those circumstances a suspension can only take place in case that is evident that there is a measure which involves State aid. According to the district court this cannot be assumed at this stage. Therefore the request for suspension of the measure cannot be granted.

The applicant lodged an appeal against this decision and the court of appeal came to an interesting conclusion. Because of the fact that the Commission had opened a formal procedure under Article 88(2) EC, the court came to the conclusion that the municipality could not carry out the measure. The request had to be granted. The argument brought forward by the municipality that the Commission had not yet determined that there is actually state aid involved in the measure, was rejected by the court of appeal. The municipality requested subsequently the Dutch Supreme Court to annul the decision by the court of appeal. The Advocate-

General (AG) of the Supreme Court has recently given its opinion and he touches upon two issues regarding the use of Article 88(3) EC.

First, the AG states that the court of appeal apparently has interpreted Community law in such a way that an opening of the formal investigation procedure under Article 88(2) EC has as such the consequence that the measure cannot be executed until a final decision has been concluded. The AG does not agree with this interpretation. While referring to jurisprudence of the ECJ, he reiterates that only if all conditions of Article 87(1) EC are met, and that thus the measure can be qualified as State aid, a measure should be notified under Article 88(3) EC.

Secondly, the AG refers to the u-jurisprudence of the ECJ: 'with a view to determining whether measures should have been notified to the Commission, a national court may have cause to interpret and apply the concept of aid. In case of doubt, it may ask the Commission for clarification. Having consulted the Commission, the court must decide whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment'².

Lesson to be learned?

A quick evaluation of the procedures in the Netherlands shows that undertakings seek recourse to a national court. This is a positive sign. First of all, because competitors suffering from damage can swiftly request for remedies before a national court. It is important though that these courts are easily accessible, otherwise the procedure becomes a high burden. In the Netherlands such access is apparently, even with a short delay, not difficult. Secondly, private litigation in front of national courts could provide increased discipline in the field of state aid. If authorities realise that competitors will go to court requesting suspension of non-notified State aid measures, the authorities will be more inclined to notify these measures for reasons of legal certainty.

However, as the two examples show, national courts do not always find it easy to apply the State aid rules. As becomes clear in the first case regarding the roll out of the glass fibre network, the judge could have not come to the judgement had he fully been aware of the jurisprudence. It is not decisive that *it cannot be excluded* that there is aid involved. Nor could the court in the second case, regarding the financing of a football stadium,

⁽¹⁾ This case is referred to as LJ-N AF1407. The appeal is registered as LJ-N AO6912.

⁽²⁾ See C-39/94, SFEI v. La Poste, ECR 1996 Page I-03547. Of course, the national court may also refer the case to the European Court of Justice.

simply have stated that at this stage it cannot be assumed that there is State aid involved. The court should have, according to the ECJ's jurisprudence, verified the aid character of the measure itself. Finally, the court of appeal could not have stated that the fact that the Commission had asked questions about the matter implies that the measure is qualified as a State aid measure and thus has to be notified.

In neither one of the cases the courts actually contacted the Commission. Perhaps the reason is that the courts did not feel a need to confer with the Commission. It can perhaps also be explained by the fact that the courts can only ask the Commission for information regarding procedural matters. The Commission will, as stated in the Notice, neither go into the substance of the individual case nor into the compatibility of the measure with the common market. Thus perhaps the value of the information which can be obtained by the courts, especially in complicated cases, is fairly limited.

Yet, this may actually change in the future. The Commission has launched a study focusing on the enforcement of state aid law at national level and the role of national courts. The Commission has already announced that if needed, it will consider reviewing the 'Notice on cooperation between national courts and the Commission in the state aid field'. Finally, the Commission has in its State aid action plan further announced that it will engage in advocacy to ensure that the rules of state aid are fully respected. To this extent, the awareness of company auditors, national market regulators and national Courts of Auditors may also be reinforced.

One may conclude that Article 88(3) EC is a useful tool for undertakings seeking swift recourse. The hindrances to such recourse by the national courts will be looked after by the Commission in order to improve the cooperation with the courts and to strengthen the enforcement of State aid rules on a national level where needed. In the future we will therefore have perhaps more of these cases.

Commission approves German aid scheme for tenants of technology centres and incubators

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On 3 May 2005, the Commission authorised, on the basis of Article 87(3)(c) EC, a German aid scheme providing public support for the creation or development of incubators and technology centres, with newly created and technology-oriented small and medium-sized enterprises (SMEs) using the services of the centres being the indirect beneficiaries⁽¹⁾. The annual budget of the scheme, which will run until end 2006, amounts to € 120 Mio.

Aim and design of the aid scheme

The importance of incubators and technology centres is threefold. Firstly, they favour the setting up of new companies, secondly, they provide the appropriate business support needed to increase the chances of their survival and, thirdly, they provide infrastructure and services to undertakings involved in innovative activities.

The aid scheme intends to support the SMEs by giving them the possibilities to rent rooms, to obtain consultancy services, research accommodation and special equipment, as well as to cooperate with universities, research institutes and enterprises in or via the centres.

However, instead of directly supporting the targeted SMEs, Germany will provide financial support to a certain group of investors in order to encourage them to construct a building for the purpose of a technology centre or incubator, so that these centres can let facilities and provide services to the targeted group of SMEs.

In order to better understand the design of the measure, three different levels of operators have to be distinguished: the investors into the centres, the centres and their management and the tenants of the centres. The investors of the centres are defined as municipalities and counties, but can also be public or private non-profit-making establishments. The centres are usually either non-profit-making owner-operated municipal enterprises or separate non-profit-making legal entities. The tenants may be newly created or technology-oriented SMEs.

The tenants have to pay a tenancy for the rooms and top-ups for the use of other facilities like laboratories or specific equipment and/or consultancy services if applicable. The tenancy and/or the price

for other facilities/services will normally be below market price. The tenants can use the centres for normally five years whilst the centres will be obtained for at least 15 years.

Assessment

The rather complex design of the measure made it very difficult to identify the aid beneficiaries and to conclude the compatibility of the measure with the common market.

The measure at stake creates incentives for one set of potential economic operators, the holders, in order to provide support to another set of operators, the tenants. In addition, the measure implies that a third set of potential economic operators is created, the centres, which are existing separately from the holders and the tenants. Even if the intention of the German authorities may be only to provide benefits to the tenants, enterprises at either one or all three levels may be beneficiaries of State aid.

Accordingly, the Commission assessed the existence of aid at three different levels: the level of the holders, the level of the centres and their management and the level of the tenants.

In its decision, the Commission considered that the holders could actually only be regarded as a vehicle for the transfer of aid to the tenants (through the centres) rather than being an aid beneficiary themselves. Germany could prove that no economic advantage will remain at the level of the holders as there will be a public tender for the construction of a centre, as the holders are obliged to obtain the centres and to let their accommodation for, at least, a period of 15 years and as any potential advantage remaining after this period will be re-transferred to the State, calculated by applying common evaluation methods.

The centres and their management were also considered as vehicles for the transfer of aid to the tenants as they do not receive an economic advantage under the scheme. In case a centre is to be managed by third parties and not by the holder, the German authorities committed themselves then to tender the management of a centre. The management of a centre will only receive a market conform remuneration as pre-defined in the tender. The German authorities undertook to also apply the aforementioned profit-transfer at the level of the centres.

⁽¹⁾ State aid No C 3/2004 (ex N 644/g/2002) — Germany, not yet published in the Official Journal of the EU.

They furthermore committed themselves to monitor the measure and to strictly control the use of funds, thereby ensuring that the aid is completely passed through to the tenants.

However, concerning the tenants of the centres, the Commission concluded that, through the holders and the centres, the SMEs who rent accommodations in the centres and use their facilities benefit indirectly from State resources and receive an economic advantage in such cases where the tenancy and/or other facilities are granted below market price. It was further considered that the measure distorts or may distort competition as it targets certain undertakings, the tenants, and affects trade as the award of the advantage to SMEs engaged in economic sectors where intra-Community trade takes place is not ruled out.

As Germany, in the course of the investigation procedure, had committed to apply Regulation (EC) N° 69/2001 ⁽¹⁾ concerning *de minimis* aid at the level of the tenants, the Commission concluded that the measure constitutes State aid within the meaning of Article 87(1) EC insofar as it exceeds the 'de minimis' threshold of € 100,000 per beneficiary over a three years period.

Concerning the application of the de minimis threshold to the different facilities offered by the centres, the Commission noted the following:

- Insofar as the renting of rooms is concerned, it was noted that the German authorities had committed themselves to respect the provisions of Regulation (EC) No 69/2001 at the level of the tenants. Germany undertook to calculate the aid elements of the tenancy for the rooms rented by the tenants on the basis of the equivalent comparative rent of similar premises. Thus, Germany could ensure the respect of the de minimis — threshold of 100,000 € over a period of three years. Germany will therefore inform each end-user of the centre that there may be an aid element when using the services of a centre, which will be counted as de minimis aid and be subject to the requirements of Regulation (EC) No 69/2001.
- Insofar as the use of laboratories and other specific equipment is concerned (in particular in technology centres), the German authorities informed that this aid element is reflected in a top-up on the tenancy. It can therefore be separated from the normal rent. It is noted that the German authorities also committed themselves to respect Regulation (EC) 69/2001 with regard to these top-ups for the rent of laboratories and specific equipment.

⁽¹⁾ OJ L 10, 13.1.2001, p. 30.

However, as to the consultancy services, the aid element was not limited to the de minimis threshold and had to be considered as State aid falling within the scope of Article 87(1) EC.

The aid could be approved pursuant to Article 87(3)(c) EC as Germany, in the course of the investigation procedure, undertook that the prices for consultancy services would never be below 50% of the market prices. The aid could thus be considered as being in accordance with Regulation (EC) 70/2001 ⁽²⁾ concerning aid for SMEs, particularly Article 5 thereof.

Conclusion

The presented case is remarkable for three reasons:

Firstly, it concerns several levels of operators, a legal situation that is currently solely addressed in the Commission communication on State aid and risk capital ⁽³⁾ and in point 2.4 of the Community framework for State aid for research and development ⁽⁴⁾, but both times for rather specific situations. The Commission's scrutiny showed how difficult it often is to identify the aid beneficiary and to achieve the compatibility of such measures.

Secondly, even if it may not be obvious from the decision text, it demonstrates the importance of strengthening the economic approach to State aid analysis, be it to identify the aid and the aid amount, or be it, in the context of the compatibility assessment, as an instrument to better focus and target certain State aid towards the objectives of the re-launched Lisbon Strategy.

Lastly, although an approval could be achieved on the basis of the currently existing State aid rules, the case indicates that incubators and technology centres as intermediaries providing infrastructure and services to undertakings involved in innovative activities may not be sufficiently covered by existing State aid rules.

The Commission, in particular with its consultation documents on the State aid action plan ⁽⁵⁾ and on Innovation and State aid, is currently seeking to address such issues in future State aid rules.

⁽²⁾ OJ L 10, 13.01.2001, p. 33 and OJ L 63, 28.2.2004, p. 22.

⁽³⁾ OJ C 235, 21.08.2001, p. 3.

⁽⁴⁾ OJ C 45, 17.2.1996, p. 5.

⁽⁵⁾ See http://europa.eu.int/comm/competition/state_aid/others/action_plan/

Determining Commission's competence: past aid and new aid — application on restructuring aid to Polish shipbuilding

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I. Introduction — Legal framework

In the context of the latest accession, Annex IV of the Act of Accession ⁽¹⁾ established the legal framework for the treatment of State aid put into effect before accession in the then candidate countries. Three categories of State aid measures can be identified: existing aid, so-called past aid and new aid.

The category of existing aid would include measures exhaustively listed in Annex IV, measures put into effect before 10 December 1994 and other measures put into effect before the date of accession and still applicable thereafter to which the Commission did not raise objections pursuant to the so-called interim mechanism procedure, introducing a two-tier review process. After the national authority responsible for the monitoring of the application of the State aid *acquis* approved the aid concerned, the Commission had the possibility to raise objections within a prescribed period on the basis of serious doubts on the compatibility of the notified measure with the *acquis*. In such a case, the Commission's objection would be regarded upon the day of accession as a decision to initiate the formal investigation procedure within the meaning of the State aid procedural regulation ⁽²⁾. On the other hand, if the Commission did not object, the notified measure would be regarded as existing aid from the date of accession.

The category of 'past aid' would include measures put into effect before accession and not applicable thereafter.

Finally, the category of 'new aid' would comprise measures put into effect after accession.

2. Classification — what effects?

The effects of classification of a measure into one of the above categories (past aid, existing aid and new aid) are of both a procedural and a substantive nature.

First, such classification determines whether the Commission has the competence to act with regard to the measure. Accordingly, the Commission is competent to adopt appropriate measures with regard to existing aid pursuant to Article 88 (1)

EC Treaty and to conduct a full assessment of the compatibility of new aid with the common market pursuant to Article 88(2) EC Treaty. In contrast, the Commission has no jurisdiction with regard to measures labelled as past aid. Measures that were put into effect before accession and are not applicable after accession cannot be examined by the Commission, neither under the interim mechanism procedure nor under the procedure laid down in the EC Treaty. The interim mechanism procedure neither requires nor empowers the Commission to review these measures.

Second, such classification will furthermore determine the effects which the Commission will be empowered to trigger by its assessment of these measures. Whereas the procedure governing existing aid is a forward-looking one, and no recovery of illegal aid can be requested in a decision of the Commission regarding existing aid, the Commission is empowered to order recovery of unlawfully granted new aid not compatible with the common market. Logically, past aid escapes any possibility to order recovery. These effects become more apparent e.g. in cases of restructuring aid where the restructuring period begins before and stretches beyond the date of accession and the company in difficulty receives public support both before and after accession. In such a situation, the Commission needs to assess the restructuring process as a whole, covering all measures in support of restructuring. To render the assessment of the effects of the aid on competition as accurate as possible, aid granted before accession (and not applicable thereafter) would be taken into account in the assessment of the necessity and proportionality of the aid, as well as for the determination of compensatory measures. This past aid, however, could not be subject of the recovery order, should the Commission arrive to a negative decision ordering recovery.

Considering these far-reaching consequences, the determination of the moment of granting of the aid and of the applicability of the aid after accession became the central element of the preliminary assessment of cases notified under the interim mechanism. The issue did not become obsolete after the accession as the Commission has received several notifications after 1 May 2004 pursuant to Article 88 EC Treaty. Through these notifications, the new Member States sought to obtain legal

⁽¹⁾ OJ L 236, 23.9.2003.

⁽²⁾ Council regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. OJ L 83, 27.3.1999, p. 1.

certainty to the effect that the notified measure is considered as past aid, because granted before accession and not applicable thereafter ⁽¹⁾. In such cases the Commission equally has to undertake the preliminary step of clarifying its own competence, i.e. determining whether the measure was indeed granted before accession.

In this respect, the Commission has developed the following criteria. First, a measure is considered to be put into effect before accession if a legally binding act by which the competent national authority undertook to grant the aid was adopted before accession ⁽²⁾. Second, a measure is considered to be applicable after accession if it can still give rise, after accession, to the granting of additional aid or to an increase in the amount of aid already granted, in other words if the precise economic exposure of the State is not known on the date on which the measure was put into effect and is still not known on the date of accession. Any aid schemes that entered into effect before accession and on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings after accession, will be equally considered to be applicable after accession.

3. Case study: Restructuring of some Polish shipyards

In practice, the apparent clarity of these criteria relatively briefly formulated by the Act of Accession was challenged on various occasions. One example is offered by the Commission's decisions to open the formal investigation procedure with regard to restructuring aid granted to the major Polish shipyards Gdynia Shipyard, Gdansk Shipyard — Gdynia Shipyard Group and New Szczecin Shipyard ⁽³⁾. These decisions illustrate the potential complexity of classifying dozens of measures of numerous public authorities in support of a restructuring process stretching well beyond the date of accession. In the following, the difficulties that the Commission encountered in these cases

in determining which measures had been put into effect before accession will be briefly described. As mentioned before, the moment of putting a measure into effect coincides with (a) the issuance of an act (b) by a public authority competent in the matter, (c) which legally binds this authority (d) in the sense that it creates legitimate expectations of the beneficiary under national law.

It is obvious that the question whether an administrative act is issued by an authority entitled to do so and is legally binding is a matter of national law. It was nevertheless recognised in the above decisions that the Commission must be able to examine, especially in border-line cases, these administrative acts and, judging on their form and content, to assess whether they could have given rise to legitimate expectations of the beneficiaries enforceable before a national court of law. This capacity to inspect national administrative acts is indispensable for the exercise of the Commission's exclusive competence to approve derogations from the general prohibition of State aid. Interpreting extensively the notion of 'put into effect before accession' would appear contrary to the principle of restrictive interpretation of all the derogations of prohibitions provided for in the EC Treaty because it could have the effect of preventing the Commission from the exercise of its prerogatives. The Commission therefore required Poland to demonstrate that a legally valid and binding aid granting event took place before accession.

What were the concrete instances in these cases where the Commission encountered problems in determining whether final legally binding aid granting decisions were adopted before accession?

a) *Determination of the granting event when it consists of a series of legal acts of several public authorities*

Under the applicable Polish legislation certain public liabilities can be restructured by way of a write-off. In order to accomplish this, a central authority coordinating the restructuring (the Industrial Development Agency) has to issue a specific type of decision (the so-called restructuring decision). This decision in turn requires a prior approval of the concrete public authorities whose receivables are to be written off (the granting authorities). The restructuring decision subsequently forms the basis for the actual restructuring, which consists of (1) the sale of the beneficiary's assets by another company called the operator, (2) the reimbursement to the public creditors of the part of their receivables not to be written off from the revenue generated from the sale of these assets and

⁽¹⁾ No notifications under the interim mechanism were possible after the accession, when the Article 88 EC Treaty procedure started to apply also to the new Member States.

⁽²⁾ Judgement of the Court of First Instance of 14 January 2004 in Case T-109/2001, *Fleuren Compost BV v the European Communities*, para. 74. OJ C 85, 3.4.2004, p. 24.

⁽³⁾ State aid No C 17/2005 (ex PL 34/2004 and N 194/2005) and C 18/2005 (ex N 438/2004) — Restructuring aid to Gdynia Shipyard; restructuring aid to Gdansk Shipyard. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty. OJ C 220, 8.9.2005, p. 7. State aid No C 19/2005 (ex PL 31/2004 and N 203/2005) — Restructuring aid to Szczecin Shipyard. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty. OJ C 222, 9.9.2005, p. 7.

finally (3) the issuance of decisions by the granting authorities to write off the remaining receivables. The process being rather complex, the first task was to determine which step would create the proverbial 'point of no-return', creating the entitlement of the beneficiary for its debts to be written off. The Commission first concluded that this decisive aid granting event is the issuance of the restructuring decision, the following steps being merely acts of implementation leading to the payment (in this case write-off), where no discretion is left to the granting authorities. On the basis of the information available at the time of the opening, the Commission then considered that, although the Industrial Development Agency did issue a decision concerning the restructuring process in question, this decision seemed to lack some *essentialia negotii*, formal and material requirements qualifying it as a 'restructuring decision' capable of directly creating legal effects. The Commission expressed doubts whether the beneficiary could have derived from this decision legitimate expectations under national law that the restructuring of its public debt would be realised.

b) *Informal commitments*

For some measures like guarantees or capital injections it was claimed that the possibility to grant this support was discussed in meetings between the beneficiaries and the granting authorities, whether on a bilateral level or within various working groups (e.g. Shipbuilding Industry Team, a forum assembling stakeholders from both the government and the industry side). The Commission did not accept any oral agreements not supported by evidence as aid granting events.

c) *Commitment of a public authority acting as a shareholder of the beneficiary I*

With regard to a capital injection by the State Treasury, which is an important shareholder of one of the investigated shipyards, it was argued that the State Treasury took on the commitment to inject additional capital at the moment when its representatives, sitting on the Supervisory Board of that shipyard, agreed with the restructuring plan presented to that Board by the company's management. The restructuring plan incorporated, among other things, the possibility for the company to receive a capital injection from the State Treasury. The Commission assessed whether the decision of a public entity, in its capacity as owner of a public enterprise, to approve the restructuring plan can be considered to be the decision of the same public entity, in its capacity as state authority, to grant the State aid provided for in that restructuring plan.

First, the Commission examined whether the approval of the restructuring plan by the Supervisory Body is indeed a decision binding upon the owners of the beneficiary and on the basis of the available evidence expressed doubts that the Supervisory Board would be empowered, without further acts of the shareholders being indispensable, to adopt decisions, which would have financial repercussions on the owners and which the owners would then be obliged to execute. Second, the Commission questioned whether a restructuring plan approved by the beneficiary's shareholders would create a positive obligation on the State Treasury, as one of the shareholders, to grant the aid. In other words, the Commission was not convinced that it was possible to assimilate the actions taken by the State as a market player and actions taken by the State in pursuance of various public goals, such as employment and regional policy.

d) *Commitment of a public authority acting as a shareholder of the beneficiary II*

The State Treasury, as the shareholder of one of the shipyards, declared in a shareholders' meeting, which took place some months before the accession, its readiness to realise a capital injection. Minutes from this shareholders' meeting evidence this commitment. According to national commercial law, the amount of a capital increase has to be filed with the competent registry court within six months from the date of the resolution on such increase. The Commission observed that these procedural steps had not been taken in the prescribed period and therefore expressed doubts whether the alleged commitment of the State Treasury, which indeed preceded the accession, was still a relevant legal act capable of producing legal effects without any further steps being indispensable.

4. To be continued ...

It was mentioned earlier that the determination of the moment of the granting of the aid has important jurisdictional consequences. Hence the interest for the Commission to establish this moment accurately. It can be seen from the above examples that this determination may involve questions related to national administrative, commercial and company law. Particular difficulties were observed where a public authority performed a dual function as, firstly, the owner of the beneficiary and, at the same time, the granting authority.

Undoubtedly, the review by the Commission of legal acts adopted under national private or public law in the context of its competence in the area of

State aid is not a frequent sight. These instances, however, occasionally are present in the State aid legislation and are potentially problematic, especially if important legal consequences are attached. Therefore it would be useful to take into account

the practical difficulties in applying criteria linked to national law in a Union of 25+ Member States, in particular in the preparation of the future enlargements and thereto related transitional procedural arrangements in the area of State aid control.

The Italian tax premium in favour of newly listed companies and the notion of selectivity relative to direct business taxation

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Background

A recent negative decision by the Commission of 16 March 2005 ⁽¹⁾ on an Italian State aid scheme providing generous business tax incentives in favour of companies going listed on regulated stock exchanges in the EU offers some interesting insights into the Commission's process to distinguish between State aids and legitimate tax preferences.

It is known that the exact distinction between State aids and derogatory taxation is controversial. The Commission notice on the application of State aid rules to measures relating to direct business taxation ⁽²⁾ prepared the ground for an expansive role for the Commission to review Member States' proposed and existing business tax regimes, with a view to creating a level playing field for undertakings competing in the common market. This review has created some tension between the Commission and the Member States because of the unclear distinction between the effects-based notion of State aid and the variable effects that general tax measures produce on different groups of undertakings. The Commission (Doc. C(2004)434 of 9.2.2004) recently published an explanatory report on the implementation of the Commission notice on direct business taxation ⁽³⁾ without addressing this specific point.

The decision under review expressly deals with the issue of appraising the nature of a national tax measure aimed at favouring the listing of companies and it is noteworthy because in the decision's reasoning the Commission clarifies the multiple-step process to establish the presence of aid when tax measures are considered.

The scheme in question provided the companies going listed on a regulated EU stock exchange with a double tax incentive consisting in the three-year corporate tax rate reduction and the extraordinary deduction of certain cost items incurred because of the listing transaction. The scheme was enacted by the Italian Government with its 2004 budget law (DL 269/2003) entering into force on 2 October

2003, the date of publication in the Italian OJ ⁽⁴⁾. The scheme was conceived as an urgent measure to quick-start the Italian economy following a period of slow growth. Accordingly, it targeted some select sectors of the Italian economy to drive the economic upturn of the country. The Commission immediately raised its concerns about the newly introduced incentives and requested Italy to provide the necessary information to establish the possible aid nature of the scheme. Notwithstanding this initial request, Italy converted the scheme into law ⁽⁵⁾. In February 2004, the Commission opened the formal investigation procedure, raising initial doubts about the aid nature of the scheme and its compatibility with the common market ⁽⁶⁾.

During the formal procedure, the Italian Government defended the legality of its scheme against the Commission review. In March 2005, however the Commission concluded that the scheme constituted State aid and that it was incompatible with the single market. Considering that the aid had been enacted without prior Commission approval, the Commission also ordered the recovery of the tax advantage illegally granted from its beneficiaries. In May 2005, Italy lodged an appeal before the Court of First Instance (Case T-211/05, pending) claiming the Commission's error in characterising the scheme in question as incompatible aid.

Granting tax breaks is attractive for Member States

The Commission is particularly mindful of the fact that in situations of slow economic growth and budgetary constraints, Member States increasingly rely on tax breaks to stimulate their economies and it is vigilant about the distortions that certain measure can provide to competition in the common market. State aid in the form of fiscal incentives is easier to manage by Governments and more efficient, in that it may be formulated as a general measure, although effectively designed to produce benefits for particular taxpayers according to their

⁽¹⁾ Commission Decision C(2005)591 fin of 16.3.2005, not yet published.

⁽²⁾ OJ C 384 of 10.12.1998.

⁽³⁾ Published in the Europa website: http://europa.eu.int/comm/competition/state_aid/others/

⁽⁴⁾ Decreto Legge of 30 September 2003, N. 269, concerning 'Disposizioni urgenti per favorire lo sviluppo e per la correzione dell'andamento dei conti pubblici' — Official Journal of the Italian Republic N. 229 of 2 October 2003.

⁽⁵⁾ Legge 24 November N. 326 Official Journal of the Italian Republic N. 274 of 25 November 2003.

⁽⁶⁾ OJ C 221 of 3.9.2004.

individual circumstances and therefore targeted at sectors of the economy that Member States intend to strengthen.

In an attempt to stimulate the economy, the Italian budget law of 2004 enacted a general incentive for all companies going listed within the year. The scheme was formulated as a general measure, but it raised the question of whether its effects could be considered selective. In addressing this question, the Commission had to conduct a State aid analysis which typically involves a multiple-step examination.

With its notice on fiscal aids, the Commission clarified that the main criterion in applying Article 87(1) to a tax measure is to prove that the measure provides in favor of certain undertakings in the Member State an exception to the application of the tax system ⁽¹⁾. The common system applicable should thus first be determined to decide whether an exception to the system is provided. According to the case law of the Court, it should be further examined if the exception within that system is justified by the nature or general scheme of such a system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned ⁽²⁾. If this is not the case, then selectivity is in principle involved, unless it can be justified because necessary and proportionate to reach the objectives set by the specific scheme ⁽³⁾. The latter means that the assessment of whether a tax scheme is selective is based on a familiar discrimination test whereby a differentiation in tax treatment must be objectively justified and may not go beyond what is warranted by the differences in the circumstances concerned with taxing non-comparable situations. As observed by the Court of Justice, the question to be determined is whether under a particular statutory scheme a State measure is such as to favour certain undertakings (or certain productions) in comparison with other undertakings (or other productions), *'which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question'* ⁽⁴⁾. Where the distinguishing criterion used by the national legislation at issue is justified by the nature and/or general scheme of the legislation, a selective measure is not in the nature of State aid.

⁽¹⁾ Paragraph 16 of the Commission notice, indicated in footnote 2.

⁽²⁾ Judgement of the Court of Justice of 2 July 1974, Case C-173/73, Italy v Commission 1974 [ECR], p. 709.

⁽³⁾ Judgement of the Court of Justice of 8 November 2001, Case C-143/99 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, 2001 [ECR], I-8365.

⁽⁴⁾ Case C-143/99, paragraph 17.

Examination of the tax premium for newly listed companies

The scheme consisted in two corporate tax incentives for companies going listed for the first time on a regulated stock exchange. First, pursuant to Article 11 of DL 269/2003, the companies going listed on a regulated European stock exchange by means of initial public offering (IPO) within the time-period between 2 October 2003 (the date of entry into force of the 2004 budget law) and 31 December 2004 could benefit from a tax premium consisting in three-year reduced corporate income tax rate of 20 percent in lieu of the 33 percent standard rate. Second, under Article 1(1)(d) of DL 269/2003, the amount of expenses incurred to go listed was excluded from the taxable income in the year of listing. The exclusion came on top of the ordinary deduction allowed for the costs involved with the IPO and had the effect of reducing the effective tax burden applied in the year of the listing.

Although formally open to all companies, the Commission had doubts that the scheme constituted a derogation from the general tax system and decided to open the formal investigation procedure. By taking this public step, the Commission intended to inform the financial markets concerned with the new listings of the recovery risks concerned with a possible finding that the scheme in question constituted State aid. Both the Italian authorities and Borsa Italiana Spa responded to the Commission's invitation to comment criticizing the Commission tentative qualification of the scheme as State aid. According to them, the scheme was to be viewed as a general tax policy measure aimed at fostering the listing of Italian companies against the negative trend registered in the recent years, and to strengthen their capitalisation and competitiveness on the global markets; as such the scheme would fall outside the scope of State aid review. They claimed that the scheme was not selective, nor it affected competition because any undertaking could benefit from the premium by going listed in a European stock exchange. According to the Italian comments, the scheme was applicable across the board to all business sectors, industries and territories and as such it was not selective. Finally, the scheme was not affecting competition because of its limited duration and budget and because foreign companies were equally eligible to receive the tax premium when going listed abroad.

Solving the ambiguities: A comprehensive notion of fiscal aid

Following a thorough examination of the Italian arguments, the Commission concluded that the

measure was State aid within the meaning of Article 87(1). Pursuant to Article 87(1) the notion of aid is dissected into four or more distinct parts. Firstly, a State aid measure must confer on recipients an advantage which relieves them of charges that are normally borne from their budgets. Secondly, the advantage must be granted by the State or through State resources. Thirdly, the measure must affect competition and trade between Member States. Lastly, it must be specific or selective in that it favours certain undertakings or productions ⁽¹⁾.

As these elements are closely interdependent, the Commission examination was a comprehensive one. It was impossible for the Commission to identify a benefit or advantage without identifying the group in relation to which such advantage was enjoyed and accordingly to address the problem of specificity presented by the expressions 'certain undertakings' and 'certain goods' provided in Article 87(1), without considering whether the advantage was granted by the State through its tax system, while the presence of a tax advantage was inseparable from ascertaining the specificity of the scheme. Similarly, the distortion competition and the effect on intra-Community trade were closely connected with the tax advantages provided and their specific character.

In the analysis conducted in this case, a substantive examination of the general principles of the national tax system was necessary to confute the Italian argument that the Commission was unduly intervening in an area traditionally reserved to Member States such as direct taxation to circumvent its obligation to regulate the competition distortions deriving from the differing Member States' tax systems with the legislative means set forth by Articles 93 and 94 of the Treaty.

Selectivity and justification of specificity

In its review of the scheme, the Commission essentially considered that the measure provided selective advantages in favour of certain undertakings being able to go listed in the short period foreseen by the law. The tax premiums accordingly constituted exceptions from the general operation of the tax system. The Commission considered that both the tax rate reduction and the tax deduction described above were derogations because although in principle applicable to all companies going listed, there was no tax motivation for effective lower taxation when a company goes listed. In particular, the tax premium consisting in the tax rate reduction seemed unrelated to the listing

and the extraordinary deduction was atypical of expenses that have already been deducted from the taxable income. The Commission accordingly concluded that the scheme in question constituted a tax incentive, because it reduced the effective taxation of the companies going listed. The scheme granted an economic advantage to its beneficiary by means of State resources and as far as it affected competition and intra community trade by favouring certain undertakings, it constituted State aid within the meaning of Article 87(1). The relevant issue was whether the tax premiums at hand were specific and distorted competition by favouring certain undertakings or productions in a way proscribed by Article 87(1).

Pursuant to the Commission practice, to be considered general a tax measure must be effectively open to all undertakings on an equal access basis and shall not be *de facto* reduced through any conditions that restrict its practical effect. Member States must and do remain at liberty to pursue policies aimed at creating a favourable economic climate. Measures which apply across the board to all sectors of the economy are, therefore, in principle permissible. Member States must not, however, favour certain individual undertakings, or even whole sectors of the economy, over others ⁽²⁾. The Commission examines a possible State aid measure not in terms of the form that it takes, but in terms of its effects. For the Court of Justice, *'the fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid'* ⁽³⁾.

The Commission noted that the scheme in question was effectively selective because it excluded, for example, both the undertakings that were already listed and the undertakings that did not fulfil the conditions for being listed or that, in any event, did not go listed in that period. The exception did not seem to be justified by the nature of the system because a corporate tax system does not typically award deductions in excess of actual expenses incurred, nor it temporarily reduces the tax rate applicable to certain profits of companies going listed unless for general reasons such as administrative simplicity (e.g. forfeit deduction

⁽¹⁾ Paragraph 9-12 of the Commission notice, indicated in footnote 2.

⁽²⁾ Judgment of the Court of Justice of 14 July 1983, Case.203/82, Commission v Italy, 1983, [ECR], p. 2525.

⁽³⁾ Case T-55/99 Confederación Española de Transporte de Mercancías (CETM) v Commission of the European Communities 2000 [ECR], II-3207, paragraph 40.

recognised for expenses that are difficult to determine or to prove), or to ensure fiscal neutrality between companies being in objectively different conditions. None of these justifications were found for the incentives in question.

Italy objected that if a State aid measure must be appreciated on the basis of its effects, any tax preference may constitute aid and the distinction between taxation and State aid would become blurred. The Commission however explained that the tax incentives in question do *'not address any fundamental tax distinctions between the situations of listed as opposed to non-listed companies. In particular, since the scheme provides for a tax rate reduction applicable on the future profits earned by its beneficiaries, it is disproportionate because unrelated to the fact that such beneficiaries go listed, to their capital structures, and to other characteristics deriving from the listing'* (1). In conclusion, the Commission showed that the scheme was *de facto* selective and that the tax premium could not be justified by the logic and general scheme of the system as the tax differentiations foreseen by the scheme was not targeted to any demarcations in the Italian tax system.

The two-pronged justification by the nature of the system

It should be noted that the Court of Justice devised a two-pronged doctrine with respect to the justification of a tax measure by the nature of the system. First, the Court considered that where a difference of treatment between undertakings is justified by reasons relating to the logic or general scheme of the system there is absence of aid (2), because there is an internal (tax) justification for a given fiscal preference. It is known that for the Court the notion provided by Article 87(1) *'does not distinguish between the measures of State intervention by reference to their causes or their aims but defines them in relation to their effects'*, however a selective measure can be justified by the nature or the general scheme of the tax system (3).

An example of justification by the nature or general scheme of the tax system is found in the judgement of the Court of 24 April 2004 (4) concerning the question whether the existence of different applicable rates for a tax on insurance premiums in the U.K. may create distortions of competition forbidden by Article 87(1). The Court held that,

even on the assumption that the introduction of a higher rate of tax for certain insurance premiums involved an advantage for operators offering contracts subject to the lower standard rate, the application of the higher rate of tax, in that case, was justified by the nature and the general scheme of the national system of taxation of insurance, and in particular by the objective of limiting tax avoidance to which those contracts were particularly exposed, and could not therefore be regarded as constituting aid (5).

Second, the Commission has to consider whether a selective measure can be justified by the logic of the scheme itself. This justification makes reference to an external or economic logic that is different from the internal or tax logic of the system. To be proven valid, the justification must be relatively broad and proportionate to the objective pursued by the scheme. To illustrate, in a landmark judgement of the Court concerning an energy tax reduction (6), the Court not only held, following the above-indicated case law, that the condition of selectivity is not satisfied by a measure conferring an advantage on its recipient when this is justified by the nature or general scheme of the system of which it was part, but it also concluded that a selective advantage may in principle be justified by the specific logic of the scheme. In the particular case, the Court considered that the ecological considerations underlying a derogatory energy tax reduction in favour of the undertakings of the manufacturing sector may not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods, because energy consumption by each of those sectors is equally damaging for the environment. The dictum confirms the principle that a tax derogation can be justified by the specificity of the measure, if its scope is sufficiently broad and targeted to the (external) objective pursued.

In reviewing the Italian tax incentives in favour of the newly listed companies, the Commission examined both possible justifications of the specific advantage provided by the scheme: first it established that the tax rebate at hand constituted a derogation from the general corporate tax rules applicable in Italy and that such a derogation did not descend from any material difference under the nature or general scheme of corporate taxation and as such it was not justified; second, it ascertained that, with particular respect to the extraordinary deduction granted, the scheme could not be justified by its own specific objectives because

(1) Paragraph 27 of the decision of 16.3.2005, referred to in footnote 1.

(2) Judgement of 22.11.2001, Case C-53/00, *Ferring v ACROSS* [2001] ECR I-9067, point 17.

(3) Case 173/73 *Italy v Commission*, [1974] ECR 709.

(4) Judgment of the Court of 29.4.2004 in Case C-308/01, *GIL Insurance*.

(5) Point 78 of the judgement of 29.4.2004.

(6) Case C-143/99, *Adria-Wien Pipeline*, paragraphs 42 to 54.

its short duration made it effectively inaccessible to many potential beneficiaries ⁽¹⁾. The Commission observed that the burden of proof for such justifications rested on Italy, while no reasonable proofs were provided of the fact that the incentives were effectively targeted to the specific objective of promoting the listing of new companies.

The Commission considered a final objection raised by Italy with respect to the limited time-period of operation of the scheme. In particular, Italy observed that the reduced number of beneficiaries being eligible could be justified by budget constraints and would further substantiate the conclusion that the effect on competition of the measure was limited. The Commission rejected this argument because it considered that the limited budget of an incentive does not take away its aid character, nor it reduces the competition distortion deriving from the measure. In this respect, the Commission referred to the relevant case law of the Court ⁽²⁾ confirming that the only relevant consideration is whether a measure as it currently applies only to certain undertakings or certain economic sectors, and any plans to make it a general measure in the future are irrelevant.

What truly mattered for the Commission was that the tax premiums at hand determined an alteration (through taxation) of the pre-existing competitive position of certain undertakings being engaged in business activities open to international competition, and as such they constituted aid susceptible to affect competition.

Effects on competition and trade

Geographical scope of tax preferences and effects on competition

In its review, the Commission addressed an objection frequently raised by Member States when subject to State aid review of their tax preferences. According to Italy, the scheme did not amount to any specific advantage and could not have the effect of distorting EU competition and trade, because it reduced the tax of undertakings already being subject to different levels of taxation.

In responding to this objection, the Commission noted that its review was solely concerned with the advantages that Italy granted to certain beneficiaries, without considering whether such advantages were aimed at compensating the local undertakings from a higher taxation vis-à-vis foreign undertakings. The Commission considered that a national fiscal measure, although formally general,

constitutes aid if it affects more prominently certain national industrial sectors in view of promoting their competitiveness with respect to foreign competitors subject to lower charges.

Since the incentives were granted through the tax system, it mainly favoured Italian undertakings going listed because, while the tax premium applied to the worldwide profits incurred by the Italian undertakings, it only applied to the local profits of the foreign undertakings going listed, and also in this respect, the latter ones were put at a disadvantage. The Commission on this point observed that while the nature of the tax system would ordinarily justify this fiscal disparity, the fact that the scheme was an extraordinary incentive distinct from the normal operation of the Italian tax system disallowed the justification and cross-border competition was therefore affected.

The Commission confirmed its appraisal made on opening the formal investigation that the measure could distort competition and affect trade between Member States. Following the settled case law of the Court, according to which for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ⁽³⁾, the Commission considered that the business activities carried out by the beneficiaries of the scheme could take place in international markets and involve trade and other business activities in markets where competition is intense.

In developing its analysis the Commission observed that by going listed on a regulated stock exchange companies seek to achieve several relevant financial objectives including among others (a) to increase and diversify the sources of corporate financing helping to pursue asset and stock acquisitions; (b) increase the financial standing of the listed company with respect to debt holders, suppliers and other creditors accepting the stock as a guarantee of debt; (c) obtain a market valuation for the company, so to facilitate at any given time merger and acquisition transactions to take place. The Commission concluded that by providing an extraordinary tax advantage for companies deciding to go listed, Italy improved their competitive conditions and their financial standings vis-à-vis other competitors not going listed and not subject to Italian taxation. Considering the calibre of the companies going listed and given that the above effects may favour the Italian beneficiaries operating in markets where intra-Community trade takes place, the Commission considered that the scheme affected trade and distorted competition. The

⁽¹⁾ Paragraph 27 of the Commission Decision of 16.3.2005.

⁽²⁾ Case C-75/97 *Kingdom of Belgium v Commission* (Maribel bis/ter scheme), 1999 [ECR], p. I-3671, paragraphs 41-43.

⁽³⁾ Case T-214/95 *Het Vlaamse Gewest vs. Commission* — 1998 [ECR] II-717.

Commission moreover noted that, as of the day of its decision, a number of companies went listed on the Italian stock markets and became entitled to fiscal benefits being proportionate to the future profits earned in the following three years of operation. These companies belonged to various sectors ranging from manufacturing to public utilities, all open to international competition. The Commission accordingly held that these specific features of the beneficiaries was justifying the conclusion that advantages granted to them could affect intra-Community trade and competition.

Based on the projected earnings incurred by some beneficiaries before the listing over three years, the Commission established that each of the listed companies could benefit from considerable tax reductions. For example, the Commission calculated that the tax benefits which would be enjoyed by one beneficiary alone over the period 2004-2007 would potentially total € 75 million. However, because of the a limitation of benefits clause of Article 11 of DL 269/2003, the actual premium could not exceed € 11,7 million over the three-year period. In any event, the Commission could not rule out that the benefits accruing to any individual beneficiary would comply with the *de minimis* limitation. Considering that the beneficiaries are often leaders in Italy in their respective business sectors, the Commission concluded that the distortion of competition deriving from the scheme in the different sectors where the beneficiaries operate could be relevant.

Compatibility and notion of operating aid

The Commission observed that none of the exceptions provided for in Articles 87, paragraphs (2) and (3) of the Treaty, under which State aid may be considered compatible with the common market, applied in the present case.

It is interesting to note the Commission's reasoning in indicating that the scheme constituted operating aid and for this reason alone could not be considered compatible with the common market. As an exception from a general principle, compatibility with the single market must be interpreted narrowly. The compatibility examination, however, requires the assessment of complex factual situations in which the Commission enjoys some latitude. Under the settled case law of the Court ⁽¹⁾, it appears that Article 87(3) of the Treaty confers on the Commission a wide discretion to allow aid by way of derogation from the principle

in Article 87(1) that State aid is incompatible with the common market. The Commission's examination entails consideration and appreciation of complex economic facts and conditions. Since the Community judicature cannot substitute its own assessment of the facts, especially in the economic field, for that of the originator of such a decision, the Court must confine itself to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate and that there has been no manifest error of assessment or misuse of powers. Notwithstanding the discretion the Commission typically enjoys, it examined one by one the derogations to the general State aid prohibition provided by Article 87(2) and (3) and concluded that the tax relieves granted under the scheme in question were not covered by such derogations.

The Commission finally examined the regime at hand in the light of the derogation provided by Article 87, (3)(c). The latter provision empowers the Commission to authorise aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect the trading conditions to an extent that is contrary to the common interest. Also this derogation could not be accepted by the Commission, however, because the Commission observed that the tax advantages granted by the regime were not related to specific investments, to job creation or to specific projects, while they simply constituted a reduction of charges that should normally be borne by the beneficiaries concerned in the course of their business activities without contributing to achieving any Community objectives. The scheme had therefore to be considered as operating State aid and for this reason it was viewed to be incompatible with the common market.

Market distortion and recovery

What was at stake in this case was not a Member State ability to shape its tax system in the way it considered most appropriate, but rather a Member State providing disproportionate tax reductions to a select number of beneficiaries and having the effect of seriously distorting competition in the common market, without justification. It was critical for the Commission to put a rapid end to this harmful distortion of competition.

The Italian authorities put their tax premiums into effect without prior notification to the Commission and therefore they did not fulfil the stand-still obligation provided by Article 88(3) of the Treaty. In such circumstances, Article 14 of Council Regulation N° 659/1999 laying down the implementing rules for the application of Article 88 obliges the

⁽¹⁾ Joined Cases of the Court of First Instance T-298 et al./97, T-1 et al./98 *Alzetta Mauro and others v Commission of the European Communities*, 2000 [ECR], II-2319.

Commission to order a Member State to recover the unlawful State aid from its beneficiaries to restore, as far as possible, the competitive position that existed before the aid was granted.

In the case at hand, the Commission, completed its procedure with a final negative decision shortly after the end of the year in which the scheme was put into effect (2004) and therefore before the tax liability of most beneficiaries had become definitive. The Commission accordingly made what was possible under the procedural rules to limit

the market distortion. However, the Commission could not exclude that certain newly listed companies had already reduced their advance tax payments relative to the fiscal year 2004. Therefore, the Commission concluded that it was necessary to order the recovery of the aid already made available to the beneficiaries. The Commission accordingly demanded Italy to enjoin to the beneficiaries of the scheme, within the two months of the decision, to reimburse the aid with the relative interests ⁽¹⁾ and to provide evidence that the recovery proceedings had initiated.

⁽¹⁾ Without prejudice, however, to the possibility that all or part of the aid granted in individual cases is considered as compatible aid, in particular under Article 5(b) of the Block Exemption Regulation in favour of SMEs.

Chief Economist section

As the role of economic analysis in competition policy has become larger, Competition Policy Newsletter adds a section which shall be devoted to the discussion of economics in competition policy. The primary purpose is to provide some insight into the economic analysis which has been applied in specific merger, anti-trust or state aid cases. Contribu-

tions may illustrate for instance the role of econometric or simulation modelling used in a particular case. While describing the technical tools applied, contributions should aim to be comprehensible also for a wider audience. On occasions, this section may also contain contributions on broader economic policy issues as competition policy guidelines.

News from the Chief Economist

- *Economic Advisory Group on Competition Policy (EAGCP):*
Opinion on Article 82: <http://europa.eu.int/comm/competition/publications/publications/#UDIES>
- *CET Discussion paper: 'A three-step structured rule of reason to assess predation under Article 82'*
http://europa.eu.int/comm/dgs/competition/cce_en.htm

The role of quantitative analysis to delineate antitrust markets: An example. Blackstone / Acetex

Benoît DURAND and Valérie RABASSA, Directorate-General Competition, Chief Economist team

Introduction

On 20 January 2005, the Commission received a notification for the proposed acquisition of Acetex, an active producer in the acetyls and plastic business, by Blackstone, a U.S. private merchant-banking company. One of the companies controlled by Blackstone, Celanese is active on the same product markets as Acetex. At the end of the first phase, the Commission decided to open an in-depth investigation, which eventually led to a full clearance. During the investigation one of the key issues was the delineation of the relevant geographic market for each product affected by the transaction.

Because the products involved are considered chemical commodities, the definition of the various relevant product markets did not pose any challenge. The transaction had an impact on four product markets:

- Acetic acid, an intermediate chemical product used in the production of various other chemicals including vinyl acetate monomer (VAM), polyvinyl alcohol (PVOH) and acetic anhydride. Acetic acid is a bulk-commodity.
- VAM is a commodity chemical derived from acetic acid.
- Acetic anhydride is a basic chemical used primarily for the production of cellulose acetate flake.
- PVOH is a water-soluble synthetic polymer.

The parties and the Commission had diverging views on what constituted the relevant geographic market for acetic acid, VAM and acetic anhydride. At issue was whether the EEA constitutes a distinct relevant geographic market, or alternatively is the market broader including other regions. The parties claimed that the markets for the affected products are worldwide. But because the presence of substantial transportation and storage costs as well as duties could inhibit trade flows, it was not clear whether imports could flow easily into the EEA as a result of a domestic price increase.

During the proceedings the parties submitted numerous econometric studies supporting the existence of a worldwide market. The evidence was carefully reviewed by the members of the Chief Economist Team working on the case who

also conducted additional empirical analysis. This case is a good opportunity to recall what an antitrust market is, to illustrate how some quantitative techniques can help delineate a relevant antitrust market, and finally to highlight the pitfalls of some of these techniques.

Antitrust markets vs. economic markets

The most commonly cited definition of an economic market is provided by George Stigler who argued that 'a market for a commodity is the area within which the price tends to uniformity, allowance being made for transportation costs' ⁽¹⁾. The economic definition of a market stresses the notion of price uniformity. Behind this definition hides the role of arbitrage that leads to price convergence, and sustains the law of one price. As a result, economic markets can be identified by co-movements of prices overtime.

Antitrust markets are concerned with the exercise of market power. An antitrust market essentially delineates the boundaries of the smallest possible market that can be successfully monopolized. Conceptually such a market is found by applying the hypothetical monopolist test or SSNIP test. That is, for our purpose could a hypothetical monopolist located in a specific geographic area successfully impose a small but significant and non-transitory price increase of 5% or 10%. If such a price increase proves profitable then that geographic area constitutes a separate antitrust market. To answer the hypothetical monopolist test, evidence about elasticities indicates whether that price increase would be profitable. Clearly, the spotlight is on market power ⁽²⁾.

Obviously antitrust and economic markets are closely connected, but they may not always coin-

⁽¹⁾ Stigler, George. 1942. *The theory of Competitive Price*. New York, Macmillan.

⁽²⁾ For more discussion on the relationship between antitrust and economic markets see Scheffman and Spiller, 1987, «Geographic Market Definition under the U.S. Department of Justice Merger Guidelines», *Journal of Law and Economics*, vol. XXX, Baker (1987) «Why price correlations do not define antitrust markets: on econometric algorithms for market definition» Working Paper no. 149, Bureau of Economics, FTC, Werden and Froeb (1991) «Correlation, causality, and all that Jazz: the Inherent shortcomings of Price Tests for Antitrust Market Delineation», *EAG Discussion Paper*, U.S. Department of Justice.

cide. For example, consider two groups of producers manufacturing the same commodity but that are located in two different regions that we call A and B. Historically prices in the two regions have been moving in parallel, with the price gap reflecting difference in transportation costs. When one producer attempts to raise prices, such an attempt is doomed to fail in this market. The presence of suppliers that could easily expand output provides sufficient discipline to prevent any profitable deviation from the actual equilibrium price. As a result, A and B belong to the same economic market. Now consider that the group of producers located in region A forms a cartel, and attempt to restrict output to raise prices. Assume that the producers located in B are unable to exercise arbitrage because they all produce at full capacity, and further their existing capacity is not sufficient to satisfy consumer demand in B. That is, producers located in A export to region B, where prices tend to be higher. In this case, a hypothetical monopolist controlling the production facilities located in A could successfully raise prices. Producers located in B would have neither the ability to increase production nor the incentive to sell their existing production to A as prices in B remain at higher levels. As a result, region A could constitute a separate antitrust market.

The example shows that antitrust market and economic market are two different concepts that need not coincide. As a result, it is important to bear in mind such a distinction when using empirical techniques to support a particular market definition.

Price correlation, co-integration tests and market definition

In support of the parties' claim, LECG, the economic consulting firm retained by the parties, submitted several empirical studies analysing price movements for each product across different regions of the world. Based on a fairly detailed correlation and co-integration analysis, the studies show that historical prices from various regions of the world move together. The studies conclude then that the relevant markets are worldwide.

First, showing that prices from two regions are correlated overtime would certainly indicate that these regions belong to the same economic market. However, how strong the correlation needs to be to validate such a claim is anyone's guess. In addition, the correlation of two price series may be the result of common factors, such as input prices or seasonality. Hence it is important to remove these common factors that would explain a strong association between price movements before claiming that prices are actually correlated as a result of mar-

ket forces ⁽¹⁾. Although the studies did not necessarily suffer from some of these shortcomings by and large these price tests, whether in the form of a correlation or a co-integration analysis, are primarily designed to identify economic markets. That is, they tend to answer questions such as: do prices converge in absolute terms? Or do price converge in relative terms (using price-differences)?

In fact, the relationship between prices in two distinct regions does not necessarily provide sufficient information about the elasticities needed to determine the relevant antitrust market. In the present case, information about the elasticities of supply of the different groups of producers would have been helpful to delineate the relevant geographic market. In sum, the empirical studies submitted did not directly provide evidence that the producers in different regions belong to the same antitrust market.

'Shock analysis'

If available, natural experiments can be a suitable empirical methodology to shed light on the source of existing competitive constraints that are likely to impede the exercise of market power. Laboratory experiment is a common methodology used in many scientific studies. In principle, scientists design two groups, a group in which the experiment will take place, and a control group. The effect of the experiment will be measured by comparing the outcome between the experimental group and the control group. Natural experiments are somewhat similar, but the experiment does not take place in a laboratory but outside in the real world. For the purpose of market definition, the natural experiment should be a relatively good proxy of the SSNIP test.

In this particular case, Professor Jerry Hausman in collaboration with LECG carried out a 'shock' analysis to help determine the relevant geographic market. Their analysis consisted in determining whether unexpected supply shocks in one particular region had any impact in other regions of the world. Because these negative supply shocks yield an unexpected output decline, they can provide useful information about the strength of the competitive reactions of producers located in other regions of the world. In this particular case, however, the identified shocks were transitory, and known to be short-lived, although there may have been some uncertainty about their duration. This

⁽¹⁾ For more on these issues, see 'The internal market and the relevant geographical market' Copenhagen Economics, Study for DG Enterprise.

implies that the finding of a competitive reaction to these transitory shocks would be evidence of a reaction to a non-transitory price increase.

1. Effect on prices

In a first step, the parties submitted an econometric study to identify the effect of unexpected plant outages on prices in different regions of the world. Plant outages usually result in production losses. The main reasons behind these outages are breakdowns or unexpected shortages of raw materials. The study contains a time-series econometric model that included a set of dummy variables to account for the impact of unexpected local plant outages. For the purpose of their study the parties identified plant outages that had occurred in various regions of the world and that were cited in the trade press. The study focused on three main regions, namely North America, Western Europe (a proxy for the EEA) and Asia. For example, for VAM, Hausman and LECG found that plant outages in Asia had actually some impact on prices in Western Europe. They therefore concluded that because shocks in one region would affect price in another region, this was sufficient to determine that the market was worldwide.

Unlike the parties, the members of the CET maintained that the relevant experiment was to first focus on the impact of unexpected outages that have occurred in Western Europe. The Commission primary concern is to determine whether the merger would lead to a significant price increase in the EEA. Therefore the starting point of the exercise is to determine if the EEA constitutes a geographic market that can be successfully monopolized. Unexpected outages, though short-lived, may provide some indication about the source of the competitive constraint faced by producers located in the EEA.¹ That is, if unexpected output restriction causes both a surge in imports into the EEA and prices in other regions to rise, this would be an indication that a hypothetical monopolist controlling all production facilities in Europe would be unlikely to impose a successful small but non-transitory price increase. As a result, the antitrust market would likely be broader than the EEA.

⁽¹⁾ *The replies to questionnaire sent to competitors seem to suggest that when unexpected plant outages occur, firms' reaction consists in different types of actions. In general, firms can use SWAP agreement or reduce their inventories, or in the best case stop supplying the spot market and in the worst case purchase missing requirement from the spot markets. The replies show that firms tend to do a combination of all, but inventories are always used to face unexpected production shortages. But firms tend to maintain relatively low levels of inventories; hence plant outages are likely to have some impact on the spot markets.*

In a first step, the Commission investigated whether the unexpected plant outages identified by the trade press were actually unexpected. By and large, the investigation confirmed that most shocks did occur with a few exceptions. Based on the econometric specification provided by the parties, the member of the CET conducted additional statistical tests to determine the impact of unexpected plant outages in Western Europe. To illustrate the following table presents the econometric results of the experiment for one set of products, VAM.

Table 1: Effect of Unexpected Regional Outages on the Regional Price of VAM

	Unexpected Outages in Western Europe	Unexpected Outage in Asia
Price effect in West. Europe	9.8%	12.9%
(Student's t value)	(2.55)	(2.75)
(p-value — one-sided)	(0.005)	(0.003)
Price effect in Asia	3.2%	6.8%
(Student's t value)	(0.84)	(1.45)
(p-value — one-sided)	(0.201)	(0.074)
Price effect in North Am.	7.4%	4.2%
(Student's t value)	(1.91)	(0.88)
(p-value — one-sided)	(0.029)	(0.189)

While the parties focused their attention on the effect of unexpected outages in Asia, which are presented in the third column, the members of the CET directed their concern to the effect of outages occurring in Western Europe. The second column of Table 1 shows that unexpected plant outages in Western Europe have had positive and statistically significant impact on prices in both Western Europe and North America. The magnitude of the effect being more pronounced for Western Europe. These results suggest that an unexpected output reduction in Europe has led to an increase of imports from North America, though not sufficient to satisfy the excess demand resulting from the outages. The fact that producers in North America diverted part of their production to Western Europe also led to a domestic supply

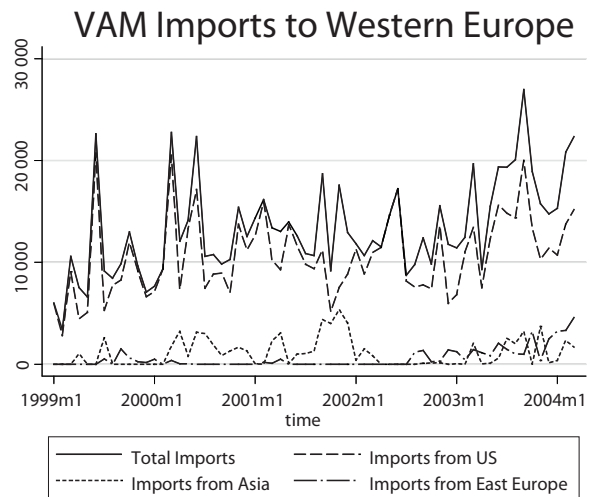
shortage, which resulted in a price increase in North America. However, there was no evidence that producers located in Asia exerted directly a competitive constraint on producers located in Western Europe. The price effect in Asia is relatively small in magnitude, and the estimate so imprecisely measured that the coefficient is not statistically significant ⁽¹⁾.

The natural extension would have been to pursue the analysis further by examining the impact of unexpected plant outages in North America in prices both in Asia and in Europe. However there were not a sufficient number of outages in North America to develop such an investigation.

In conclusion, these results suggest clearly that the EEA cannot be considered a separate antitrust market for VAM. In fact, the econometric evidence suggests that producers located in North America would exert a competitive constraint that could defeat any attempt to raise prices in Western Europe. However, to complete the analysis it would be judicious to determine how these outages have also affected trade flows, and if this is consistent with the price effect unearthed by the analysis presented so far.

2. Effect on imports

The next step of the analysis consisted in examining whether unexpected plant outages that had occurred in the EEA have had any impact on trade flows and in particular on the levels of imports into the EEA. By and large exports from North America (mostly from the US) to Western Europe represented and still represent the vast majority of VAM imports into the EEA. The graph presented below displays the evolution of total imports over the period from January 1999 to March 2004. Although monthly observations show that US exports have fluctuated overtime, with some large swings, US exports would appear to have increased throughout the period. Asian exports to Western Europe, on the other hand, are much smaller and tend to be very lumpy. The empirical distribution of Asian exports to Western Europe is censored to the left as the data are bounded from below.



To determine the impact of unexpected outages, the members of the CET conducted an econometric analysis modelling VAM imports into the EEA as an AR(2) process as displayed below ⁽²⁾. The model selection used the Box-Jenkins methodology ⁽³⁾.

$$Y_t = \log(\text{WE imports})_t$$

$$Y_t = \alpha + \beta_1 \text{Outage WE}_{t-2} + \delta_1 Y_{t-1} + \delta_2 Y_{t-2} + e_t$$

The model is first fit on total VAM imports. Including dummy variable for unexpected plant outages, the regression results show that these local output restrictions generated a surge of total imports into the EEA. Because most imports of VAM into Western Europe originate from North America, the above analysis is replicated for imports from North America only. A similar model specification is adopted. The regression results clearly show that unexpected outages have a positive and significant impact on US exports to Western Europe.

In sum, the results show that unexpected plant outages occurring in Western Europe have a positive impact on change in VAM imports into Western Europe, especially from North America. These results nicely complement the price effect discussed in the section above, and confirm that Western Europe is not a separate antitrust market.

However, there are an insufficient number of observations to determine at this stage whether imports from Asia significantly affect the ability of European producers to raise prices. And because

⁽¹⁾ It is usual to determine whether a coefficient estimate is statistically significant. That is, what is the probability that the coefficient estimate is different from zero? When such a probability is low, say 5%, one concludes that the estimate is not statistically significant.

⁽²⁾ If $\{X_t\}$ is a collection of random variables that forms a time-series process, such process can take various forms. One common process is the autoregressive process, which is denoted by AR(p), where p is the order of the process. This process is modelled by regressing X_t on its past values.

⁽³⁾ For more details on the Box-Jenkins methodology see Hamilton, James. 1993. Time Series Analysis. Princeton, Princeton University Press.

there are not enough data on outages in America, it is not possible to conclude that the market is global, though such a conclusion cannot be excluded.

Conclusion

The econometric studies submitted by the parties were reviewed and extended by the member of the CET. These various empirical analyses

have enabled the Commission to determine that the EEA did not constitute a distinct geographic market. The relevant geographic market had to include at least North America as well. However, the lack of historical data did not permit to reasonably extend the analysis beyond this conclusion. In light of the new and planned capacity expansion in Asia, the Commission considered that the market has become or was about to become global.

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3. Document management, information and communication	<i>Corinne DUSSART-LEFRET</i>	02 29 61223/02 29 90797
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Deputy Head of Unit	<i>Donncadh WOODS</i>	02 29 61552
2. Merger policy and strategic support	<i>Carles ESTEVA MOSSO</i>	02 29 69721
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Deputy Head of Unit	<i>Lars KJOLBYE</i>	02 29 69417
4. European Competition Network	<i>Kris DEKEYSER</i>	02 29 54206
5. International Relations	<i>Blanca RODRIGUEZ GALINDO</i>	02 29 52920/02 29 95406
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Deputy Head of Unit	<i>Dominik SCHNICHELS</i>	02 29 66937
2. Basic industries, Chemicals and Pharmaceuticals	<i>Georg DE BRONETT</i>	02 29 59268
3. Mergers	<i>Dan SJÖBLOM</i>	02 29 67964
Deputy Head of Unit	<i>John GATTI</i>	02 29 55158
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1. Telecommunications and post; Information society	<i>Claude RAKOVSKY</i>	02 29 55389
Coordination	...	
Deputy Head of Unit	<i>Reinald KRUEGER</i>	02 29 61555
— Liberalisation directives, Article 86 cases	<i>Christian HOCEPIED</i>	02 29 60427/02 29 52514
2. Media	<i>Arianna VANNINI</i>	02 29 64209
3. Information industries, Internet and consumer electronics	<i>Cecilio MADERO VILLAREJO</i>	02 29 60949/02 29 65303
4. Mergers	<i>Dietrich KLEEMANN</i>	02 29 65031/02 29 99392

DIRECTORATE D**Services**

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2. Transport	<i>Bernhard FRIESS</i>	02 29 56038/02 29 95592
Deputy Head of Unit	<i>Linsey Mc CALLUM</i>	02 29 90122
3. Distributive trades & other services	<i>Maria José BICHO</i>	02 29 62665
Deputy Head of Unit	<i>Zsuzsanna JAMBOR</i>	02 29 87436
4. Mergers	<i>Rüdiger DOMS</i>	02 29 55984
	<i>Joachim LUECKING</i>	02 29 66545

DIRECTORATE E**Industry, Consumer goods and Manufacturing**

1. Consumer goods and Foodstuffs	...	
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2. Mechanical and other Manufacturing industries including transportation equipment	<i>Andrés FONT GALARZA</i>	02 29 51948
3. Mergers	<i>Paolo CESARINI</i>	02 29 51286/02 29 66495
Deputy Head of Unit	<i>Maria REHBINDER</i>	02 29 90007
	<i>Guillaume LORIOT</i>	02 29 84988

DIRECTORATE F**Cartels**

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2. Cartels II	<i>Ewoud SAKKERS</i>	02 29 66352
Deputy Head of Unit	<i>Dirk VAN ERPS</i>	02 29 66080
3. Cartels III	<i>Flavio LAINA</i>	02 29 69669
	<i>Jaroslav POREJSKI</i>	02 29 87440

DIRECTORATE G**State aid I: Cohesion and competitiveness**

1. Regional aid	Humbert DRABBE	02 29 50060/02 29 52701
Deputy Head of Unit	<i>Robert HANKIN</i>	02 29 59773/02 29 68315
2. Industrial restructuring	<i>Klaus-Otto JUNGINGER-DITTEL</i>	02 29 60376/02 29 66845
3. R&D, innovation and risk capital	<i>Karl SOUKUP</i>	02 29 67442
4. Environment and Energy	<i>Wouter PIEKE</i>	02 29 59824/02 29 67267
	<i>Jorma PIHLATIE</i>	02 29 53607/02 29 69193

DIRECTORATE H**State aid II: Network industries, liberalised sectors and services**

1. Post and others services	Loretta DORMAL-MARINO	02 29 58603/02 29 53731
2. Financial services	<i>Joaquin FERNANDEZ MARTIN</i>	02 29 51041
3. Telecommunications and Media	<i>Jean-Louis COLSON</i>	02 29 60995/02 29 62526
	<i>Eric VAN GINDERACHTER</i>	02 29 54427

DIRECTORATE I**State aid policy and strategic coordination**

1. State aid policy	Marc VAN HOOFF	02 29 50625
2. Strategic support and decision scrutiny	<i>Alain ALEXIS</i>	02 29 55303
3. State aid network and transparency	<i>Nicola PESARESI</i>	02 29 92906
4. Enforcement and monitoring	<i>Wolfgang MEDERER</i>	02 29 53584/02 29 65424
	<i>Dominiq VAN DER WEE</i>	02 29 60216

Reporting directly to the Commissioner

Hearing officer	<i>Serge DURANDE</i>	02 29 57243
Hearing officer	<i>Karen WILLIAMS</i>	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://europa.eu.int/comm/competition/speeches/>

Speeches by the Commissioner, 1 May 2005 — 31 August 2005

15 July: Services of General Economic Interest — Neelie KROES — Brussels, Belgium (Press Conference given in Commission Pressroom)

14 July: The State Aid Action Plan — Delivering Less and Better Targeted Aid — Neelie KROES — London, UK (UK Presidency Seminar on State Aid)

24 June: Competition Law and the Liberalisation of the Polish Market — Neelie KROES — Warsaw, Poland (Dutch-Polish Chamber of Commerce Conference)

21 June: Competition Policy — Past, Present and Future — Neelie KROES — Brussels, Belgium (Meeting with Committee on Economic and Monetary Affairs, European Parliament)

14 June: Reforming Europe's State Aid Regime: An Action Plan for Change — Neelie KROES — Brussels, Belgium (Wilmer Cutler Pickering Hale and Dorr/University of Leiden: Joint conference on European State Aid Reform)

6 June: The Competition Principle as a Guideline for Legislation and State Action — the Responsibility of Politicians and the Role of Competition Authorities — Neelie KROES — Bonn, Germany (12th International Conference on Competition)

12 May: Competition in the European Union — the Case for Romania — Neelie KROES — Bucharest, Romania (European Institute of Romania)

Speeches and articles, Directorate-General Competition staff, 1 May 2005 — 31 August 2005

1 August: Der ökonomische Ansatz in der europäischen Wettbewerbspolitik — Lars-Henrik ROELLER — Zukunftsperspektiven der Wettbewerbspolitik, Nomos-Verlag

12 July: Application of Competition Rules to Internet Licensing — Herbert UNGERER — Brussels, European Digital Media Association (EDIMA)

27 May: Keynote Speech — LOWE Philip — Brussels, Belgium (Public presentation of the preliminary findings of the New Media (3G) Sector Inquiry, European Commission)

Community Publications on Competition

New publications and publications coming up shortly

- *European Competition Authorities: Loyalty programmes in civil aviation — an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commissions (http://europa.eu.int/comm/competition/publications/eca/report_air_traffic.pdf)*
- *Merger remedies study (<http://europa.eu.int/comm/competition/mergers/legislation/remedies.htm>)*
- *Report on competition policy 2004*
- *Competition policy newsletter, 2006, Number 1 — Spring 2006*

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Press releases

1 May 2005 — 31 August 2005

All texts are available from the Commission's press release database RAPID at: <http://europa.eu.int/rapid/> Enter the reference (e.g. IP/05/14) in the 'reference' input box on the research form to retrieve the text of a press release. Note: Language available vary for different press releases.

Antitrust

IP/05/1056 — 17/08/2005 — Competition: Commission consults on BUMA and SABAM's commitments for the licensing of online music

IP/05/1033 — 03/08/2005 — Competition: Commission helps to secure improved competitive conditions for line sharing in Germany

IP/05/1032 — 02/08/2005 — Competition: Commission publishes report on EU securities trading, clearing and settlement arrangements

IP/05/1027 — 01/08/2005 — Competition: convergence of car prices improves within EU while remaining constant in the euro zone

IP/05/957 — 18/07/2005 — Euro area economy: sluggish second quarter but signs point to a pick-up in second half of 2005

IP/05/926 — 14/07/2005 — Electronic communications: Commission delivers review of 200th notification by Member States of measures to improve competition

IP/05/810 — 29/06/2005 — Competition: Commission to make proposal on IATA Tariff Conferences in autumn

IP/05/775 — 22/06/2005 — Competition: Commission makes commitments from Coca-Cola legally binding, increasing consumer choice

IP/05/768 — 21/06/2005 — Competition: 2004 Annual Report on Competition Policy

State aid

IP/05/1044 — 05/08/2005 — State aid: Commission opens probe into restructuring aid for Kliq in The Netherlands

IP/05/986 — 20/07/2005 — State aid: Commission gives green light to restructuring aid for Imprimerie Nationale in France

IP/05/985 — 20/07/2005 — State aid: the Commission proposes that France amend its measures in support of civil service mutual societies

IP/05/984 — 20/07/2005 — State aid: Commission endorses € 5 million aid for investment project in Czech lignite mine

IP/05/982 — 20/07/2005 — State aid: Commission endorses Dutch guarantee scheme for financing shipbuilding

IP/05/981 — 20/07/2005 — State aid: Commission approves change of re-structuring plan of steel producer Mittal Steel Poland

IP/05/980 — 20/07/2005 — Air transport / Outermost regions: the Commission authorises a French social aid scheme

IP/05/979 — 20/07/2005 — State aid: Commission endorses cultural support schemes in Poland, Hungary and Denmark

IP/05/937 — 15/07/2005 — State aid: Commission provides greater legal certainty for financing services of general economic interest

IP/05/876 — 07/07/2005 — State aid: Commission requests Sweden, Austria and the Czech Republic to fully implement Directive on financial transparency

IP/05/861 — 06/07/2005 — State aid: Commission endorses €45 million of public funding for an R&D project by BIAL in Portugal

IP/05/842 — 06/07/2005 — State aid: Commission concludes no aid involved in restructuring of Polish steel company Huta Czestochowa, but orders recovery of €4 million restructuring aid

IP/05/844 — 05/07/2005 — Dutch aid to make inland waterways vessels more environmentally friendly

IP/05/843 — 05/07/2005 — European Commission authorises Belgian scheme to assist combined transport

IP/05/811 — 29/06/2005 — State aid: Commission opens investigation into aid to Poczta Polska

IP/05/782 — 23/06/2005 — State aid: Commission extends its formal investigation into the Italian aeronautical law

IP/05/777 — 22/06/2005 — State aid: Commission closes state aid investigation into tax breaks for sports clubs in Italy (the 'Salvacalcio' law)

IP/05/771 — 22/06/2005 — State aid: Commission endorses € 47.3 million aid to AVR in the Netherlands but orders recovery of € 2.4 million

IP/05/770 — 22/06/2005 — UK state aid for Channel Tunnel rail freight services

IP/05/704 — 09/06/2005 — State aid: Commission approves research and environmental aid of € 5.7 million to Solvay Soda in Germany

IP/05/691 — 08/06/2005 — State aid: Commission endorses Northern Irish Language Broadcast Fund

IP/05/689 — 07/06/2005 — State aids: the Commission approves financing for the 'Chaîne française d'information internationale' (CFII)

IP/05/680 — 07/06/2005 — State Aid: Commission outlines comprehensive five year reform of state aid policy to promote growth, jobs and cohesion

IP/05/679 — 07/06/2005 — Dutch aid to European Train Control System

IP/05/650 — 01/06/2005 — State aid: Commission opens formal investigation into envisaged sale of the Tote

IP/05/649 — 01/06/2005 — State aid: Commission approves restructuring of Spanish public military shipyards

IP/05/648 — 01/06/2005 — State aid: Commission approves new French scheme of tax breaks for takeovers of ailing industrial firms

IP/05/646 — 01/06/2005 — State aid: Commission endorses public funding to bridge broadband communications gap in Wales

IP/05/644 — 01/06/2005 — State aid: restructuring of Polish shipyards under Commission scrutiny

IP/05/536 — 03/05/2005 — State aid: Commission endorses German aid scheme for tenants of technology centres and incubators

IP/05/531 — 03/05/2005 — State aid: Commission endorses € 15 billion public funding for new Dutch health insurance system

IP/05/530 — 03/05/2005 — State aid: Commission endorses public funding for broadband network in Limousin, France

IP/05/529 — 03/05/2005 — State aid: Commission endorses UK Enterprise Capital Funds for small business

IP/05/525 — 03/05/2005 — Aid for ABX Logistics: European Commission extends investigation procedure

IP/05/523 — 03/05/2005 — Air services to Corsica: Commission gives go-ahead for social aid scheme

IP/05/521 — 03/05/2005 — Rescue aid for Cyprus Airways

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IP/05/1070 — 26/08/2005 — Mergers: Commission approves acquisition of StorageTek by Sun Microsystems

IP/05/1067 — 25/08/2005 — Mergers: Commission approves acquisition of ink manufacturer Flint by Xsys

IP/05/1065 — 25/08/2005 — Mergers: Commission approves takeover of Guidant Corporation by Johnson & Johnson, subject to conditions

IP/05/1059 — 22/08/2005 — Mergers: Commission approves joint venture between NYK Reefers and Lauritzen

IP/05/1058 — 19/08/2005 — Mergers: Commission clears Rheinmetall's acquisition of 50% shareholding in AIM in the infrared components industry

IP/05/1056 — 17/08/2005 — Competition: Commission consults on BUMA and SABAM's commitments for the licensing of online music

IP/05/1055 — 12/08/2005 — Mergers: Commission approves the acquisition of Edison by EDF and AEM

IP/05/1049 — 09/08/2005 — Mergers: Commission clears the creation of United Launch Alliance, a space launch services joint venture between Lockheed Martin and Boeing

IP/05/1048 — 09/08/2005 — Mergers: Commission refers Macquarie and Ferrovia acquisition of Exeter Airport to the UK competition authority

IP/05/1045 — 08/08/2005 — Mergers: Commission approves acquisition of Philips Monitors' business by TPV

IP/05/1039 — 05/08/2005 — Mergers: Commission clears acquisition of Pinnacle by Avid

IP/05/1038 — 04/08/2005 — Mergers: Commission approves acquisition of Solvus by United Services Group

IP/05/1026 — 29/07/2005 — Mergers: Commission clears the planned acquisition of Royal P&O Nedlloyd by AP Møller, subject to conditions

IP/05/1019 — 29/07/2005 — Mergers: — The Commission has approved the acquisition of Nokia's Professional Mobile Radio business by European Aeronautic Defence and Space company.

IP/05/1006 — 26/07/2005 — Mergers: Commission clears Tetra Laval's acquisition of SIG Simonazzi

IP/05/996 — 20/07/2005 — Mergers: Commission approves joint acquisition of 23 Le Meridien hotels by Lehman Brothers, SCG and Starwood

IP/05/967 — 19/07/2005 — Mergers: Commission approves acquisition of Chr. Hansen by PAI

IP/05/966 — 19/07/2005 — Mergers: Commission clears acquisition of Fournier by Solvay

IP/05/955 — 15/07/2005 — Mergers: Commission approves acquisition of Gillette by Procter & Gamble subject to conditions

IP/05/922 — 13/07/2005 — Mergers: Commission clears Blackstone's take-over of Acetex

IP/05/919 — 13/07/2005 — Mergers: Commission approves takeover of VA Tech by Siemens, subject to conditions

IP/05/881 — 08/07/2005 — Mergers: Commission opens in-depth investigation into E.ON's acquisition of Hungary's MOL gas business

IP/05/871 — 07/07/2005 — Mergers: Commission clears PCM and Wegener newspaper joint venture, subject to conditions

IP/05/851 — 06/07/2005 — Mergers: Commission clears Goldman Sachs' acquisition of Pirelli's energy and telecoms cable businesses

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IP/05/837 — 05/07/2005 — Mergers: Commission clears planned acquisition of Swiss by Lufthansa, subject to conditions

IP/05/830 — 01/07/2005 — Mergers: Commission approves joint venture between BP and Nova Chemicals

IP/05/824 — 30/06/2005 — Mergers: Commission clears acquisition of Edelstahlwerke Buderus by Böhler-Uddeholm

IP/05/815 — 30/06/2005 — Mergers: Commission approves acquisition of car battery producer Delphi SLI by Johnson Controls and Bosch

IP/05/814 — 30/06/2005 — Mergers: Commission approves acquisition of Flender by Siemens

IP/05/794 — 24/06/2005 — Mergers: Commission clears Avnet's acquisition of Memec in the distribution of electronic components industry

IP/05/792 — 24/06/2005 — Mergers: Commission approves acquisition of Allied Domecq by Pernod Ricard, subject to conditions

IP/05/788 — 24/06/2005 — Mergers: Commission approves Strabag take over of Walter Bau; refers Hamburg asphalt market review to Federal Cartel Office

IP/05/768 — 21/06/2005 — Competition: 2004 Annual Report on Competition Policy

IP/05/750 — 17/06/2005 — Mergers: Commission clears acquisition of Travelex by Apax

IP/05/743 — 16/06/2005 — Mergers: Commission approves acquisition of Mölnlycke by Apax Partners

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IP/05/714 — 10/06/2005 — Mergers: Commission approves acquisition of some Allied Domecq brands and assets by Fortune Brands

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IP/05/677 — 07/06/2005 — Mergers: Commission approves acquisition of British Vita by TPG IV

IP/05/669 — 06/06/2005 — Mergers: Commission clears car distribution joint venture between DaimlerChrysler and MAV

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IP/05/626 — 27/05/2005 — Mergers: Commission clears the acquisition of Hexal by Novartis, subject to conditions

IP/05/607 — 25/05/2005 — Mergers: Commission clears acquisition of Clearwave by Vodafone

IP/05/596 — 24/05/2005 — Mergers: Commission conditionally clears Reuters' acquisition of competitor Telerate

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