Recent cases — Introductory remarks

In the first four months of 2005 the number of notifications received by the Commission increased by over 40% to 101 as opposed to 72 in the previous period.

The Commission adopted a total of 88 final decisions, an increase of nearly 35%, compared to the previous four month period and over 50% in the comparable 2004 period. Of these, 84 transactions were cleared unconditionally pursuant to Art. 6 (1) (b) and 4 transactions were cleared subject to conditions imposed pursuant to Art. 6 (2). Of the 84 unconditional clearances 46 decisions (55%) were taken in accordance with the simplified procedure. No decisions were adopted pursuant to Article 8. However two proposed transactions were withdrawn after the Commission had decided to open in-depth investigations. In addition, four Article 6(1)c decisions initiating second phase investigations were adopted. Finally the Commission took two referral decisions pursuant to Article 9 during the period. The most important decisions adopted during the period are summarised below.

A – Summaries of decisions taken under Article 6

Summaries of decisions taken under Article 6(2) where undertakings have been given by the firms involved

Alcatel / Finmeccanica / Alcatel Alenia Space & Telespazio

The European Commission cleared the creation of two joint ventures resulting from the French electronics company Alcatel merging its space activities with those of Alenia Spazio and Telespazio, part of the Italian Defence and engineering company Finmeccanica. The Commission's review highlighted serious concerns in certain satellite subsystems (Telemetry Tracking & Control or 'TTC' and radar altimeters), but Alcatel and Alenia addressed these concerns by offering a license for both subsystems, in addition to agreeing to price monitoring for TTCs.

Alcatel is a French industrial company that produces telecommunication equipment, satellites and space subsystems and provides space-related services. Finmeccanica is an Italian state controlled diversified engineering company that produces satellites and subsystems and provides satellite-based services such as space mission management. The two groups will merge their space-related activities into two joint ventures. One, Alcatel Alenia Space will concentrate on the manufacturing of satellite systems and payload for commercial satellites (e.g. telecommunications) and institutional satellites (e.g. scientific missions, military). The other, Telespazio, will provide space-related services such as the control of satellite systems.

Satellite systems and subsystems are either sourced globally by commercial telecommunication operators or sourced at the European level by the European Space Agency (ESA). The Commission verified whether the combination of Alcatel Space and Alenia Spazio as two prime contractors of satellite systems and suppliers of a number of satellite subsystems, could exclude competing satellite prime contractors and integrators from the market or negatively affect satellite users. The Commission's market investigation did not confirm these concerns, as Space and Alenia Spazio face credible competitors for satellite systems and related equipment. Specifically for satellites for institutional buyers, the buyer power and the extensive monitoring of the European Space Agency (ESA) and the application of geographical return rules (work sharing between ESAs member states) would keep the merged entities from acting independently of their customers and competitors.

The Commission's investigation however showed that the combination of the merging parties' activities would result in a virtually uncontested market position for TTCs and radar altimeters, which are essential components of satellites.

In order to address these competitive concerns, Alcatel Space and Alenia Spazio committed themselves to license TTCs and radar altimeter technology and to supply TTC equipment at prices not exceeding those charged for comparable equipment and as documented in price lists that will function as a benchmark. The Commission was satisfied that the proposed commitments would remove the competition concerns and ensure effective competition in the EU markets and therefore cleared the operation.
Apollo / Bakelite

In March, the European Commission cleared the proposed acquisition of the German chemical company, Bakelite AG, by the investment group Apollo, subject to conditions. The Commission found that the proposed transaction could give rise to competition concerns in the markets for phenolic resins for refractory materials and for reactive diluents for epoxy systems. Phenolic and epoxy resins are chemical products used in a variety of end-applications, such as insulation, laminates, friction material, coatings and flooring.

The Apollo Group controls two companies active in the sectors concerned by the transaction, namely Borden and Resolution which manufacture respectively formaldehyde resins and epoxy resin products for sale throughout the world.

Bakelite is a producer of formaldehyde resins, moulding compounds and epoxy resins. Based in Germany, it is mainly active in Europe. Prior to the transaction, Bakelite was controlled by the Rütgers group, which is part of the RAG group.

The activities of Bakelite and Borden overlap in the sector of phenolic resins (a type of formaldehyde resins), and the activities of Bakelite and Resolution overlap with respect to epoxy resins.

The market investigation carried out by the Commission into phenolic resins confirmed that Bakelite and Borden were complementary businesses in terms of both geographic sales and end-applications. The Commission found however that the proposed operation would significantly impede effective competition in the markets of phenolic resins for refractory bricks, shapes, and taphole clay (refractory materials) in the EEA. In order to remove these competition concerns, the parties offered to license a ‘Technology package’ to their customers, who could then sublicense it to an alternative supplier. The proposed remedy will therefore help alternative suppliers to meet customer demands for these specialised products. The Commission did not consider that the proposed operation would significantly impede effective competition in other end-applications for phenolic resins due to the parties’ complementarities and the presence of strong alternative suppliers, such as Dynea and Sumitomo.

In the field of epoxy resins, the Commission’s market investigation identified concerns regarding mono-functional aliphatic glycidyl esters (Cardura™), a specific type of diluents, where the parties have strong market positions. This raw material is an essential component of epoxy formulated systems, which are tailor made epoxy product packages for specific end-uses, such as composites, surface protection and electrical laminates, where Bakelite is already a major market player. Hence, the new entity could have leveraged its market power in this market to strengthen its overall position over the whole epoxy product value chain and to foreclose Bakelite’s downstream competitors. However, the parties offered to enter into long-term supply agreements with any direct customer of Cardura™ using it in epoxy formulated systems to secure supply and pricing conditions.

Honeywell / Novar

The European Commission cleared the proposed acquisition of Novar by Honeywell after Honeywell had proposed to divest Novar’s fire alarm business in Italy.

Honeywell, a US corporation, is an advanced technology manufacturing company supplying customers world-wide with aerospace products and services, automotive products, electronic materials, specialty materials, performance polymers, transportation and power systems, home and building controls, and industrial controls.

Novar is an international group based in the UK focusing on Intelligent Building Systems (IBS), Indalex Aluminum Solutions (IAS) and Security Printing Services (SPS). This acquisition will allow Honeywell and Novar to combine their activities in the sectors of fire alarm systems, intrusion and other security systems and in building control systems.

The Commission’s investigation showed that the merger would significantly impede effective competition on the market for fire alarm systems in Italy where the merged entity would have held a very strong position, leading to likely price increases for customers.

To remove these serious doubts, Honeywell proposed the divestiture of Novar’s entire fire alarm business in Italy (known in Italy under the brand Esser Italia). The Commission considered this undertaking to be sufficient to eliminate its competition concerns and therefore cleared the case.

Orkla / Chips

The Commission’s investigation into the proposed acquisition of Chips by Orkla highlighted concerns in certain sectors of the Finnish convenience foods market. In January the Norwegian group Orkla, which is active in branded consumer goods, announced a public tender offer for all shares in Chips Abp, a Finnish snacks and food company operating mainly in the Nordic and Baltic countries.
The investigation identified serious competition concerns resulting from the combination of the merging parties’ activities in the Finnish market for the sale of frozen pizzas to the retail sector. In order to eliminate the Commission’s regulatory concerns, Orkla offered to terminate the existing distribution agreement for Billy’s pizza between Chips and a Swedish company, Gunnar Daifgard, which accounts for all of Chips’ sales of frozen pizza in Finland. The Commission considered that this commitment is sufficient to maintain effective competition, as it ensures that the Billy’s pizza brand will be managed and distributed independently from the merged businesses. The Commission therefore cleared the operation subject to conditions.

B – Summaries of referral decisions taken under Article 9 of the ECMR

Blackstone (TBG Careco) / NHP

In February, following the request of the UK Office of Fair Trading (‘OFT’), the European Commission decided to refer the acquisition of NHP plc by the US Blackstone Group to the UK competition authority for examination. Both parties are active in the UK private care home market for the elderly.

Blackstone is an international merchant-banking firm, which had acquired Southern Cross Healthcare Limited (Southern Cross), a UK company which operates care homes for the elderly. NHP is a UK-listed company which is also active in the care home sector in the UK. The OFT argued that the care home market in the UK is very local and that the proposed transaction would affect competition especially in three UK local authorities areas (Arbroath, Nottingham and Port Talbot), where the parties would have a high combined market share in nursing and residential care homes.

The Commission’s investigation indicated that the UK care home market is local in scope. Furthermore, following the results of the investigation, it could exclude the possibility that there are separate product markets for nursing and residential care homes the UK. The parties would become the biggest service provider in some local areas. Therefore the merger would affect competition in some local markets. The local markets do not represent a substantial part of the common market.

On this basis the Commission decided to refer the case pursuant to Article 9(2) of the Merger regulation as the concentration affects competition in a distinct market within the territory of the UK that does not form a substantial part of the common market.

Iesy Repository /Ish

In February, the European Commission referred, pursuant to Article 9.2 of the Merger Regulation, the examination of the proposed acquisition of the North Rhine-Westphalian network cable operator ‘Ish’ by the Hessian cable operator ‘Iesy’ to the German competition authority (the Bundeskartellamt) mainly because both undertakings are exclusively active in Germany.

Both Iesy and Ish operate cable networks, bought from Deutsche Telekom AG, in their respective regions of Hesse (Iesy) and North Rhine-Westphalia (Ish). They deliver radio and television signals to households and other network operators through these networks. They are not active outside Germany.

The Bundeskartellamt requested that the case be referred to it, as the effects of the merger were limited to Germany and the Bundeskartellamt believed that the merger might affect competition in the German market for cable television. As there are distinct markets for cable television within the European Community, the Commission agreed with the Bundeskartellamt’s view that the planned merger could affect competition on parts of the German market for cable television.

The Commission concluded that the conditions for a referral were met, and that a national investigation was appropriate given the experience the Bundeskartellamt gained in previous cable TV cases.

C – Summaries of cases abandoned during Phase II investigation

Microsoft / Time Warner / ContentGuard

Microsoft and Time Warner had notified the Commission of their intention to acquire joint control of Contentguard. ContentGuard is one of the main Digital Rights Management (DRM) patent-holders. The Commission launched an in-depth investigation on 25 August 2004, examining, in particular, the possibility for Microsoft to block competitors’ access to ContentGuard’s patents.

ContentGuard is a US company active in the development and licensing of intellectual property rights (IPR) relating to DRM. ContentGuard holds a key patent portfolio, as an inventor of fundamental DRM technology. DRM technology consists of software solutions that enable digital content of any type (e.g. audio, films, documents) to be transmitted securely over an open network e.g. to end users or exchanged between devices. DRM is set to become pervasive throughout the entire IT indus-
try, and is already the standard for online delivery of media content such as music and video. Microsoft is currently the leading, and possibly dominant, supplier of DRM solutions.

The Commission opened an in-depth investigation on 25 August 2004 and sent a statement of objections on 29 November 2004. One of the main Commission concerns was that the operation could have buttressed Microsoft’s monopoly in the market for PC operating systems. Microsoft would have the ability to use DRM as a gatekeeper technology, because Microsoft controls the PC operating systems on which DRM software can be used.

The parties informed the European Commission that Thomson was acquiring a 33% stake in ContentGuard. Although this acquisition by Thomson was announced in November 2004, it only took place on 14 March 2005. As the original operation, whereby Microsoft and Time Warner acquired joint control of ContentGuard, was abandoned, the companies withdrew their notification under the Merger Regulation.

The Commission service carefully reviewed whether the transaction involving Thomson would fall under the Merger Regulation and concluded that the conjunction of Thomson’s acquisition of an equity stake, and of changes in ContentGuard’s governance structure, no shareholder will have control over ContentGuard. Thus, the new transaction was not subject to EU Merger rules.

The shareholding structure and governing rules of ContentGuard have been significantly modified. Microsoft, Time Warner and Thomson each hold a one third stake and none of them has control over ContentGuard. Consequently, Microsoft will no longer be in a position to change ContentGuard’s licensing policy to the detriment of Microsoft’s competitors.

Total/Sasol

Sasol Wax International (‘Sasol’), a German company belonging to the South-African Sasol Group, specialises in the production and sale of petroleum-based waxes, in particular in paraffin and micro waxes. Total France S.A. (“Total”) is part of the Total group, one of the largest oil and gas companies world-wide. In addition to the production of paraffin and micro waxes, Total produces their raw materials: slack wax and bright stock slack wax.

The proposed operation was the creation of joint venture active that would have been active in the production, marketing and sale of petroleum-based wax products and bitumen additives combining Sasol’s and Total’s activities in these areas.

Slack wax and bright stock slack wax are produced in refineries as by-products of the oil refining process. They can be used captively, sold directly or further refined into paraffin waxes or micro waxes, to be used in a variety of end applications such as candle, rubber, packaging, cable, chewing gum or adhesives.

The first-phase investigation carried out by the Commission raised serious doubts as to the compatibility of the transaction with the common market and the EEA agreement. In particular, the investigation showed that the combination of Total’s and Sasol’s commercial activities, the supply of raw material from Total to the joint venture and the increase of the capacity constraints resulting from the transaction would significantly strengthen Sasol’s leading position in the markets for paraffin and micro waxes.

In the light of the competitive concerns identified and the unsatisfactory nature of the remedies proposed by Total and Sasol, the Commission decided on 12 April 2005 to open a second-phase in depth investigation. However, on 20 April 2005, Sasol and Total communicated to the Commission the termination of the joint venture agreement and the withdrawal of the notification.