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EUROPEAN COMMISSION

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La Commission dresse un bilan de son action dans le domaine des aides fiscales

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Près de 5 ans après l'adoption de la Communication sur l'application des règles en matière d'aides d'État aux mesures relevant de la fiscalité directe ([1]), la Commission vient de dresser un premier bilan de son action dans ce domaine sous forme d'un rapport ([2]). Ce bilan intervient après que la quasi-totalité des procédures initiées en juillet 2001 ([3]) ont été clôturées ([4]), permettant ainsi à la Commission de tirer les enseignements de cette action, qui peuvent être résumés comme suit:

L'application de l'article 87 du traité

Le rapport dresse en premier lieu le bilan de la mise en œuvre de la Communication tant sur la notion d'aide d'État et l'examen de la compatibilité que sur les aspects procéduraux. Il indique que la Communication s'est révélée être un instrument idoine lors de l'examen des cas d'aides fiscales, en particulier dans le cadre des procédures initiées le 11 juillet 2001. Ces procédures concernaient principalement les régimes fiscaux spéciaux en faveur des entreprises multinationales.

La notion d'aide

En ce qui concerne la notion d'aide, la Commission a été notamment amenée à se prononcer sur l'application des méthodes alternatives d'imposition telles que la méthode du coût de revient majoré («cost plus») destinée à appréhender les transactions réalisées dans le cadre des relations intragroupe transfrontalières. La méthode «cost plus» consiste à calculer le résultat imposable, en utilisant les coûts encourus par l'entreprise dans le cadre des transactions qu'elle effectue avec les entreprises du groupe auquel elle appartient. Une marge est ajoutée à ces coûts pour obtenir un bénéfice approprié, compte tenu des fonctions exercées, des actifs utilisés, des risques encourus et des conditions du marché. Le rapport précise que la Commission n'a pas d'opposition de principe à l'égard de méthodes alternatives de ce type. Elle considère cependant qu'une méthode d'imposition alternative peut être à l'origine d'une aide d'État, si la charge fiscale résultant de son application est inférieure à la charge qui aurait résulté de l'application d'une méthode d'imposition «classique», où les résultats imposables sont obtenus par différence entre les produits et les charges d'une entreprise. Le rapport fait l'état de sept régimes ([5]) fondés sur la méthode «cost plus» qui ont été examinés par la Commission depuis l'adoption de la Communication de 1998. Dans ces affaires, la Commission a conclu à l'existence d'avantages fiscaux résultant soit de l'exclusion de certaines dépenses de la base d'imposition ([6]), soit de la fixation arbitraire des marges, sans prendre en compte la réalité des activités en cause ([7]).

Par ailleurs, en ce qui concerne le transfert des ressources de l'État, un des quatre critères de la notion d'aide d'État, le rapport indique que ce critère doit être apprécié en référence à la situation du bénéficiaire de l'aide, sans qu'il soit possible de prendre en compte un éventuel impact induit

([1]) JO C 384 du 10.12.1998.

([2]) http://www.europa.eu.int/comm/competition/state_aid/legislation/business/rapportaidesfiscales_fr.pdf

([3]) Voir IP/01/982

([4]) Sur les 15 procédures ouvertes, 13 ont été clôturées.

([5]) Il s'agit notamment du régime des centres de coordination belges, décision du 17 février 2003, JO L 282 du 30.10.2003, p. 25, du régime des centres de contrôle et de coordination des sociétés étrangères en Allemagne, décision du 5 septembre 2002, JO L 177 du 1.7.2003, p. 17, des centres de coordination luxembourgeois, décision du 16 octobre 2002, JO L 170 du 9.7.2003, p. 20, des sociétés de financement luxembourgeoises, décision du 16 octobre 2002, JO L 153 du 20.6.2003, p. 40, des centres de coordination de Biscaye (Espagne), décision du 22 août 2002, JO L 31 du 6.2.2003, p. 26 et du régime français des quartiers généraux et des centres de logistique, JO L 23 du 23.1.2004, p. 1, des sociétés de vente américaines en Belgique, décision du 25 juin 2003, JO L 23 du 28.1.2004, p. 14.

([6]) Il s'agissait, selon les cas, des frais du personnel (centres de coordination belges), des coûts liés à la promotion des ventes, au transport des marchandises et au crédit (régime applicable aux entreprises de promotion de ventes américaines en Belgique), de certains coûts de sous-traitance (avantages consentis en France aux quartiers généraux et aux centres de logistique), ou des frais financiers (centres de coordination de Biscaye).

([7]) Voir les décisions relatives aux centres de coordination belges, aux sociétés de vente américaines en Belgique, aux sociétés de financement luxembourgeois, aux centres de coordination à Luxembourg, aux centres de coordination et de contrôle en Allemagne et au régime espagnol applicable aux centres de coordination de Biscaye (précitées).

positif de la mesure en cause en termes économiques ou budgétaires. Ainsi, même si une mesure fiscale produit des effets globaux positifs pour le budget public en attirant les investisseurs, elle doit être qualifiée d'aide s'il apparaît qu'elle implique un abandon des ressources par l'État au niveau des bénéficiaires individuels par rapport au montant d'impôt dont ils auraient dû s'acquitter ([1]).

Le rapport souligne par ailleurs que le caractère sélectif de certaines mesures fiscales, virtuellement ouvertes à tous les secteurs de l'économie, peut être reconnu lorsque ces mesures excluent, en fait, certaines entreprises de leur bénéfice. Tel peut être en particulier le cas des mesures applicables aux seules multinationales ([2]) ou aux entreprises de taille suffisamment importante ([3]). En effet, ces mesures excluent du bénéfice de l'aide toutes les petites entreprises ou celles à caractère local. Il en est de même des mesures applicables aux seules entreprises créées après une certaine date, dans la mesure où sont exclues du bénéfice de l'aide les entreprises déjà existantes auparavant ([4]).

En outre, le rapport précise que la Commission continue à adopter une approche stricte du principe de la justification d'une mesure fiscale sélective par la nature ou l'économie du système fiscal en cause. Selon ce principe, un traitement fiscal différencié peut être justifié par des éléments découlant de la logique intrinsèque du système fiscal. Le fait que la sélectivité de la mesure résulte de l'application de critères objectifs (chiffre d'affaire, taille, implantation géographique, etc.) n'est pas de nature à justifier l'existence d'une dérogation. À ce propos, la Commission s'attache en particulier à vérifier si les critères d'éligibilité requis pour bénéficier d'une mesure sont cohérents avec les justifications avancées par l'État membre concerné ([5]).

L'appréciation de la compatibilité des aides sous forme fiscale

En ce qui concerne l'examen de la compatibilité, la Commission souligne qu'elle n'a pas d'*a priori,* négatifs ou positifs, à l'égard des aides d'État sous forme fiscale. En pratique, elle a procédé à leur examen à la lumière des encadrements et lignes directrices existants et n'a pas établi de règles particulières à leur égard. Cependant, le plus souvent, les dispositions d'allègement fiscal ne sont ni limitées dans le temps, ni liées à la réalisation de projets spécifiques, et doivent, partant, être qualifiées d'aides au fonctionnement. Aux termes des encadrements actuellement en vigueur, ce type d'aides ne peut être autorisé que de manière exceptionnelle et sous de strictes conditions.

Aspects procéduraux

La Commission indique dans son rapport qu'elle continue à avoir une approche stricte de l'appréciation des conditions pouvant donner lieu à la confiance légitime. Ainsi, la confiance légitime ne peut être reconnue que dans des cas exceptionnels, notamment lorsqu'un régime analogue a été jugé comme étant en dehors du champ d'application de l'article 87, paragraphe 1, du traité dans le passé.

Concernant, la distinction entre les aides existantes et nouvelles, le rapport cite le récent arrêt du Tribunal de première instance, rendu le 30 avril 2002 ([6]), dans lequel celui-ci a précisé que lorsqu'un régime d'aide existant fait l'objet d'une modification, il est nécessaire d'opérer une distinction entre les modifications qui affectent le régime initial dans sa substance même et les modifications clairement détachables de ce régime. Seules les modifications clairement détachables n'affectent pas la qualification d'aide existante du régime initial.

Les rapports entre le contrôle des aides d'État et la lutte contre la concurrence fiscale dommageable

En second lieu, la Commission a analysé les rapports entre son action au titre du contrôle des aides d'État et la lutte contre la fiscalité dommageable menée dans le cadre du code de conduite sur la fiscalité des entreprises ([7]). Le rapport souligne que, tout en poursuivant le même objectif général de réduction des distorsions de concurrence au sein du marché intérieur, la procédure d'examen des régimes fiscaux du point de vue des

([1]) Voir affaire des centres de coordination belges (précitée) et affaire relative aux activités de financement internationales aux Pays-Bas (décision du 17 février 2003, JO L 180 du 18.7.2003, p. 52).

([2]) Décision relative au régime applicable aux activités de financement mis en place par les Pays-Bas (précitée), ainsi que la décision du 11 décembre 2002 concernant le régime d'aide applicable aux centrales de trésorerie en France, JO L 330 du 18.12.2003, p. 23.

([3]) Voir décisions relatives aux centres de coordination belges et de Biscaye (précitées).

([4]) Voir par exemple décision du 11 juillet 2001, JO L 174 du 4.7.2002, p. 31.

([5]) Décision du 11 décembre 2001, JO L 184 du 13.7.2002 rendue dans une affaire italienne portant sur les avantages fiscaux au profit de certaines opérations de concentration dans le secteur bancaire; voir aussi l'affaire portant sur l'aide pour les activités de financement internationales.

([6]) Affaires jointes T-195/01 et T-207/01, Government of Gibraltar contre Commission.

([7]) JO C 2 du 6.1.1998

aides d'État est indépendante des travaux du code de conduite. En effet, la qualification d'une mesure comme dommageable au sens du code de conduite n'entraîne pas nécessairement sa qualification en tant qu'aide d'État, et inversement. Toutefois, le rapport indique que dans la mesure où la Commission a donné la priorité à l'examen des mesures dommageables qui constituaient également des aides d'État ([1]), elle a contribué à l'élimination de certaines mesures fiscales dommageables. Ainsi, cette action a pu, dans une certaine mesure, faciliter l'accord sur le code de conduite sur la fiscalité des entreprises conclu le 3 juin 2003. Le rapport souligne également que l'action de la Commission en matière d'aides fiscales ne prendra pas fin avec l'accord sur le code de conduite sur la fiscalité des entreprises et continuera à se concentrer sur les cas ayant un impact économique significatif et des effets négatifs sur la concurrence et les échanges.

Applicabilité des principes de la Communication aux mesures relevant de la fiscalité indirecte

Enfin, le rapport aborde la question de la fiscalité indirecte qui, en principe, n'est pas couverte par la Communication de 1998. Il conclut que si les principes de la Communication sont en grande partie également applicables en matière de fiscalité indirecte, certaines questions pourraient éventuellement être traitées dans le cadre d'une communication séparée. Le rapport décrit la façon dont la Commission assure la cohérence entre politique de contrôle des aides et la politique fiscale. Ainsi, la Commission procède désormais, de façon simultanée, à un examen des demandes de dérogation fiscale à l'harmonisation en matière d'accises sur les huiles minérales et à une analyse au regard des règles relatives aux aides d'État.

De manière générale, le rapport constate que la Communication s'est révélée être un instrument adéquat dans le cadre de l'action de la Commission dans le domaine des aides fiscales. Par conséquent, il n'apparaît pas nécessaire, dans l'immédiat, de procéder à une révision de cet instrument. Cependant, le rapport indique que dans certains domaines la pratique décisionnelle et la jurisprudence sont encore limitées et que, le cas échéant, la Communication pourrait être complétée à la lumière de l'évolution de la jurisprudence et de la pratique décisionnelle de la Commission.

([1]) Voir IP/00/182.

Le contrôle des aides d'Etat dans la mise en place du marché intérieur de l'électricité: le cas EDF

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La Commission a adopté le 16 décembre 2003 une décision en matière d'aides d'Etat qui concerne Electricité de France (EDF) et le secteur français des industries électriques et gazières. Cette décision clôture une investigation initiée par la Commission en 2002.

Au-delà de la transposition des directives sur la mise en œuvre du marché intérieur de l'électricité, cette décision vise à garantir une concurrence loyale au sein du marché français. Le 16 octobre 2002, la Commission avait proposé aux autorités françaises, au titre de mesure utile, la suppression de la garantie illimitée de l'Etat liée au statut d'EDF et avait ouvert une procédure formelle d'examen sur l'avantage fiscal dont avait bénéficié EDF en 1997 lors du reclassement dans son bilan de provisions comptables devenues sans objet. Suite au refus des autorités françaises de mettre en œuvre la mesure utile proposée, la Commission a ouvert le 2 avril 2003 une procédure formelle d'examen sur la garantie illimitée de l'Etat liée au statut d'EDF, conformément à l'article 19, paragraphe 2, du règlement de procédure en matière d'aides d'Etat (règlement (CE) n° 659/1999 du 22 mars 1999) ([1]). Enfin, le 11 novembre 2003, les autorités françaises ont notifié à la Commission une réforme du système de retraite des industries électriques et gazières, qui a été traitée dans le cadre de la décision EDF.

I – La suppression de la garantie illimitée de l'Etat liée au statut d'EDF

Au fil des dossiers qu'elle a eus à traiter, la Commission a été confrontée aux formes multiples que peuvent prendre les garanties octroyées par les Etats membres à certaines de leurs entreprises. Elle a notamment constaté qu'au-delà des garanties expresses limitées à certaines opérations, il existe d'autres formes de garanties beaucoup plus générales liées par exemple à l'impossibilité pour une entreprise de faire faillite. La communication de la Commission sur l'application des articles 87 et 88 du traité CE aux aides d'Etat sous forme de garanties ([2]) dispose donc que «constituent […] une aide sous forme de garantie les conditions de crédit plus favorables obtenues par les entreprises dont le statut légal exclut la possibilité d'une procédure de faillite ou d'insolvabilité ou prévoit explicitement une garantie de l'Etat ou une couverture des pertes de l'Etat».

Cette question d'une garantie illimitée de l'Etat en faveur d'une entreprise a déjà été examinée par la Commission à plusieurs reprises. Elle a notamment analysé l'existence de garanties illimitées dans le cas des banques publiques allemandes ([3]) dont la continuité économique ainsi que l'absence de défaut de paiement étaient garanties par les autorités publiques aux termes d'un principe général du droit, ainsi que dans le cas de certaines banques autrichiennes. Un problème comparable s'est également posé dans le dossier CDC Ixis, la filiale commerciale de la banque publique française Caisse des Dépôts et Consignations ([4]). Les bénéficiaires de ces garanties illimitées de l'Etat intervenaient dans des activités concurrentielles, et de telles garanties, illimitées dans leur montant et leur durée, et non rémunérées, ont été qualifiées d'aides d'Etat incompatibles avec le traité. En effet, il est difficile de déterminer la valeur exacte de marché d'une garantie générale d'Etat, qui est à la fois indéterminée dans son montant, dans le temps et d'une fiabilité totale.

En l'espèce, EDF a été créée en 1946 sous la forme d'un Etablissement public à caractère industriel et commercial (EPIC). En France, les personnes morales de droit public, dont les EPIC font partie,

([1]) Cf. Garantie illimitée de l'Etat en faveur d'EDF : ouverture de la procédure formelle d'examen, E. Paroche, MJ. Segura Catalan, Competition Policy Newsletter, 2003, Number 2, p. 88.

([2]) JO C 71 du 11.3.2000, p. 14.

([3]) Cf. State guarantees to German public banks: a new step in the enforcement of State Aid discipline to financial services in the Community, S. Moser, N. Pesaresi, K. Soukup, Competition Policy Newsletter, 2002, Number 2, p. 1.

([4]) Cf. Where State guarantees supporting commercial banking activities distort competition, they must be abolished: the case of CDC IXIS, R. Bufton, Competition Policy Newsletter, 2003, Number 3, p. 26.

ne sont pas soumises au droit commun de la faillite. En effet, selon un principe général du droit français datant de la fin du dix-neuvième siècle, les biens des personnes publiques sont insaisissables. Or, toute procédure de faillite implique la saisie des actifs du débiteur afin de désintéresser les créanciers. Le droit commun de la faillite s'est donc révélé inapplicable aux personnes publiques.

Ainsi, en raison de son statut d'établissement public, EDF ne peut pas faire faillite et ses engagements font de facto l'objet d'une garantie de l'Etat. Les agences de notation ont donc longtemps attribué à EDF la meilleure note possible, le fameux «triple A», ce qui lui a permis d'emprunter à des taux inférieurs à ceux qui auraient été proposés à une société commerciale soumise au droit commun de la faillite.

Dans sa décision du 16 décembre 2003, la Commission a considéré que l'inapplicabilité du droit commun de la faillite équivalait pour EDF à une garantie générale portant sur l'ensemble de ses engagements. Une telle garantie, illimitée dans sa couverture, dans le temps et dans son montant, ne peut faire l'objet d'aucune rémunération au prix du marché. La Commission a donc conclu qu'elle constituait une aide d'Etat et qu'elle était incompatible avec le traité, aucune exemption prévue à l'article 87 n'étant applicable. Elle exige donc la suppression de cette garantie illimitée avant le 1er janvier 2005, un délai s'avérant nécessaire aux autorités françaises pour mettre en oeuvre la décision.

Deux remarques s'imposent. Tout d'abord, l'action de la Commission est conforme à l'article 295 du traité CE qui stipule que «le présent traité ne préjuge en rien le régime de la propriété dans les Etats membres». La détention du capital d'EDF par l'Etat français n'est pas mise en cause. En effet, la garantie illimitée de l'Etat n'est pas liée au régime de propriété d'EDF, mais à une spécificité de son statut juridique. La Commission ne conteste pas non plus le statut d'EPIC en tant que tel, mais le fait qu'EDF, grâce à ce statut, échappe au droit commun de la faillite. Afin de supprimer cette garantie illimitée, les autorités françaises se sont engagées à transformer EDF en société commerciale de droit commun soumise aux procédures de faillite. Il s'agit d'une option choisie par les autorités françaises, mais d'autres choix étaient également possibles.

La seconde remarque concerne les missions de service public qu'exerce EDF. Même si les autorités françaises ont indiqué qu'EDF est en charge de telles missions, elles n'ont jamais invoqué l'application de l'article 86, paragraphe 2, du traité, ni indiqué de manière détaillée les obligations spécifiques de service public d'EDF et leur coût. Il aurait de toute façon été difficile d'appliquer en l'espèce l'article 86, paragraphe 2. En effet, aux termes de cet article, est compatible avec le traité une aide d'Etat visant à compenser des coûts supplémentaires liés à l'exercice de missions de service public. Cela suppose de pouvoir déterminer les coûts des obligations de service public, mais aussi le montant de l'aide supposée les compenser.

II – Le recouvrement d'une aide fiscale incompatible avec le traité CE

Le deuxième volet de la décision EDF concerne une importante aide fiscale dont la Commission exige le recouvrement.

En 1987, au motif que le réseau d'alimentation générale (RAG) lui avait été confié en 1956 par un contrat de concession, EDF a modifié sa pratique comptable et classé les actifs affectés au RAG au poste du bilan «Biens mis en concession». EDF a donc appliqué à ces actifs les règles comptables spéciales établies en France pour les biens mis en concession qui doivent être retournés à l'Etat à la fin de celle-ci, et a créé en franchise d'impôt des provisions pour le renouvellement du RAG. Cette pratique ayant suscité des critiques de la part de la Cour des comptes française, la question de la propriété du RAG a été résolue par la loi n° 97-1026 du 10 novembre 1997, qui a confirmé qu'EDF était bien propriétaire de ce réseau depuis 1956. Les provisions créées en franchise d'impôt de 1987 à 1996, pour un montant total de 8,6 milliards d'euros, sont alors devenues sans objet.

Conformément à la pratique comptable selon laquelle les corrections d'erreur doivent être comptabilisées dans le résultat de l'exercice au cours duquel elles sont constatées, les autorités françaises ont correctement reclassé une partie de ces provisions après les avoir soumises à l'impôt sur les sociétés. En revanche, une autre partie de ces provisions a été reclassée sans être soumise à cet impôt, ce qui a permis à EDF de bénéficier d'une exonération fiscale de 888,89 millions d'euros au titre de l'exercice 1997. La Commission a qualifié cette exonération d'aide fiscale et a considéré qu'elle était incompatible avec le traité CE. L'Etat français doit donc désormais récupérer cette aide auprès d'EDF. En tenant compte des intérêts courant depuis 1997, le montant total de l'aide à recouvrer s'élève à environ 1,2 milliards d'euros, ce qui représente le recouvrement le plus important jamais exigé auprès d'une seule entreprise.

Au-delà du montant de l'aide qui doit être remboursée, deux éléments méritent l'attention. D'une part, cette décision reprend un principe bien établi selon lequel un Etat membre ne peut pas profiter de ses prérogatives de puissance publique pour favoriser une entreprise dont il est par ailleurs actionnaire. Vis-à-vis d'une telle entreprise, l'Etat membre a un double rôle: un rôle d'autorité publique, notamment fiscale, et un rôle d'actionnaire, et il ne peut pas mélanger ces deux rôles au gré de ses intérêts ou de ceux de l'entreprise. Admettre le contraire priverait de tout effet utile les règles communautaires en matière d'aides d'Etat et le principe d'égalité de traitement entre entreprises publiques et entreprises privées.

D'autre part, cette décision rappelle que dans certains secteurs, il peut exister des échanges entre Etats membres avant que ne soit transposée une directive communautaire de libéralisation. Ainsi, la directive concernant les règles communes pour le marché intérieur de l'électricité a été adoptée en décembre 1996 et devait être transposée avant février 1999. Même si le marché français de l'électricité n'était pas encore libéralisé à la date de l'exonération fiscale dont a bénéficié EDF, la Commission a néanmoins considéré qu'il existait bien une affectation des échanges entre Etats membres sur la base des indices suivants: EDF exportait de l'électricité dans d'autres Etats membres; elle avait acquis des participations dans des sociétés de certains Etats membres où le marché de l'électricité était déjà libéralisé; elle était active en France sur le marché connexe des services énergétiques et enfin, elle était en concurrence, tant en France que dans d'autres Etats membres, avec les fournisseurs d'énergies de substitution comme le gaz ou le pétrole. La transposition d'une directive sectorielle de libéralisation ne marque donc pas nécessairement le début des échanges entre Etats membres, qui peuvent avoir préexisté à l'adoption de la directive sous différentes formes, mais elle vise à harmoniser leurs conditions et à les renforcer.

III – La réforme du système de retraite des industries électriques et gazières: quelques lignes directrices pour le futur

Le troisième volet de la décision concerne la réforme du système de retraite des industries électriques et gazières notifiée par les autorités françaises. De nombreux Etats membres ont entrepris récemment de vastes réformes de leurs systèmes de retraite, et notamment de leurs régimes sectoriels de retraite. Pour autant, la Commission s'est rarement prononcée sur de telles réformes, bien qu'elles puissent soulever des problèmes de concurrence.

Dans une décision de 1995 sur les aides à la restructuration de la Lufthansa, la Commission a approuvé, au titre de l'article 87, paragraphe 3 c), la reprise par l'Etat des obligations de retraite de l'entreprise aérienne dans le cadre de sa privatisation. Dans une décision de 2002, la Commission a considéré que la compensation par l'Etat du surcoût de la poste italienne pour ses retraites, avant son adossement au régime général de la sécurité sociale, ne lui conférait pas un avantage et ne constituait pas une aide. Au-delà de ces deux précédents, la Commission a saisi l'occasion de cette notification pour développer une doctrine cohérente.

Le secteur des industries électriques et gazières (IEG) était soumis à un régime de retraite par répartition spécifique. Les retraites dues aux inactifs de tout le secteur étaient payées par un service commun à EDF et Gaz de France (GDF), et intégralement financées par une contribution fixe des salariés et une contribution des entreprises de la branche, dite «d'équilibre», déterminée au prorata de leur masse salariale et ayant pour objet d'équilibrer chaque année les charges de retraite du régime. La réforme notifiée consiste à adosser ce régime au régime général pour les prestations de droit commun, à créer une Caisse de retraite sectorielle indépendante d'EDF-GDF et à décharger partiellement les entreprises du financement des prestations supplémentaires spécifiques, qui seront financées par une contribution d'acheminement assimilable à une taxe parafiscale.

Conformément à sa pratique constante, la Commission considère que les fonds mis à la disposition de la sécurité sociale constituent des ressources d'Etat, même si les organismes de sécurité sociale relèvent du droit privé et sont gérés par les partenaires sociaux. En effet, ces organismes, outre qu'ils sont financés par des contributions obligatoires, sont soumis à une forte tutelle de l'Etat en raison même leur activité.

Tout d'abord, l'adossement du régime de retraite des industries électriques et gazières au régime général est réalisé par l'affectation des cotisations sociales des entreprises et des travailleurs de ce secteur au régime général qui, en échange, assure le versement des retraites de droit commun. Dans ce cadre, la Commission pose un principe clair: l'adossement d'un régime sectoriel au régime général ne contient pas d'aide d'Etat, si cette opération est neutre financièrement pour le régime général. En d'autres termes, l'adossement ne doit créer aucune charge financière nouvelle pour le régime d'accueil. Or, une telle opération est susceptible de créer une charge supplémentaire si, dans le secteur qui rejoint le régime général, le rapport du nombre de retraités sur le nombre d'actifs ou son évolution prévisible est plus défavorable qu'au sein du régime général. Sur la base d'un calcul actuariel des obligations de retraite du régime adossé, il y a plusieurs moyens d'assurer la neutralité financière requise: soit les entreprises du secteur continuent, en plus de leurs cotisations sociales ordinaires, de financer une partie des retraites de droit commun, soit elles s'acquittent de cotisations supérieures, soit elles payent au moment de l'adossement une soulte au régime général afin de compenser la charge nouvelle ainsi créée. En l'espèce, les autorités françaises se sont engagées à ce que l'adossement du régime des industries électriques et gazières au régime général se fasse en parfaite neutralité financière pour l'ensemble des parties en cause; la Commission a donc considéré que cette opération ne contenait pas d'aide d'Etat, pour autant qu'elle soit bien neutre financièrement.

La seconde partie de la réforme consiste à décharger partiellement les entreprises du secteur électrique et gazier du financement des droits de retraite spécifiques qui vont au-delà des prestations de droit commun. En effet, chaque entreprise est tenue de financer ces droits proportionnellement à sa masse salariale et surtout, à compter de l'entrée en vigueur en 2005 des normes comptables IAS, de les provisionner dans ses comptes. Un tel provisionnement représente une charge financière exorbitante qui pèse non seulement sur les opérateurs historiques, mais aussi sur les nouveaux entrants. En cela, le financement et le provisionnement de ces droits de retraite spécifiques constituent une barrière à l'entrée sur les marchés français de l'électricité et du gaz. La réforme notifiée par les autorités françaises prévoit donc de décharger les entreprises du secteur du paiement d'une partie de ces droits de retraite, en les transférant à une caisse de sécurité sociale qui sera financée par une taxe parafiscale.

Le fait de retirer une charge aux entreprises d'un secteur économique pour la faire financer par une taxe parafiscale constitue une aide d'Etat. La Commission a néanmoins considéré que cette aide était compatible au titre de l'article 87, paragraphe 3, point c) du traité. D'une part en effet, le paiement des obligations de retraite de la branche par toutes les entreprises au prorata de leur masse salariale constitue une barrière à l'entrée, ce qui conduit la Commission à considérer que sa suppression favorisera l'entrée de nouveaux acteurs et se traduira par une concurrence plus libre sur ces marchés. D'autre part, dans la mesure où le système de retraite existant était géré par un service interne d'EDF-GDF et reposait sur la garantie illimitée accordée par l'Etat, il était clairement conçu pour fonctionner dans le cadre d'un secteur organisé sous une forme monopolistique. L'assimilant à une compensation de «coûts échoués», la Commission a estimé que cette aide était nécessaire et proportionnée pour permettre la transition du secteur vers un fonctionnement pleinement concurrentiel. Quant à la taxe parafiscale instituée par les autorités françaises, la Commission a bien entendu veillé à ce qu'elle ne pèse pas sur l'énergie importée.

Conclusion

La décision EDF illustre parfaitement comment la Commission utilise les règles en matière d'aides d'Etat pour garantir l'existence d'une concurrence effective sur des marchés récemment libéralisés. Ces règles permettent à la fois d'abolir une entrave à la concurrence, telle que la garantie illimitée de l'Etat, ou d'éliminer un avantage fiscal illégalement acquis, mais aussi d'encourager des réformes qui favoriseront l'entrée de nouveaux acteurs sur des marchés toujours dominés par des opérateurs historiques.

Lagardère/Natexis/VUP: big deal in a small world

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The COMP/M.2978 Lagardère/Natexis/VUP case concerned the proposed acquisition of Editis (formerly called Vivendi Universal Publishing or VUP) by the Lagardère conglomerate. Before the transaction, Editis was the leader in the publishing, marketing and distribution of French language books and Lagardère's subsidiary Hachette Livre was the second player in the sector. Lagardère is also active in book retailing, broadcasting and newspaper publishing as well as distribution.

The case, following formal notification on 14 April 2003, resulted in a number of decisions by the Commission: Article 6(1)(c) (opening of proceedings) on 5 June 2003, Article 9 (refusal to refer the case to France) on 23 July 2003, two Article 11(5) Decisions (suspending the procedure) and the final Article 8(2) Decision authorising Lagardère to acquire around 40% of Editis on 7 January 2004. This case also featured numerous complaints from associations of readers, retailers, book wholesalers, publishers, authors and illustrators.

The Commission's investigation and analysis revealed that the acquisition of the entire Editis publishing business, as planned in the transaction notified to the Commission, would have produced a heavily dominant group with a turnover at least seven times that of its nearest rival in French-speaking countries of the European Union. In reply to the Commission's objections, Lagardère undertook to sell the entirety of Editis with the exception of certain assets (Larousse, Dunod, Dalloz and the Anaya group) making up around 40% of the worldwide turnover of the company, while only below 25% of Editis in the French-speaking regions of the EU (i.e. the relevant markets) was retained.

I – The French-speaking publishing sector

The publishing sector is best described as a 'book chain', where a series of steps allow the production, marketing, distribution and sale of books. At the top of the chain is the acquisition of content — publishing rights — which are provided by authors or by other publishers. The book has then to be marketed and distributed ([1]) towards various types of resellers (either distinct kinds of retailers or wholesalers). At the end of the chain, retailers sell the book to the final consumers.

Along that book chain, the French-speaking publishing sector is characterised by different tiers of players, depending on their scope and degree of vertical integration. The first tier is made of Hachette Livre and Editis, which not only produce all kinds of publications, but are also active through the entire book chain including with their own wholesaling structures as well as Hachette Livre's retailing activities through Virgin stores, Furet du Nord, and the Relay outlets. The second category of players is made of four medium sized groups, three of which (Gallimard, Flammarion and Seuil) are vertically integrated (marketing/distribution and pocket format ([2]) series) but partly dependent on Hachette Livre and/or Editis for marketing as regards the smaller outlets, and the fourth group (Albin Michel) is rather more dependent, as a significant proportion of its books are marketed by Hachette Livre and its pocket format books are generally published by LGF, an Hachette Livre subsidiary. Finally, the third category is made of small publishers heavily, and sometimes totally, dependent on the larger publishers for the marketing of their products and the publication of their pocket format books.

([1]) The book distributor will typically handle logistics as well as all financial transactions (such as invoicing) related to the sales of books by publishers to resellers (in that context, a specific provision is also given to resellers, in the case of new publications, to return unsold books to the original publisher).

([2]) 'Livres de poche' or 'pocketbooks' can be defined as books with specific characteristics such as the format (usually 10x18 cm or 11x17.8cm), a soft cover and the fact that they usually belong to a collection.

This structure leads to the situation in which large publishers usually market and distribute the books of their smaller competitors who lack the minimum scale required to afford sales representatives or distribution facilities. For that reason, the Commission has identified separate markets for marketing and sales services to third parties and for distribution services to third parties, where demand originates from non-integrated publishers and supply from the vertically integrated publishers, who in addition to marketing and distributing their own books, also market and distribute the books of smaller competitors.

Against that background, the Commission found that competition between publishers essentially occurred at two levels of the book chain: first, access to publishing rights, then access to the resellers' shelves. The economics of the book industry show that it is an inherently risky activity as sales performances can vary greatly from one book to the other, especially for creative works, like general literature (novels, fictions, essays, etc). It is therefore critical for a publisher to be able to work with renowned authors and be properly available on the store shelves in order to maintain some stable resources and remain competitive.

In that respect, the Commission's investigation showed that marketing and distribution are critical in the book chain to the extent they enable access to the retail networks, and ensure the proper transit of physical and financial flows. Given the important volumes produced ([1]), the success of a book largely depends on its appropriate display on the tables and shelves of the retail outlets. The capacity to properly market a book to retailers (wholesalers, bookshops and hypermarkets) has therefore a critical impact on its commercial success. For that reason, marketing and sales as well as distribution are important not only as services to third party publishers, but also given their vertical relationship with the sales markets. The strong position held by a given publisher in marketing and distribution services will consequently improve its position on the book sales markets towards retailers, since that publisher will account not only for its own production but also for that of the other publishers it markets and distributes. In turn, this situation will increase the attractiveness of that strong vertically integrated publisher towards authors.

II – Product market definition issues

An important number of product markets were identified along the book chain: i) publishing rights, ii) marketing and sales as well as distribution services, and iii) sales of books (at distinct retailer levels).

As regards publishing rights, Lagardère had taken the view that there existed no market between authors and publishers, because relationships between them would not be based on traditional market mechanisms but rather on trust, mutual understanding and collaboration. The Commission's investigation revealed that even though such elements played a role, other elements, such as the compensation paid for the rights, exposure to media and marketing as well as distribution capabilities towards a large number of retailers were equally important factors for authors when they select their publisher. The Commission found that while unknown or new authors were generally not tendered bids by publishers seeking to acquire their works, that was the case for successful authors. Such findings were strengthened by the fact that a number of authors, in particular foreign authors, are represented by literary agents, who are particularly sensitive to economic and monetary considerations. In the end, taking account of the type of contracts, the nature of the rights and the differences in prices, types of book written and whether it was a collective or an individual work, the Commission identified a number of relevant publishing rights markets: (i) markets for primary rights for general literature, cartoons, university and professional publications in French and in foreign languages respectively, as well as (ii) markets for secondary rights for pocket books and for books sold through book clubs.

As far as marketing and sales and distribution services to third publishers are concerned, the Commission found that, despite the fact that these services were sold to third-party publishers through a single contract that covered the marketing and sales of the books to different types of resellers (including wholesalers) as well as the distribution of the books, several distinct markets ought to be distinguished, because of the specificities of the services concerned, and because of demand side and product side lack of substitutability. For that reason, distinct markets for marketing and sales services and distribution services were retained. In addition, the Commission found that marketing and sales services had to be distinguished according to the types of resellers

([1]) More than 40,000 new publications each year (more than 600 new novels were produced for the literary opening of September 2002, which in practice means that no one is able to perfectly know the entire offer of books).

that were handled by the service providers. The Commission found that bookshops, hypermarkets and book wholesalers ought to be distinguished because of the differences for marketers in handling them and because client publishers valued the access to these three types of resellers differently [1]. The question was also raised about whether services for third parties constituted distinct markets or whether they should include services for own account, since integrated publishers may use the same resources as the publishers who buy marketing and sales and distribution services from them. In that respect, the Commission followed the *Endemol* judgement [2] to conclude that only services to third parties constituted a market, because marketing and distribution capabilities are mostly for own use, involve fixed costs investments and because only capacities that are not used internally are offered to third parties. At the same time, the Commission considered that the overall position of the various players should be taken into account in the competitive assessment since, as already explained above, it bears an impact on a given vertically integrated publisher's position towards resellers.

Finally, as regards markets for the sale of books from publishers to resellers (i.e. retailers and wholesalers), the Commission adopted the general approach towards cultural goods that supply side substitutability should be the main determinant of relevant markets. From a strict demand side perspective, most of the books are indeed unique and therefore not substitutable. But from a supply side perspective, it is clear that strip cartoons publishers have no difficulty to produce a new strip cartoon while they will find it more difficult to produce a novel or a dictionary. For that reason, and also because of the various product characteristics and other distinctions, the Commission considered that the sale markets had to be distinguished according to the broad categories of books considered: (i) general literature titles, (ii) children's books, (iii) art books, (iv) guides and manuals, (v) strip cartoons, (vi) educational books, (vii) academic and professional books, (viii) reference works and (ix) and books published in instalments. In addition, an important issue was to clarify whether books in pocket format (typically 18x11 cm) should be distinguished from books in larger format. The Commission found that in the field of general literature, pocket books constituted a distinct market versus large format books. Reasons for this include distinct formats and visual identities, distinct types of rights, distinct prices and cost structures, distinct market demand trends, distinct corporate structures as well as distinct publication timings and life cycles [3].

Furthermore, the Commission took the view that book sale markets had to be distinguished according to the type of resellers, between bookshops, hypermarkets and wholesalers, as it also had found for marketing and sales services. This is due to structural properties that distinguish these types of resellers, notably the different kinds of books they buy, the ways in which commercial relations are organised and the different conditions governing rebates levels, resulting in observed differences in the rebates obtained by the three types of resellers. There are in addition specific barriers in accessing hypermarkets and wholesalers, linked to product offer, financial entry costs, brand image and other factors too. The Commission also found that wholesalers served a different type of retailers, like press outlets, food stores or other specialised shops for which books are only secondary products (such retailers are generally called ‘level 3’ retailers). For that reason, a market for the sales of books from wholesalers to level 3 retailers was retained.

III – Geographic market definition and the Article 9 decision

Article 9 of the Merger Regulation makes it possible for a Member State to request the referral in full or in part of an operation notified to the Commission. The purpose of this provision is to ensure that transactions are dealt with by the authority which is best placed to do so in accordance with the principle of subsidiarity.

According to Article 9(2)(a), a request can be made when a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market. In this case, the Commission has to assess whether (i) there exists such a distinct market within the territory of the relevant Member State, and (ii) the notified concentration may give rise to the creation or strengthening of a dominant position. If these two conditions are fulfilled the

(1) While bookshops generally carry a lot of different books, hypermarkets and wholesalers focus on the best-selling segment of books that rotate rapidly.

(2) Court of First Instance judgement of 28.4.1999, case T-221/95.

(3) Interestingly, the Bundeskartellamt, reached a similar conclusion for German language pocket books when it analysed the proposed acquisition of Ullstein-Heyne-List by the Bertelsmann group (see Decision of 24.11.2003 in the case B6 — 7/03 Random House/ Wilhelm Heyne Verlag).

Commission has the discretion whether to grant a referral.

On 14 May 2003, the French authorities asked for part of the case to be referred to them under Article 9 of the Merger Regulation. The request concerned the analysis of the effects of the transaction on the markets for publishing general literature titles in large format, general literature titles in pocket format, the acquisition of publishing rights for pocket format publishing, school textbooks, educational supporting materials, single language dictionaries, bilingual and multilingual dictionaries, single volume general encyclopaedias, as well as marketing and distribution services provided to publishers. The French authorities argued that the two above-mentioned conditions were met as each of these markets had a national dimension and that the notified concentration may give rise to the creation or strengthening of dominant positions.

However the Commission considered that the condition that there should be a distinct geographic market was not satisfied for the pocket format publishing rights, marketing and distribution services, large format general literature titles, pocket format general literature titles, single language dictionaries, bilingual and multilingual dictionaries and single volume general encyclopaedias. These markets could consequently not be referred to the French authorities under the second subparagraph of Article 9(3) of the Merger Regulation as the investigation revealed a broader geographic dimension, namely supranational, corresponding to the entire French speaking area of the European Union in the case of the markets for the sale of most of the books by the editors to the resellers, or even wider, in particular in the case of the markets for publishing rights, which were found to be of world geographic dimension, notably because of the worldwide scope of the contracts. The markets for marketing and sales services as well as for distribution services were found to be of a geographic dimension corresponding to the French speaking area of the European Union, notably because of single contracts and of the presence of the same actors throughout that territory.

For the sale of school textbooks by publishers to retailers, the Commission considered that all the conditions imposed by Article 9(2)(a) of the Merger Regulation were satisfied. However, even if the geographic dimension of this market was national, the Commission, in accordance with the first subparagraph of Article 9(3) of the Merger Regulation, decided not to refer the analysis of this market to the French authorities and to analyse the effects of the merger itself in view of the close links between this market and the other markets, and notably the distribution services market.

This position was reflected in the Commission's decision of 23 July 2003, rejecting the French authorities' request ([1]).

From a more procedural perspective, the case raised several issues surrounding the application of Article 9 of the Merger Regulation. In particular, Articles 9(4)(b) and 9(5) of the Merger Regulation state that, in a second phase investigation, the Commission has to take a decision on the referral request within three months from the notification of the concentration, except if it has taken preparatory steps in order to adopt the necessary measures to maintain or restore effective competition on the markets concerned, otherwise the referral request is deemed to be granted. The sending of a Statement of Objections to the notifying party is undoubtedly a preparatory step ([2]).

In this case, as the Commission had taken an Article 11(5) Decision, the deadline to take an Article 8 decision was extended, and then the internal deadline to notify the objections to the notifying party was exceeding the three months period, in accordance with Article 9(1)(a) and Article 9(2)(a) of the Implementing Regulation. Nevertheless this Article omits to give any indication on the effects of such a situation on the suspension of the three months deadline set by the Article 9(4) of the Merger Regulation. In practice, the Commission was not yet in a position to send a Statement of Objections as essential information was still missing, in particular pending the reply of the notifying party to the Article 11 requests. Furthermore neither the European Court of Justice nor the Commission itself, through its administrative practice, had ever addressed whether acts such as an Article 11 Decision or a State of Play meeting with the notifying party could be considered as ‘preparatory steps’. Finally, the Commission adopted a formal Article 9 Decision, thereby avoiding any judicial risk.

This procedural omission regarding the suspension of the Article 9(4) deadline in case of an Article 11(5) Decision has now been filled by the revised Implementing Regulation ([3]).

([1]) This conclusion was supported by the Belgian authorities who had expressed their position against the referral in a letter addressed to the Commission.

([2]) See re Article 9 in Notes on Council Regulation (EEC) 4064/89.

([3]) See Article 9(1) of the new Implementing Regulation.

IV – Competitive assessment

The Commission's investigation identified a number of competitive problems that would result from the combination of Editis and Hachette Livre, the two leading market players with the highest vertical integration. Dominant positions for the new entity were found along the whole book chain and notably in the more industrialised part of the publishing business: marketing, distribution and pocket format publishing. The new entity would control access both to the 'raw material', i.e. well-known authors, whose sales are the lifeblood of publishers, and to sales outlets, which cannot absorb, let alone promote, more than a limited proportion of the works published each year.

First, the Commission concluded that the transaction would give rise to the creation of a dominant position in the primary markets for French language general literature publishing rights, and for the secondary market for French language general literature publishing rights in pocket format. The Commission's investigation showed that competition on these markets took place through competitive bidding, where the amount of non-refundable advance payments played a critical role. The merger would not only eliminate the competition between Editis and Hachette Livre, but also create a significant gap between them and the other publishers, in their capacity to attract well-known authors, notably because of the vertical integration of the parties into pocket books, marketing and sales as well as distribution services ([1]).

At the next level of the book chain, the markets for marketing and sales services as well as for distribution services, the Commission also concluded that the transaction would give rise to the creation of dominant positions. Before the merger, there was evidence that Editis and Hachette Livre were competing to attract publishers from one another, as illustrated by the case of Albin Michel, which had left Editis to be marketed and distributed by Hachette Livre. Editis and Hachette Livre were not only the two largest players, but also the only ones to have their own wholesaling activities and to offer access to all types of retailers down to the smallest ones. The Commission's investigation revealed that the combination of Editis and Hachette Livre would lead to high markets shares for marketing and sales services to bookshops and very high market shares for marketing and sales services to hypermarkets and wholesalers, both representing essential sales channels for the client publishers ([2]). The high market shares, also observed for distribution services, together with the fact that these services are tied in a single contract with marketing and sales services contributed to the creation of a dominant position on that market as well. Commonalities across these markets included the significant gap resulting from the transaction between the merged entity and its competitors, the limited purchasing power of customers as well as the inability of competing service providers to present a viable alternative to the merged entity because, among other things, of the other marketers and distributors' lack of integrated wholesaling structures.

Hachette Livre and Editis' wholesalers were actually the two leading structures in the market and were necessary for other distributors to reach level 3 retailers (retailers for which books are only secondary products). In that respect, the Commission also found that the merger would lead to the creation of a dominant position in the market for the sales of books by wholesalers to level 3 outlets, mainly because of the merged entity's high market share, the high barriers to entry and the dependence of competing wholesalers for Hachette Livre and Editis' products resulting from the merged entity's dominant position on the markets for the sale of large format and pocket format general literature books ([3]). In the end, the merger would therefore risk limiting the access to retailers for competing publishers, thus leading to a reduction of choice for the consumer.

Finally, further down the book chain, the Commission concluded that several dominant positions would be created or reinforced on several of the relevant markets for the sale of books to resellers, even though for some markets (strip cartoons, art books and professional and university books) it was considered that effective competition would not be impeded as a result of the transaction.

With regard to the markets for the sales of schoolbooks in France, the combination of Hachette Livre and Editis, currently market leaders, would lead to very high market shares of around 80%

([1]) In addition the Commission's investigation revealed that merged entity could benefit from its financial surface and from Lagardère's important media activities, even though the Commission retained that these factors alone could not lead to the creation of a dominant position.

([2]) These two categories of retailers are essential for best-selling books, which represent a critical share of the publishers' turnover and profits.

([3]) In that respect, Hachette Livre had been condemned by the French competition authorities for its abusive behaviour towards the book wholesaler DNL, its main competitor outside Editis.

with the merged entity combining the main brands (Hachette, Hatier, Nathan, Bordas) and the strongest marketing capabilities in a market characterised by high entry barriers.

On the markets for the sale of educational supporting materials by publishers to bookshops, hypermarkets and wholesalers, the parties would equally have achieved near monopoly market shares and would have benefited from their vertical integration into marketing and distribution services to strengthen their prescribing power towards retailers.

On the markets for the sale of dictionaries by publishers to bookshops, hypermarkets and wholesalers and on the markets for the sale of smaller general encyclopaedias by publishers to bookshops, hypermarkets and wholesalers, the Commission concluded to the strengthening of the dominant position of Editis. Editis already had very high market shares (more than 80% for dictionaries) and Hachette Livre was virtually the only remaining or potential competitor, in markets characterised by high barriers to entry and where retailers had very little countervailing power.

The Commission concluded that the merger would lead to the creation of dominant positions on the markets for the sale of general literature titles in both large and pocket format by publishers to bookshops, hypermarkets and wholesalers with relatively high market shares for general literature titles in large format and very high market shares for pocket formats. In addition, the Commission found that the vertical integration of the merged entity into marketing services, distribution services as well as into the acquisition of publishing rights increased its market power towards resellers and its ability to promote its books on the shelves to the detriment of its competitors. The Commission also identified the creation of dominant positions on the markets for the sale of children's books by publishers to hypermarkets and wholesalers as well as on the markets for the sale of guides and manuals by publishers to hypermarkets and wholesalers, in particular due to the dominant position of the merged entity in the marketing and sales and distribution of books to hypermarkets and wholesalers. For the sales of children's books and of guides and manuals to bookshops, the Commission took the view that other publishers could still access bookshops and present competitive alternatives to the merged entity, which was not the case for hypermarkets and wholesalers, where significant barriers to entry prevail.

In conclusion, as a result of the transaction, the merged entity would have had the capacity and the incentive to alternatively or cumulatively increase prices, reduce rebates to retailers or reduce diversity on the markets for the sale of books where a dominant position would have been created or strengthened.

V – Remedies

Given the scope of the competition problems raised by the combination of Hachette Livre and Editis, the case could only be cleared if very substantial remedies were submitted. Such remedies not only had to provide solutions (in terms of divestiture of assets) for almost every market along the book chain (publishing rights, marketing and distribution services, sale of books), in which the merger would bring together the two leading players, they also had to address the numerous vertical and conglomerate links between these markets.

On the one hand, as a result of these links, a divestiture could have positive effects in more than one market. For example, the divestiture of a publishing house active in general literature could help to restore competition not only on the market for the sale of general literature titles, but also on the markets for secondary publishing rights (by making the titles published by that publisher available to pocket format publishing houses) or marketing and distribution services (by providing critical mass and in particular titles with a high sales volume).

On the other hand, very often, the viability of a divestiture that was needed to solve the competition problem on one market depended on a suitable remedy for an upstream or downstream market. For instance the divestiture of a pocket format publishing house would only be viable if it had sufficient access to secondary publishing rights (upstream) as well as marketing and distribution (downstream). Last but not least, the viability of the divestiture of a large distribution centre — necessary to solve not only the competition problem in the markets for distribution services to third parties, but also to remedy the creation of dominant position in the markets for the sale of books to resellers as well as to ensure the distribution of divested publishing houses — would depend on the divestiture of publishing houses delivering a critical mass of books to be distributed.

The solution that was finally proposed by Lagardère and accepted by the Commission as basis for clearance therefore consisted in a commitment to divest the whole of Editis, except for a number of assets which could be retained by Lagardère without creating competition problems.

Lagardère consequently committed to divest all assets of Editis except dictionary publisher Larousse, professional and academic publishers Dalloz and Dunod as well as the Spanish publishing group Anaya, which is active mainly in schoolbooks and general literature in Spain and Latin America.

The assets of Editis that Lagardère committed to divest are in principle to be sold to a single purchaser. A divestiture to more than one purchaser will indeed only be accepted by the Commission under exceptional circumstances and provided that the requirement of re-establishing a viable vertically integrated competitor is fully satisfied. By that way, a viable vertically integrated player with appropriate access to publishing rights, marketing and distribution capacities (in particular the Editis distribution centre) will remain in the market as a competitor to Hachette and the other publishing groups.

Lagardère, on the other hand, will be able to retain those assets of Editis that are active in markets where no competition issues arise (essentially French language academic and professional publishing and Spanish language publishing) or where the situation after the divestiture is more competitive than before the operation (French-language dictionaries, where in the future Larousse — owned by Lagardère — will compete with Le Robert — owned by the divested Editis group — whereas pre-merger both these publishing houses — that account for the almost the totality of the market for dictionaries — belonged to Editis). As a result, Lagardère will become the new market leader in book publishing in the French language area and gain a strong position in the Spanish language area as well.

The Lagardère/Natexis/VUP case shows once more that in some cases remedies need to go beyond what is strictly necessary to purely eliminate horizontal overlaps. If a notified operation raises very serious competition concerns on a large scale, a significant modification of the transaction in terms of divestiture commitments may be necessary in order to make it possible for the remaining of the operation to go ahead.

VI – Conclusion

The Lagardère case, by its scope and by the depth of the Commission's investigation, should be regarded as a landmark in the book publishing and sales sector.

Box: unilateral effects

In the Lagardère/Natexis/VUP case, the expected unilateral effects were measured by an econometric study (1) commissioned by the Commission on the retail market of general literature books (i.e. sale of such books by the retailers to the final consumer). In this study, the unilateral effects measured the impact of a concentration on the public sales prices (2), the final consumers' surplus and the profits of the companies. Before the merger with Editis, if Hachette Livre (subsidiary of Lagardère) decided to increase prices unilaterally, some of these final consumers would turn to other competing publishers, one of whom was Editis. Following the concentration with Editis, Hachette Livre would absorb some of these competitive pressures, and could thus be expected to retain some of these customers.

The theoretical framework used to analysing the market demand in this study is the nested logit model from the family of the discrete choice model. The nested logit model is of significant interest in differentiated industries, somewhat like the book industry. Consumers make a discrete choice among a set of different alternatives called 'nests' — here: novel, thriller, romance, essay, etc — in the general literature book market and then choose a book in the concerned nest. The utility of a given consumer is assumed to depend on the observable characteristics of the chosen book (e.g. number of pages, brand name, series by a famous author), on 'random consumer tastes' and on a small set of economic parameters to be estimated (e.g. the marginal utility of a given book and the intra-brand correlation). Market demand is then derived from the aggregation of individual consumer choices and prices are endogenously determined by price-setting publishers.

On the retail markets for all general literature books (pocket and large formats) sold by retailers to final consumers, the study indicates that, as a result of the merger, sales prices of the books published would increase significantly even without taking account the vertical and conglomerate effects of the concentration. According to the study, which used the Bootstrap method to construct confidence intervals, there is only a 5% probability that the price rise due the concentration could not be included in an interval showing significant price increase (3). Consumers' surplus would also fall significantly and this fall would represent a non-negligible part of the turnover of the industry in the field of general literature.

In addition to the Bootstrap method, different elements indicate the robustness of the model: the very high number of observations, the different statistical tests of significance and robustness, the stability of the main parameters. Overall, the model employed appeared very robust and in line with the state of the art of empirical analysis in such a market.

(1) 'Evaluation Econométrique des Effets de la Concentration Lagardère/VUP sur le Marché du Livre de Littérature Générale', Jérôme Foncel et Marc Ivaldi, revised and increased final version, September 2003.

(2) In the absence of reliable data available on the level of the discounts granted to the retailers.

(3) Jérôme Foncel and Marc Ivaldi have calculated a confidence interval through the 'Bootstrap' method. This method calculates, by simulating a large number of times the concentration, a possible interval of price rise.

Compensation for services of general economic interest: some thoughts on the Altmark ruling

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1. Introduction

With the *Altmark* judgement (2), the European Court of Justice has uttered the last word in a long-standing dispute: is compensation for services of general economic interest (SGEI) a State aid?

The debate — opened by the departure in the *FFSA* judgement (3) from the approach of *Waste Oils* (4) and revamped with *Ferring* (5) — originated from the apparent impossibility of avoiding either one of two unpleasant conclusions:

— Fair compensation for extra costs imposed by the State gives an advantage to the recipient;

— Article 86 loses any purpose in State aid, if fair compensation is no aid and over-compensation is always incompatible.

While in the previous pronouncements the arguments against one conclusion had been given more weight than those against the other, the *Altmark* judgement is a fine and successful attempt at squaring the circle and at striking a balance between the two views. We believe, however, that some clarifications and, possibly, a shift in emphasis in some parts, could be useful to avoid undesirable deductions from and possible misinterpretations of the judgement.

2. The Altmark judgement

In the Altmark judgement, the European Court of Justice, after reminding the requirements for existence of State aid, (6) goes on to argue that — provided the compensation for the public service obligations meets certain conditions — the recipient undertakings *'do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them'*. (7) In other words, public support might be arranged in a way that does not confer any advantage to the recipient, therefore failing one of the requirements of article 87(1) for qualifying as a State aid.

The conditions for such compensation to escape classification as State aid are:

— First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

— Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. (8)

(1) Both authors work for the European Commission, Directorate-General for Competition. The present document only reflects their personal opinions and should not be held to represent the views of the European Commission or of the Directorate General for Competition. The authors wish to thank the many colleagues who provided them with their valuable comments and opinions. The final responsibility for the content of the paper rests solely on the authors.

(2) Judgement of the Court, case C-280/00, *Altmark* [2003].

(3) Judgement of the Court of First Instance, case T-106/95 *Fédération française des sociétés d'assurances* (FFSA), [1997] ECR II-0229. See also the Court's judgement in Case T-46/97 *SIC* [2000] ECR II-2125.

(4) Judgement of the Court, Case 240/83 *ADBHU* [1985] ECR 531.

(5) Judgement of the Court, case C-53/00 *Ferring* [2001] ECR I-9067.

(6) '*First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition*'. §75 of the judgement.

(7) §87 of judgement.

(8) The ECJ adds that: 'Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty'.

— Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

— Fourth, where the undertaking is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical undertaking, well run and adequately provided with means.

These criteria seem to lead to the identification of three categories of cases, in which:

(1) the compensation is limited to the extra costs of an efficient operator;

(2) the compensation does not exceed the extra costs of the recipient/provider, which, however, is not an efficient operator; and

(3) the compensation exceeds the extra costs of the provider. (1)

The logical conclusion for the assessment would be a finding of:

— **non-aid** in the first category of cases;

— possibly, **compatible aid** in the second category, and

— clear-cut **incompatibility** in the third.

The aid element would therefore be present not only in the overcompensation of the actual costs of the public service, but also in the funding of economic inefficiency.

Within this framework, a role would be preserved for article 86, while maintaining that a provider of a public service that is compensated at the minimum possible level does not receive any economic advantage. This framework differs from what the ECJ previously implied notably in Ferring, where only the two extreme categories were foreseen: either non-aid or incompatible aid. (2)

3. Neither necessary nor sufficient conditions

The whole controversy on the SGEI is dictated by what is eminently a practical problem. If compensation for SGEI is always aid, the notification requirement of Article 88(3) EC Treaty applies, and any national judge could halt a public service whose funding mechanism had not been notified to the Commission.

The ECJ therefore tries to identify situations in which there is ex-ante certitude that the public service is assured at the least cost to the community and that no advantage has been granted to the recipient. In such circumstances there would be no need for Commissions' scrutiny and the measures could be classified as non-aid.

The four conditions set in the Altmark judgement have different scope. The first pertains to the object of the payment: it must be related to well defined SGEI. The second refers to procedural aspects: calculation method must be set ex-ante. The third concerns the appropriate amount of compensation. The fourth is a mix of quantification elements (least cost or efficient provider) and procedural aspects (tender or cost analysis).

The wording of §§ 88 and 94 of the judgement suggests that the criteria established by the Court represent sufficient and necessary conditions for qualification of (non)aid. In these circumstances, (non)existence of aid would necessarily proceed not only from the object and amount of compensation, but also from procedural aspects.

3.1. The paradox of the non-tendered minimum compensation

The framing of procedural requirements as necessary conditions for non-aid could easily lead to paradox. One could imagine two cases — identical in every respect, save for the procedure followed in granting the compensation — being classified differently. The same, minimum amount granted after a thorough analysis of the costs of efficient enterprises would not be an aid, contrary to the same amount granted without such an assessment.

(1) In mathematical terms the three categories can be expressed as follows: i) $S \leq EC^* \leq EC^{R;}$ ii) $EC^* \langle\leq S \leq EC^{R;}$ iii) $EC^* \leq EC^{R} \langle\leq S$, where S = subsidy, EC* = extra costs of the efficient operator and EC^R = extra costs of the subsidy recipient.

(2) Such a problem of loss of meaning for article 86(2) EC was first highlighted by Advocate General Léger in his opinion on the Altmark case of 19 March 2002 and in the Opinion of Advocate General Jacobs of 30 April 2002 in Case C-126/01, *GEMO*.

Apart from this hypothetical example, there is the more realistic situation in which there are only few potential providers of a certain service. In those circumstances a tender or even a survey of typical costs would not prove very useful, but skipping those procedures leads to a finding of aid. Can we really say that in all those circumstances there is advantage for the recipient?

The mix of procedural and substantive requirements seems related to the ECJ attempt to identify under which circumstances compensation for a SGEI could legitimately escape notification (a procedural obligation), since it would be limited to the minimum necessary (a substantive requirement). However, it is doubtful that a procedural defeat necessarily implies a substantive failure.

3.2. Tenders and 'reasonable' profit

The above paradox is based on the circumstance that procedural aspects are not necessary to achieve the 'least cost' objective. One can also wonder whether they represent sufficient conditions.

It is an acknowledged result in economics that a tender may lead to very different results depending on how it is designed and that, at any rate, a tender does not necessarily lead to the provision of a service at the least possible cost. ([1])

A typical case would be that of a SGEI provided through a network, such as water or electricity distribution. In such cases, an incumbent firm that owns the network would be greatly advantaged in a tender for the provision of the service, unless there are open access requirements to the distribution facility or the use of the network itself is also being included in the procedure. In many other circumstances, the incumbent would enjoy scale and scope economies well beyond alternative suppliers. In view of the asymmetry between providers, a tender procedure would not necessarily drive the winning offer down to the least possible cost. The incumbent, in fact, can limit its offer to just below what can be afforded by its competitors.

This observation begs the question of what is intended by the wording 'least cost to the community'. Does it refer to the cost of the most efficient producer or to the best offer available on the market? The two are not necessarily equal and a tender procedure would only ensure the achievement of the latter.

The question is strictly linked to the issue of how to interpret the notion of 'reasonable profit'. It is not surprising that the ability to produce at lower costs generates higher profits. Indeed, even in perfect competition the most efficient producers are capable of enjoying profits. Those could be seen as the 'fair' remuneration for their superior production factors. In the case of SGEI, however, the ability to produce at lower cost is often linked to the control over networks set up by the public authorities or already amortised thanks to granting of exclusive rights. Can the economic rents associated to those networks be accepted as reasonable profit?

The answer to this question must be negative, but this implies that even in cases where a SGEI is attributed through a tender, the third Altmark criterion (no overcompensation) might not be met and that the compensation is an incompatible aid that should have been notified. This is consistent with the wording of the judgement — *'selection of the tenderer capable of providing those services at the least cost to the community'* — providing that the concept of least cost to the community is interpreted restrictively. Even so, however, the Commission would be put in a very difficult position if it had the burden of proving that the tender procedure was not capable of avoiding overcompensation.

4. Absence of advantage: the paradox of the tendered factory

The Altmark judgement is based on one fundamental principle: when the public service is assured at the least possible cost — including a reasonable profit margin — no advantage is being granted to the recipient. In such cases there is no State aid.

Now let's, for a moment, avert the discussion from SGEIs and imagine a situation in which a regional authority tenders out the production of a certain good in its territory. The region faces some competitive disadvantages so that a subsidy is needed to attract, for instance, the necessary investments. The subsidy could take the form of a factory or of a piece of equipment or land rented at below market price. The tendering procedure might ensure that the subsidy is the minimum necessary to attract a producer. Therefore, it can be reasonably argued that the winner of the tender does not enjoy a financial advantage and is put in

([1]) See for instance P. Klemperer, *What really matters in Auction design*, Journal of Economic perspectives, 2002, also available on www.paulklemperer.org.

exactly the same competitive position as producers located in more favoured regions. Is this an aid?

The first reaction to this question would be to say that the measure is clearly aid, actually a regional aid, i.e. aid for the development of a region. Regional aid is typically subject to strict rules as it distorts the investment allocation of firms across the EU and trade between Member States. (1)

Indeed, the Altmark criteria are not relevant here since the good in question is not a service of general economic interest. However, if the principle is accepted that a mere compensation for disadvantages — that does not put recipients in a more favourable competitive position than competitors — is not an aid, why the reasoning should be valid for services of general economic interest and wrong in other circumstances? Once an absence of advantage is ascertained, the State measure no longer meets one of the basic conditions in Article 87(1) and, regardless of its aims and purpose, should not qualify as aid. (2)

In fact, we can think of three different types of goods or services which could be 'procured' by the State through a tender procedure, e.g.: the stationary to the public administration, a public service to the citizens or an economic activity to a less developed region. The three situations are obviously very different, but they have one element in common: the tender procedure is supposed to neutralise the advantage for the recipient. If the advantage to the recipient is a *condicio sine qua* non for presence of aid the emergence of a paradox cannot be prevented.

5. Possible clarifications

Are the paradoxes avoidable? Could some adjustments be envisaged or clarifications provided, to avoid possible misinterpretations of the judgement? We believe so.

The difficulties arise from the circumstance that it is possible to have overcompensation in the presence of a tender and fair compensation in the absence of tender. This is not to say that reference to tenders or to well run undertakings is without merits. On the contrary, it is very important because it clarifies that there is aid whenever compensation goes beyond the costs of an *efficient* provider, not simply beyond the costs of the recipient. (3) It would probably have been better, however, to clarify this concept and present the 'ideal tender' as the benchmark for assessment, without raising the procedural requirements to the rank of constituent parts of the notion of aid.

A second comment is referred to the issue of ‘advantage’ and to the notion of services of general economic interest.

Qualifying State intervention as non-aid simply on the basis of absence of advantage for the individual operator, would neglect the possibility that there still might be an advantage for certain *productions.* When the State procures stationary for its administration it behaves like a normal consumer and does not favour any production; but when it alters the allocation of resources in the market, by acting as a public authority (4), it may favour certain sectors or productions. (5) This would be justified in the case of services of general economic interest, less so to stimulate economic activity in general, possibly to the detriment of productions in other Member States.

In fact, in the case of SGEI, the non-aid nature of the intervention is due to the nature of the aided activity as much as to the absence of advantage for the individual recipient. The reasoning presents some analogies with the funding of non-economic activities. When the State finances the universal health system or public education it is not deemed to favour certain productions, but rather carrying out a typical duty of the public authority. In that

(1) In fact it would not be possible to argue that the region is acting as a market economy investor to the extent it could sell the same good or service at a higher price had it decided to impose no condition on the use of such good or service. See for instance *Commission Communication on State aid elements in sales of land and buildings by public authorities* (97/C 209/03), OJ C 209, 10.7.1997. See also the *Commission Guidelines on National Regional Aid*, OJ C 74/9, 10.3.1998.

(2) The argument that in the two cases the origin of the disadvantage is different — State obligation vs external factors — is not convincing: the obligation to produce in a disadvantaged region would not be very different from the obligation to open a post office in a remote area.

(3) The reference to a tender also clarifies that all sorts of advantages — direct and indirect — linked to the entrustment of the public service must be taken into account in determining the amount of compensation. Indeed, bidders form their offers on that basis.

(4) The different roles of normal economic actor or of public authority are typically detected by checking the compliance with the Market Economy Investor Principle (MEIP), i.e. whether a private operator would have carried out the same transaction on the same terms under similar circumstances.

(5) A few examples would be that of a form of transport that is favoured over alternative means, or televised information over newsprint, or clean energy over non-renewable one.

case the recipients are not considered to be 'undertakings', which is sufficient to qualify the intervention as outside the scope of Article 87. When making possible the provision of SGEIs, the State is similarly performing a typical task of the public authority. The only difference is that it chooses to entrust the task to undertakings. This requires the State to avoid granting advantages to the individual recipients of compensation, but the activities remain, so to say, protected from a possible claim of sectoral aid.

Perhaps the Court could clarify that the absence of advantage for individual recipient is sufficient to exclude aid, only in view of the fact that sectoral advantage must be ruled out in the particular case of services of general economic interest. This, however, should be coupled with greater guidance as to which type of services can be defined as services of general economic interest. In the current situation, Member States enjoy a large discretion on this issue and there is a concrete risk that the notion of SGEI is extended with the purpose of subtracting certain types of subsidies from the standard rules on State aid. The qualification as service of general economic interest should be confined to services that meet general needs of the population, that are not adequately provided by the market in the absence of State funding and where the entrustment of a specific task to individual operators is the only practicable solution or has clear advantages over the alternatives (e.g. general regulation).

It should be noted that the fulfilment of the Altmark criteria deprives the Commission of the possibility to effectively apply the common interest criterion of Article 86(2). Accordingly, the circumstance that there might be less distortive ways of achieving the public interest task, than a financial transfer to individual operators — through e.g. regulation (laws on media concentration etc) or open access public infrastructures — can only be tackled by questioning the definition of the public service. [1] If it is maintained that the Commission role is limited to control for manifest error, the Altmark judgement would imply lowering the standard for compatibility with the common market.

6. Conclusion

The Altmark judgement conclusively establishes the principle that a compensation that does not exceed what is necessary to cover the minimum possible costs incurred in the discharge of public service obligations is not a State aid. This is a welcome clarification as well as an appreciated introduction of the idea that compensation for inefficiency is an aid, although possibly compatible.

The judgement, however, goes beyond the setting of this principle and links some procedural requirements (ex-ante fixation of parameters, tender procedure, analysis of the costs of a typical undertaking) to the notion of aid. While this has the beneficial effect of preserving ex-ante Commission control in cases where the compensation is not entirely transparent, it has the consequence of labelling as aid all compensations not meeting those requirements, independently of whether they provide an advantage to the recipient or not. On the other hand, these procedural requirements — possibly refined to ensure the achievement of the desired outcome — should continue to provide guidance on the assessment of cases.

Finally, further developments on the definition of SGEI would be desirable. The absence of advantage to the individual recipient should be considered sufficient to exclude State aid only in connection to services of general economic interest. The latter should be confined to services that meet general needs of the population that are not adequately provided by the market and where those needs cannot be reasonably served in less distortive ways.

(1) In case of recourse to cost analysis rather than to a tender, there might also be distortions originated by the application in different Member States of different definitions of SGEIs and different criteria for compensation. On this topic cf. *An example of the application of State aid rules in the utility sector in Italy*, Competition Policy Newsletter, N. 3, October 2002, p. 17.

EUROPEAN COMPETITION DAY IN DUBLIN

Thursday April 29 2004, Dublin Castle, Dublin Ireland

The European Competition Day will emphasise the benefits to consumers from competition. In particular the discussion will focus on:

— how competition, in both the traded and the non-traded sector, contributes to productivity and growth, and

— the importance of regulation in facilitating (or constraining) the benefits to consumers from competition.

Both of these themes are of particular relevance to current and soon-to-be members of the European Union.

Speakers will include:

Mary Harney, An Tanaiste TD, Deputy Prime Minister and Minister for Enterprise Trade and Employment

Mario Monti, EU Commissioner Competition Policy

Christa Randzio-Plath, Chairperson, Committee on Economic and Monetary Affairs, European Parliament

Robert Gordon, Northwestern University

Philip Lowe, Director-General, DG Competition, European Commission

John Fitzgerald, Economic and Social Research Institute (ESRI), Ireland

Tim Muris, Chairman, Federal Trade Commission, USA

Giuliano Amato, former Italian Prime Minister, former Head of Italian Competition Authority and current Member of the Italian Senate

Jim Murray, Director, European Bureau of Consumer Organisations (BEUC)

John Kay, Financial Times

John Fingleton, Chairman, Irish Competition Authority.

During February 2004 the Competition Authority intends posting more detailed information about the Competition Day on its website, www.tca.ie, and also on the Presidency website, www.eu2004.ie. In the interim, information (e.g. about registration) can be obtained by contacting Sandra Rafferty on **conference@entemp.ie**

The REIMS II exemption decision: enhancing competition in the cross-border mail market through third party access

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1. Introduction

On 23 October 2003, the European Commission adopted a decision in case COMP/C1/38170 *REIMS II prolonging* for an additional five years the exemption of the REIMS II (Remuneration of Mandatory Deliveries of Cross-Border Mails) Agreement ('REIMS II'), i.e. the instrument by which 17 European Public Postal Operators ('PPOs') ([1]) collectively determine the remuneration they pay each other for the delivery of incoming cross-border mail in the country of destination, so called terminal dues ('TDs') ([2]).

This has been the second time that the Commission has assessed the compatibility of the REIMS II Agreement with EC Competition Law. On 15 September 1999, the Commission had already exempted the REIMS II Agreement for a period of two years expiring on 31 December 2001 ([3]). An amended REIMS II agreement was notified on 18 June 2001 with the request for a renewal of the 1999 exemption.

The decision of the Commission to renovate the exemption is based on two main elements: the acknowledgement of the effective benefits for consumers as a result of the implementation of the agreement and the strict requirements imposed on the parties in the decision, notably the decision to condition the exemption to the awarding to third parties of a non-discriminatory access to REIMS II delivery terms and conditions.

2. A short history of terminal dues

In 1969 the Universal Postal Union ('UPU') introduced a system for the remuneration of delivery of cross-border mail in the country of destination, the 'terminal dues'. The method used, as well as the one subsequently introduced in 1987 in the framework of the European Conference of Postal and Telecommunications Administrations ('CEPT'), a sub grouping within the UPU, were not satisfactory, since they did not properly reflect the real costs of delivery in the country of destination. In 1993, the Commission issued a statement of objections stating that the CEPT system was contrary to Article 81(1) since it fixed a uniform rate for the delivery of incoming international mail. The Commission also considered that Article 81(3) was not applicable and that the method for calculating TDs should at least involve a more accurate approximation of these costs, for example by calculating TDs as a percentage of domestic tariffs in the country of destination. However the Commission decided not to proceed to a prohibition decision in that case in view of the subsequent signature, on 2 June 1995, of the first REIMS I Agreement under which TDs were for the first time to be linked to domestic tariffs on a European-wide basis. The approach adopted by the Commission was endorsed by the Court of First Instance in its judgment of 16 September 1998 in Case T-110/95 (IECC/Commission).

Further to the expiration of the REIMS I on 30 September 1997, the same parties except the PPO of the Netherlands decided to sign REIMS II, which maintained the framework of the previous agreement although introducing some relevant changes mainly regarding the application of the penalty system.

3. The REIMS II agreement

The main aims of the REIMS II agreement are to provide the parties with a compensation for the delivery of cross-border mail which reflects more closely the real costs of delivery of each party, and to improve the quality of cross-border mail services.

According to REIMS II as re-notified, TDs are calculated as a percentage of the domestic tariff for priority mail. In reality REIMS II identifies different levels of remuneration for different products. The main levels of remuneration are the so-called Level 1 and Level 3. The former is the remuneration paid for the delivery of priority mail and relates to what are generally known as TDs. The latter relates to the 'generally available

([1]) The PPOs of all EU Member States except The Netherlands and those of Norway, Iceland and Switzerland.

([2]) IP/03/1438 of 23 October 2003.

([3]) Commission Decision 1999/695/EC in Case No COMP/36.748 — *REIMS II),* OJ L 275, 26.10.1999, p. 17.

domestic rates' in the country of delivery to which all the parties are obliged to grant each other access. This remuneration level, which will normally be lower than TDs (Level 1), is important as a possible low cost alternative to them.

In the notified agreement, TDs were to be increased over a transitional period ending in 2004. During this period two intermediate steps were foreseen (73.3% on 1 January 2002 and 76.6% on 1 January 2003) before reaching the final level of 80% in 2004.

In REIMS II the link with the improvement of the quality of the relevant services is achieved via the introduction of a system of quality-of-service standards for the delivery of priority mail (1).

4. The relevant markets

The REIMS II Agreement concerns the markets for normal — as opposed to express — cross-border mail between the countries concerned i.e. cross border mail from one REIMS II country to another REIMS II country.

The relevant product market is to be further divided into a market for the forwarding of outgoing cross-border mail, on which PPOs and to an increasing extent private companies collect mail from customers in the originating country for delivery in other countries, and a market for delivery of incoming cross-border mail on which PPOs (and for a very small part other postal operators) offer mail delivery services for cross-border mail to PPOs and private mail companies. This distinction has been reinforced by the full liberalisation of outgoing cross-border mail by Directive 2002/39/EC (2).

The geographic dimension of the markets must be considered national since national boundaries mark the scope of national monopolies. Moreover, collection and delivery are organised on a national basis and prices systems differ for every country.

5. The 1999 Exemption decision

In 1999, the Commission considered that the agreement constituted a restriction of competition, falling within the scope of Article 81(1), because it collectively established a common level of TDs expressed as a percentage of the domestic tariff in the receiving country. The Commission concluded that, although the amounts in absolute terms were not fixed, the agreement had the effect of jointly fixing prices. By linking the price for the cross-border service to the price for the domestic service, the price of which is determined primarily by do-mestic considerations, the parties eliminated or reduced their freedom to set the prices they charge for the delivery of incoming cross-border mail.

As regards Article 81(3), reference was made to the following main elements: (1) the need for the PPOs to increase TDs in order to cover their costs, (2) the fact that the penalty mechanism would bring to substantial improvements in the quality of service for incoming cross-border mail, (3) the likelihood that the availability of a low-cost alternative to TDs would reduce the financial impact of the increases of TDs.

At the same time, in absence of adequate data on parties' costs for delivery of inbound cross-border mail, the Commission considered that the parties had not provided sufficient evidence that the ultimate level of remuneration was an adequate proxy for these costs. As a consequence parties were allowed to raise TDs to a level equal to only 70% of the domestic tariffs whilst the final increase to the 80% would have been allowed only in presence of the necessary evidence in terms of accurate cost data (3).

6. The new decision/The new elements

The considerations mentioned above are also at the basis of the new exemption decision which has however modified the assessment made in 1999 with regard to the requirements imposed on the parties for the awarding of the exemption. These modifications are mainly due to the presence of several new important elements which were not known in 1999, namely:

6.1. The Parties' cost data

Further to the implementation by the Parties of the obligation to introduce a transparent cost

(1) The standards are defined as the percentage of incoming cross-border mail which has to be delivered within one working day after the day of its arrival. A penalty system, or curve, is applied when the agreed standards are not met. The larger the gap between the quality target and the quality of service actually achieved, the higher the penalty applied.

(2) Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, OJ L 176, 5.7.2002, p. 21-25.

(3) For this purpose the Commission imposed on the parties the obligation to develop, by the end of 1999, a transparent cost-accounting system, as provided for in Directive 97/67/EC, ensuring that all significant cost elements can be identified, quantified, compared and controlled.

accounting system, the Commission has obtained detailed accounting data regarding each party's costs for cross-border mail delivery.

This information, not available at the time of the 1999 exemption decision, has permitted the Commission to make a more accurate assessment of the agreement.

6.2. Level 3 access

The 1999 decision obliged the parties to take all the necessary steps in order to grant each other effective access to generally available domestic rates, so called Level 3.

The investigation carried out in the course of the procedure showed that the effective use of this opportunity had a difficult take-off although, more recently, the volumes of REIMS II mail making use of Level 3 tariffs have risen substantially. The explanation given by the parties for this phenomenon is that, since Level 3 rates were meant to be a cheaper and less qualitative alternative to TDs, this possibility was limited as long as TDs were still low, but has risen substantially as soon as TDs started to go up. As TDs have gone up (mainly through reduction of penalties due to increased quality), so has the volume of cross-border mail making use of such access, rising from 33 million items in 1999 to 120 million in 2002.

6.3. The new Postal Directive

On 10 June 2002 the Council of the European Union and the European Parliament adopted Directive 2002/39/EC on further liberalisation of the European postal markets. One of the major changes introduced by this Directive is that, as from 1 January 2003, Member States are no longer allowed to include the market for outgoing cross-border mail in the reserved area unless it is necessary to ensure the provision of the universal postal service. This modification of the regulatory environment increases substantially the scope of the service area in which REIMS II parties are direct competitors, thus modifying the basis on which the applicability of both Article 81(1) and 81(3) have been assessed.

6.4. Quality improvement

The investigation carried out further to the re-notification of the agreement has also shown that REIMS II has effectively brought about substantial improvements in the quality of the relevant services.

In 1999 the evaluation of the impact of REIMS II on quality of service was mainly abstract and correlated to the inherent capability of the agreement to foster quality improvements. Four years after, it has been indeed possible to ascertain that since then quality of service has increased substantially. Despite some different critic opinions, the Commission believes that these improvements are mainly due to the application of REIMS II quality improvement mechanism based on penalties ([1]).

7. The new decision/Article 81(1) of the EC Treaty

The new exemption decision confirms and reinforces the assessment made in 1999 as regards the applicability of Article 81(1). Indeed, developments in postal markets have led the Commission to identify competitive concerns which are even more important than those referred to in 1999. To an increasing extent PPOs are in direct competition with each other, most of all in those home markets for outgoing cross-border mail which have been opened to competition. Bearing the above in mind, the conclusion must be drawn that the restrictions of competition brought about by the REIMS II agreement have become more serious, thus requiring more stringent requirements for the concession of an exemption.

8. The new decision/Article 81(3) of the EC Treaty

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

As in 1999, in the new exemption decision the Commission has considered that the REIMS II agreement produces improvements which fulfil the first prerequisite for exemption under Article 81(3).

The first important improvement to be taken into consideration is the increased correlation between terminal dues and the Parties' costs for the delivery of incoming cross-border mail. An imbalance between costs of delivery and remuneration, in

([1]) For example, between 1998 and 2000, the percentage of cross-border mail delivered within one day from entering the country of destination has improved, on average, by 6%. In Italy, the improvement amounts to 50% and in Norway to 13%. Indicators show that the improvements continued after 2000.

fact, would oblige PPOs to cover the losses suffered in the delivery of international mail by making use of profits generated by delivery of domestic mail, thus creating distortions in the allocation of revenues from different categories of end-users. In this regard, it has been considered as an improvement the fact that the REIMS II TDs increase the above mentioned correlation.

The main benefit that the Commission has taken into consideration is, however, the increase in the quality of the relevant services which the agreement has produced. The decision recognises that the quality of the relevant services has improved substantially in the period in which REIMS II has been applied. Although it has been argued by some third parties that those improvements have causes other than REIMS II, notably improvements in the quality of domestic mail delivery, the causal link between such improvements and REIMS II has been considered sufficiently strong to be taken into consideration in the assessment of the case ([1]).

According to the decision, the link between TDs payable to the receiving party and improvements in the quality of the cross-border delivery service ([2]) has worked and works as a strong incentive for the parties to improve service quality.

8.2. Benefits for consumers

The decision takes carefully care that consumers will benefit from the highest possible advantages from the exemption of REIMS II. As regards the main benefits already mentioned, i.e. the improvements in the quality of service and the better correlation between TDs and costs, the awarding of a fair share of these benefits to consumers is a natural consequence. Quality of service is in fact easily perceived by consumers, as are increases of domestic mail tariffs which may be the consequence of cross-subsidisation of losses incurred in the delivery of cross-border mail.

Another important element this respect is the fact that, as in 1999, the Commission has conditioned its exemption on the availability of a viable and less-costly alternative to TDs for the delivery of cross-border mail and has imposed a condition in this respect. Such an alternative, in fact, reduces the financial impact of the increases of TDs necessary to make them consistent with the parties' costs.

The last but certainly not least element of the decision that is important for consumers is the imposition of third party access to REIMS II TDs at non-discriminatory conditions. This condition, imposed in order to avoid a possible elimination of competition, strengthens the likelihood of effective competition by third party operators. As a consequence, consumers' choice is likely to be enriched with new offers that will most probably be attractive both on price and on non-price issues.

8.3. Indispensability

The requirement of indispensability set forth at Article 81(3) (a) has been interpreted in the sense that an agreement setting TDs at the same percentage of domestic tariffs for all the parties is to be considered indispensable for the attainment of the relevant benefits and improvements. It has been considered, however, that the common level of TDs agreed upon by the parties must reflect, on average, their actual costs for delivery of inbound cross-border mail. In this regard, since they have failed to demonstrate that 80% of the domestic tariffs is a sufficiently accurate approximation of their costs, the parties have been requested to reduce the TDs levels indicated in the notified agreement. The parties have therefore agreed on a new set of TDs levels to be applied during the exemption. According to the decision these TDs sufficiently reflect, on average, the parties' costs. The restriction of competition connected with the joint fixing of TDs percentages by the parties is therefore to be considered indispensable within the meaning of Article 81(3) (a).

8.4. Non elimination of competition

The application of the criterion set forth in Article 81(3) (b) constitutes the main difference with the 1999 decision since it has brought what is perhaps the most important result of the whole exemption procedure i.e. the imposition of non-discriminatory access to REIMS II TDs for third party postal operators.

The reasoning behind the imposition of this requirement is mainly based on two elements: (i) the fact that REIMS II is only open to postal operators entrusted with the obligation of providing the universal postal service (thus

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([1]) As regards the influence of domestic mail quality, according to the Commission the available data show that since the entry into force of the REIMS II Agreement, quality of service for cross-border mail has improved more than quality of service for domestic mail.

([2]) According to REIMS II quality improvement mechanism, the receiving party can claim higher TDs from the sending parties only if it manages to meet the quality-of-service targets set out in REIMS II. Otherwise, penalties will be applied which may considerably reduce the TDs to which it is entitled.

limiting participation to PPOs) and, (ii) the liberalisation of outgoing cross-border mail.

The effect of the combination of these two elements is that, without allowing third parties access to delivery on an equivalent foot as REIMS II parties, competition on the outgoing cross-border mail markets risks to be strongly reduced if not eliminated.

Without third party access, in fact, a private postal operator providing outgoing cross-border mail services has basically two alternatives, either to turn the mail over to the sending party, paying the full international tariff in the country of origin, or, to transport the mail to the receiving country to hand it over to the receiving party and pay the full domestic tariff in the country of destination. In both cases it would be obliged to pay a much higher price than that paid for the same service by any REIMS II party competing with him thus being *de facto* unable to compete on price with them.

When competition between the parties to an agreement risks to be severely curtailed, as it is the case with REIMS II, the likelihood that the criterion at issue is fulfilled is influenced by the intensity of competition from third party operators. Without having access to TDs on REIMS II terms, however, competitive pressure from third parties would be too weak to avoid a substantial elimination of competition. This is why the decision states that, in order to maintain an acceptable level of competition in this market, competing postal operators should be granted access to REIMS II TDs at non-discriminatory conditions and conditions exemption to the respect of this requirement.

9. Requirements imposed in view of the exemption

The requirements imposed in the exemption decision are of two categories: modifications of the notified agreement, and conditions to the exemption.

9.1. Reduction of TDs

The most important amendment of the notified agreement has been the reduction of the TDs levels to be applied during the exemption period.

Further to its analysis of the cost data, the Commission made clear that the final level of 80%, to be reached in 2004 according to the re-notified agreement, was still not indispensable to achieve the benefits of the agreement and that the maximum level of TDs compatible with an exemption would have not been superior to the weighted average of the parties' costs (1). As a consequence, in January 2003, the parties amended REIMS II whereby TDs will now go up more slowly over a longer transitional period: 2002: 73.3%, 2003: 74.5%, 2004: 75.7% and 2005/2006: 78.5% (2). The Commission considered these levels of TDs to be in line with the weighted average of parties' costs.

9.2. Low cost alternatives to TDs/Level 3 access

The need to have a low cost alternative to TDs has been addressed by means of both an amendment to REIMS II and a condition to the exemption. On the one hand the important increase in the use of this particular canal of delivery (the Level 3 access) in the last three years has confirmed that the genuine availability of access to generally available domestic rates is still essential. Therefore in the new decision the same condition for the exemption already imposed in 1999 has been reproduced. On the other hand, in the course of its investigation comments were received in which some REIMS II parties as well as other operators expressed their concerns for the lack of harmonisation and transparency in the conditions for access to domestic bulk mail products. To address this concern, the Commission encouraged the parties to introduce a new harmonised product for international bulk direct mail (3).

(1) Weighted average means the average costs of delivery of all the parties multiplied by a weighting factor to take into account the volumes of mail handled by each party.

(2) It should be noted that the percentages above are only the gross values of TDs: if the quality of service targets are not met, TDs are subject to substantial reductions as a result of the penalties applied. In 2002 the penalties system prevented 10 out of the 17 Parties from charging the full TDs set forth in the Agreement.

(3) On 24 January 2003 most of the REIMS II parties signed the ‘Agreement for the Delivery of REIMS International Direct Mail’, which is aimed at introducing a low-cost, transparent and easily usable product for international direct mail.

9.3. *Third party access to REIMS II delivery conditions*

The requirement to give access to third parties to REIMS II TDs and delivery conditions has been imposed in the form of a condition to the exemption. Failure to respect this condition will therefore need to be analysed by the Commission in order to verify whether the infringement justifies withdrawing of the exemption.

Two are the elements which is worth underlying with regard to the content of this requirement, both related to the interpretation of the non-discrimination principle in the sense that no 'unjustified' discrimination is allowed. First, where there are objective differences between REIMS II parties and third parties, the formers are entitled to apply different treatment provided it is proportional. Second, apart from these (rather limited) exceptions, third parties must be treated exactly in the same way as REIMS II parties. One practical consequence is that TDs applied to third parties will also be calculated taking into consideration the relevant penalties. This is quite important since penalties can amount up to 50% of the remuneration due. Another consequence is that the non-discriminatory access does not regard only TDs but also any other type of remuneration indicated in the REIMS II agreement including Level 3 and the one for the brand new IDM product mentioned above. Such a wide-ranging requirement makes will hopefully put third parties in the conditions of competing with the parties on the market for outgoing cross-border mail more effectively than they would in the absence of the REIMS II agreement.

10. Importance of the case

In light of the above, the importance of REIMS II and the consequences of the renewal of its exemption under strict conditions are threefold.

First, the exemption contributes to create a context of legal certainty as regards the compatibility with EC Competition Law of agreements collectively fixing TDs for the delivery of cross-border mail within the European Union. The decision moreover says an important word on the recurring issue of whether REIMS II TDs are an adequate proxy for the parties' costs of delivering cross-border mail.

In this regard, the assessment made in 1999 has always been considered provisional since the Commission had not at its disposal the data on REIMS II parties' costs.

In its new investigation, on the contrary, the Commission has been provided with the necessary elements, thus being able to assess whether or not the level of remuneration agreed by the parties is in line with the parties' costs. The assessment contained in the decision at issue must therefore be considered *rebus sic stantibus* as definitive.

Second, the exemption decision is of particular importance for its effects on the neighbouring field of so called remailing activities ([1]). The assessment of whether REIMS II TDs are or not an adequate proxy for parties' costs is in fact important for interpreting the relevant case law of the ECJ on the limits which PPOs must respect when charging internal postage to mail items which are the object of remailing activities ([2]). Such clarification should hopefully contribute to strengthen competitive pressure exercised by remailers on PPOs, especially as regards non-price competition.

Last but not least, the solution found regarding third party access is important since it permits to protect and at the same time enhance competition on the outgoing cross-border mail market thus ensuring the *effect utile* of the relevant provisions of Directive 2002/39/EC.

The decision to grant to third party postal operators non-discriminatory access to the REIMS II terms of delivery, although aimed at preventing a possible elimination of the competition on the relevant market, produces effects which go beyond the mere application of the criteria set forth in Article 81(3). The requirement at issue, concretely contributes to the creation of a real level playing fields in which third party operators are as much as

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([1]) Remailing can be described as the practice of re-routing mail between countries utilising a combination of conventional transport services, express services and other postal services. Two types of remailing are mainly known, namely so-called A-B-A and A-B-C remailing. These practices are normally described in the following manner. AB-A remail: letters come from State A but are posted in State B for delivery in State A; A-B-C remail: letters come from State A but are posted in State B for delivery in State C. Centralised mail distribution.

([2]) See Judgment of the Court of 10 February 2000. Deutsche Post AG v Gesellschaft für Zahlungssysteme mbH GZS) (C-147/97) and Citicorp Kartenservice GmbH (C-148/97) § 61. According to the Court, only in absence of an *'agreement between the postal services of the Member States concerned fixing terminal dues in relation to the actual costs of processing and delivering incoming trans-border mail',* it is not contrary to Article 86 in conjunction with 82 of the EC Treaty to charge internal postage on items of mail posted in large quantities with the postal services of a Member State other than the Member State to which the PPO belongs.

possible put in the same competitive position as REIMS II parties.

11. Conclusions

The opening of outgoing cross-border mail to competition is only the first of a series of regulatory interventions that are foreseen to take place in the next years. The debate on a possible completion of the single postal market after 2009 is ongoing but some Member States have already made clear that they will not keep their monopolies beyond that date. The competitive environment in which REIMS II is going to be applied further to the expiration of the new exemption will therefore be different from now and the assessment made in the decision at issue will certainly need to be revised taking into consideration the changes intervened. In such a context, the structuring the exemption decision, it has been necessary to cope with the need of piloting the transition to the new regulatory and competitive environment already en-visaged in the relevant rules of Directive 2002/39/EC. The requirements imposed in the exemption decision, in particular the imposition of third party access, are therefore of extreme importance to achieve the mentioned result. In a competitive environment which gradually but progressively opens the postal markets to competition it is paramount to prevent any possible pre-emption by the incumbents of any little window of competition already opened. The decision at issue succeeds in achieving this result and brings competition on the relevant markets to a level substantially higher than the one prior to the new exemption.

Complaint against German insurers withdrawn after Commission preliminary investigations did not reveal sufficient threat of foreclosure through tied agents

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Introduction

On 6 October 2003, the European Federation of Insurance Intermediaries, BIPAR, withdrew its complaint against German insurers Allianz Versicherungs AG, Colonia Versicherungs AG (today AXA Versicherung AG) and the Hamburg-Mannheimer Versicherung AG (today part of the Ergo insurance group) ('the three insurers'). The complaint alleged that the exclusive ties or non-compete clauses in the agreements between the three insurers and their agents were in breach of Article 81(1) of the EC Treaty, by contributing to a cumulative foreclosure effect on the German mass (private) insurance market. The withdrawal of the complaint followed a letter by the European Commission ('the Commission') of 29 July 2003 that set out the results of its examination and the provisional conclusion that the complaint could not be upheld (1). In its legal analysis, the Commission for the first time applied the Guidelines on Vertical Restraints (2) to the insurance sector.

Summary of complainant's arguments

In the context of the Guidelines on Vertical Restraints, the complainant argued that Article 81(1) EC was applicable to the exclusivity ties and non-compete obligations of the German tied agents. Firstly, the complainant claimed that there was a cumulative foreclosure effect of these ties which significantly restricted (or was likely to restrict) entry by insurers to the German mass insurance market and secondly, it argued the agency agreements in question were in any event 'non-genuine' agency agreements.

The facts

The evidence examined by the Commission included a survey of large foreign insurers, statistics, publications and articles, including those submitted by BIPAR. It indicated that the German mass insurance market was characterised by a large number of insurance companies (about 1,800) and insurance intermediaries (about 87,000); a low concentration of insurance companies, with the three insurers holding relatively modest market shares (the highest being between 12 and 18%); a growing share of foreign insurers (around 19%); competition between insurance companies; and a growing variety of insurance products and prices as well as comparisons between different insurers and increased readiness by customers to switch insurers. Whilst the evidence also suggested that a high proportion of mass insurance products in Germany was sold through tied agents (up to about 70%), it indicated that the tied agents system was losing in importance compared to other distribution channels including brokers and banks and, more generally, multi-channel strategies. Moreover, the investigation indicated an increasing competition between different distribution channels, including electronic commerce, as well as sufficient entry possibilities for new and foreign insurers, including direct selling, brokers and multiple agents, the establishment of branches and the takeover of German undertakings.

Legal assessment

The Commission carried out its legal assessment of the facts in the framework of the Guidelines on Vertical Restraints and relevant case law. The question of whether the agency agreements in question constituted genuine or non-genuine agency agreements was left open, since for the purposes of assessing non-compete clauses, the applicability of Article 81 depended on the existence of any foreclosure, regardless of the nature of the agency agreements (3). In this context the Commission considered firstly, whether there was evidence for insufficient inter-brand competition, secondly, whether there was a cumulative foreclosure effect and thirdly, whether the non-compete

(1) Letter pursuant to Article 6 of Regulation 2842/98/EC,Commission Regulation of 22 December 1998 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty (OJ L 354, 30.12.1998, p. 18).

(2) Commission Notice — Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, p. 1.

(3) See paragraph 19 of the Guidelines on Vertical Restraints.

clauses in question consequently led to an appreciable restriction of competition.

Relevant market

The Commission examined the behaviour of the three insurers on the market for mass insurance (private life and non-life insurance) in Germany, to be distinguished from the market for industrial insurance. A further narrowing of the relevant market was not considered necessary, as BIPAR did not argue that a further segmentation of the product market according to different risks would have led to a different assessment.

Legal assessment of the facts

Based on the evidence and the particular circumstances of the German market, the Commission reached the following findings:

- The market circumstances, in particular the number of competitors, the market position of individual competitors and the resulting low degree of concentration, the increasing variety in products and prices and comparison by consumers, and the views expressed by the foreign insurers who were questioned, did not indicate insufficient inter-brand competition. Following the Guidelines on Vertical Restraints, in particular paragraphs 6 and 102, the Commission therefore assumed that due to sufficient inter-brand competition the non-compete clauses in question did not appreciably restrict competition.
- Based in particular on the results of the survey of foreign insurers, there was no evidence that the totality of exclusive ties in Germany was the *cause* of any lack of market entry by foreign insurers on the German mass insurance market or, conversely, that a relaxation of the exclusivity arrangements would lead to increased market entry.
- There was no evidence of a lack of real entry possibilities for new competitors on the German mass insurance market; instead the evidence suggested that the proportion of foreign insurers on the German market was growing.
- In these circumstances, it could not be shown that the proportion of tied agents in Germany or the length of any exclusivity or non-compete clauses created a foreclosure effect.

This assessment led the Commission to the provisional conclusion that it had not been shown that the non-compete arrangements in question created an appreciable restriction of competition under Article 81(1) EC.

The TACA judgment: lessons learnt and the way forward

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Introduction

On 30 September 2003, the Court of First Instance (CFI) delivered a long-awaited judgment in the Transatlantic Conference Agreement ('TACA') case. (1) The case concerned the organisation of containerised liner shipping services between Northern Europe and the United States. Though the CFI annulled parts of the Commission's decision, including the fines, the judgment is a success for the Commission's policy in the maritime sector. This article summarises the key elements of the judgment concerning the maritime sector specific issues (2) and comments on its implications for future competition policy actions in this sector.

The case concerned a liner shipping conference in which 16 carriers provided regular container transport for freight between ports in Northern Europe and the United States. A liner shipping conference is a grouping of shipping companies which benefit from a **block exemption** contained in Council Regulation 4056/86 (the maritime equivalent to Regulation 17). The block exemption is both generous and exceptional. It is <u>generous</u> because it permits the liner conference, among other things, to collectively fix common freight rates and regulate the capacity offered by their members — something which is normally regarded as hard core restrictions of competition for which no exemption can be given. It is <u>exceptional</u> because it is contained in a Council Regulation which was adopted even though the Commission had gained no experience in granting individual exemptions in the sector. Furthermore, it contains no market share thresholds and it is unlimited in time. The justification given in the Regulation 4056/86 for this generous and exceptional block exemption is, in essence, that price fixing by liner conferences is assumed to lead to price stability, assuring reliable scheduled transport services.

Background

In a series of decisions and administrative actions, the Commission has sought to clarify the scope of the block exemption and rebut the industry's assumption that Regulation 4056/86 authorised 'self-regulation' of the liner shipping sector, leaving it outside the scope of the general competition rules. (3) The TACA case must be seen in the context of this policy development.

The TACA was the successor of the TAA, a trans-atlantic rate fixing arrangement which had been the subject of a Commission prohibition decision in 1994. (4) The TACA was notified to the Commission on 5 July 1994 under Council Regulation 4056/86. Shortly thereafter, the Commission informed the parties that it also intended to examine the application under Regulation 1017/68 (the inland equivalent of Regulation 17) since certain of the notified activities fell outside the scope of Regulation 4056/86. By a decision of 26 November 1996, the Commission removed the TACA parties' immunity for fines for the inland activities. The appeal against that decision was dismissed by the CFI on 28 February 2002. (5)

(1) Judgment of the Court of First Instance of 30 September 2003 in joined cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line AB and others v Commission.* The judgment has not been appealed.

(2) The judgment also clarified certain important elements concerning access to file, rights of defence and the interrelation between Articles 81 and 82 EC which will not be addressed in this article.

(3) For a detailed overview of Commission actions and previous Court judgments, references are made to previous articles in the Competition Policy Newsletter, notably *Competition in the maritime sector: a new era,* Jean-François Pons and Eric FitzGerald (Competition Policy Newsletter 1/2002), *Recent judgements in the liner shipping sector*, Eric FitzGerald (Competition Policy Newsletter 2/2002) and *The Revised TACA Decision — The end of the conflict?,* Eric FitzGerald (Competition Policy Newsletter 1/2003).

(4) Commission decision of 19 October 1994 in Case No IV/34.446 — *Trans-Atlantic Agreement* (OJ L 376, 31.12.1994). Judgment of the Court of First Instance of 28.2.2002 in Case T-395/94 *Atlantic Container Line and others v Commission.* The CFI found that the TAA was not a liner conference (and could therefore not benefit from the block exemption) because it did not operate uniform or common freight rates as required under Regulation 4056/86.

(5) Judgment of the Court of First Instance of 28.2.2002 in Case T-18/97 *Atlantic Container Line and others v Commission* The CFI found that Regulation 1017/68 does not contain any provision granting immunity from fines. The appeal was consequently inadmissible, since the Commission decision did not alter the applicants' legal position.

The Commission's findings

In its decision of 16 September 1998, (1) the Commission found that the TACA parties had committed three separate infringements of Article 81 EC. Furthermore, it concluded that the TACA parties held a joint dominant position on the market and identified two separate abuses constituting infringements of Article 82 EC.

Reiterating the position already taken under the TAA and FEFC decisions, the Commission objected against the TACA parties' collective fixing of inland prices, arguing that the block exemption did not cover the extension of the rate setting activities of conferences to cover the inland leg of intermodal transport operations. (2) The Commission also found that the TACA parties had infringed Article 81 EC by agreeing on the level of reward which conference members should pay to freight forwarders, including the terms and conditions for the payment and the designation of persons eligible to act as brokers. As with the inland arrangements, the Commission concluded that these arrangements did neither fall within the block exemption, nor did they qualify for an individual exemption.

Also in dispute in the TACA case was the arrangements concerning service contracting. (3) The Commission found that the TACA had sought to prohibit the inclusion of individual service contracts. It had also regulated the inclusion of both conference and individual service contracts by *inter alia* imposing binding guidelines concerning the content of service contracts and the circumstances in which they may be concluded (such as duration, confidentiality, the level of liquidated damages for non-performance of the contract and conditional clauses). The Commission found that the TACA parties had infringed Article 81 EC by agreeing the terms and conditions under which they could enter into service contracts with shippers. (4) In reaching that conclusion, the Commission rejected the TACA parties' view that joint service contracts fell within the scope of the block exemption and concluded that the agreements did not fulfil the conditions of Article 81(3) EC. (5) The Commission furthermore took the view that, by placing restrictions on the availability and contents of service contracts, the parties had abused their joint dominant position and thereby also infringed Article 82 EC (the first abuse). (6)

The last infringement identified in the TACA decision concerned a finding that the TACA parties had taken steps to induce potential competitors wishing to enter the market to do so only as parties to the TACA. The Commission found that the TACA had thereby abused its dominant position by altering the competitive structure of the market so as to reinforce the dominant position of the TACA (the second abuse).

The Commission did not impose fines for the three infringements under Article 81 EC. It did however impose fines in an aggregate amount of EUR 273 million for the two infringements of Article 82 EC.

The CFI Judgment

In a detailed and comprehensive judgment (consisting of more than 1600 paragraphs) the Court upheld the Commission decision as regards

(1) Commission decision of 16.9.1998 in Case No IV/35.134 — Trans-Atlantic Conference Agreement (OJ L 95, 9.4.1999, p. 1).

(2) See footnote 5 and Commission decision of 21 December 1994 in Case No IV/33.218 — *Far Eastern Freight Conference* (OJ L 378, 31.12.1994). The Commission based its objections on the wording of Article 1(2) of Regulation 4056/86 which provides that the Regulation 'shall apply only to international maritime transport services from or to one or more Community ports', arguing that the block exemption contained in Article 3 could not go beyond the scope of the Regulation itself.

(3) A service contract is a contract between a shipper (customer) and carrier(s) or a conference in which the shipper undertakes to provide a minimum quantity of cargo over a fixed period of time and the carrier or the conference commits to a certain rate or rate schedule as well as a defined service level (including for example assured space, transit time or port rotation). A shipper can enter into a service contract either bilaterally with one carrier (individual service contracts (ISC)), with a conference (conference service contracts or 'agreement service contracts' (ASC)) or with several, but not all members of a conference (multi-carrier service contracts (MSC)). The two latter categories are also referred to as joint service contracts.

(4) As was confirmed by the Commission at the hearing, the decision did however not prohibit the TACA parties from entering into conference service contracts or from determining the content of such contract, as long as the agreement did not prevent the members from entering into individual service contracts, from departing from the terms of conference service contracts by way of independent action or restricted the terms which may be included in individual service contracts.

(5) The Commission considered that the agreements neither contributed to the productivity of the shipping lines concerned nor promoted technical or economic progress. Moreover, they did not allow shippers a fair share of the benefits arising from it and it had in any event not been shown not to have been indispensable (TACA decision paragraphs 472-502).

(6) The practices making up the abuse consisted in (a) the prohibition of individual service contracts in 1994 and 1995 and (after these had been authorised with effect from 1996), the application of certain terms and conditions collectively agreed by the TACA parties and the mutual disclosure of their terms, as well as (b) the application in conference service contracts of certain terms collectively agreed by the TACA parties (prohibition of contingency clauses, the duration of service contracts, the ban on multiple contracts and the amount of liquidated damages).

all three of the Article 81(1) infringements as well as the main findings on the first abuse pursuant to Article 82 EC. The Court however annulled the findings of the second abuse and the fines in their entirety.

In line with its judgements in the TAA and FEFC case, the Court noted the exceptional nature of the block exemption and emphasised that it, as a derogation of Article 81(1) EC, must be strictly interpreted. (1)

Article 81 EC

Collective fixing of inland prices and freight forwarder remuneration

While the Commission's position regarding the collective fixing of inland prices had already been entirely endorsed by the Court in the *FEFC* judgment, (2) the TACA judgment also confirmed the Commission's findings on the collective fixing of freight brokerage and freight forwarder remuneration. In doing so, the Court pointed out that the block exemption could not be extended to services which, even if they could be considered to be ancillary to or even necessary for maritime transport to and from ports, were not maritime transport services as such. (3)

Service contracts

Concerning the important issue of service contracting, the CFI confirmed the Commission's position that the block exemption for conference tariff price fixing should not be interpreted in such way that it encompassed also the different concept of contract carriage. Applied to the facts in the case at hand, the Court consequently found that the Commission was entitled to find that the ban on individual service contracts and the restrictions on the availability and contents of individual service contracts are not covered by the block exemption. Likewise, the Court held that, with one exception, none of the practices in relation to service contracts constituting the first abuse was capable of qualifying for block exemption. (4)

Article 82 EC

Collective dominance

In the *CEWAL* case, the ECJ had found that a liner conference, by its very nature and in the light of its objectives, could be described as a collective entity presenting itself as such on the market and was therefore capable of holding a dominant position within the meaning of Article 82 EC. (5) In the TACA judgment, the CFI carefully considered the evidence of internal competition put forward by the applicants and concluded that this was not sufficient to preclude a collective assessment of the TACA parties' position on the market. Likewise, the Court endorsed the Commissions' findings that the TACA parties held a dominant position on the relevant market. (6)

The abuses

In its assessment of the two abuses identified in the Commission decision, the Court stressed that abusive practices are prohibited regardless of the advantages they may allegedly bring to the concerned undertakings or third parties and that a conduct cannot cease to be abusive merely because it is the standard practice in a particular sector. (7) The Court confirmed that the TACA parties had abused their joint dominant position by restricting

(1) TACA judgment, paragraph 1381.

(2) Judgment of the Court of First Instance of 28.2.2002 in Case T-86/95 *Compagnie Générale Maritime and others v Commission*. Having regard to the FEFC judgement as well as the Revised TACA decision, the applicants declared during the TACA court proceedings that they did no longer persist with the pleas relating to the inland aspects, with the effect that it was no longer necessary for the Court to make a finding on these pleas (see TACA judgement paragraphs 481-482).

(3) Following its findings in the FEFC case, the Court noted that the service in question constituted a separate market on which the freight forwarders were competing with other economic operators, which showed that the block exemption was not applicable. The Commission took a similar position when finding that certain cargo-handling activities fell outside the scope of Regulation 4056/86 (and hence the block exemption) in its Revised TACA decision (Commission decision of 14.11.2002 in Case COMP/37.396/D2 — *Revised TACA* (OJ L 26, 31.1.2003, p. 53), paragraphs 93-96).

(4) TACA judgement paragraph 1380. The exception concerned the mutual disclosure of the availability and content of individual service contract, which is also further addressed below.

(5) Judgment of 16.3.2000 in Joined Cases C-395/96 P and 396/96 P, *Compagnie Maritime Belge Transport and Others v Commission* [2000] ECR I-1365.

(6) The Court found that the dominant position was sufficiently made out by the TACA parties' extremely high market share, as well as their ability to discriminate on prices and to the absence of effective external competition (as evidenced by their share of available capacity on the trade in question), by the foreclosure effect created by the service contracts, by the TACA's leadership in pricing matters and by the role of follower played by their competitors in pricing matters (TACA judgment paragraph 1085).

(7) TACA judgment paragraphs 112 and 1124.

the availability and content of service contracts. While upholding all Commission's findings regarding the lack of objective justifications for the ban on individual service contracts and the application of collectively agreed terms and conditions, the Court did however not uphold the findings in relation to the exchange of information on individual service contracts. The Commission had objected to the TACA parties' practice to disclose the existence as well as the content of individual service contracts to other carriers that were not party thereto. The Court found that, as a result of US legislation in force at the time of the relevant facts, (1) the information in question was in the public domain or could easily be deducted from the information which was. In these circumstances, the Court considered the disclosure between the TACA parties of that information to be an exchange of public information which, in the view of the Court, could not infringe EU competition rules.

The Court also annulled the findings of the Commission as regards the infringement concerning the alteration of the competitive structure of the market and the fines related thereto. In doing so the CFI concluded that the Commission's finding was partly based on inadmissible evidence (the parties had not been given an opportunity to comment on certain evidence relevant to a finding that they had taken specific measures to alter the competitive structure of the market) and that such evidence would in any case not be sufficient to support the claim. The Court also found that there was insufficient evidence of general measures to alter the competitive structure.

The fines

Despite upholding the findings of the first abuse, the CFI found that the abusive practices which fell within Regulation 4056/86 were covered by immunity under Article 19(4) of the Regulation since they had been a part of the notified TACA arrangement. (2) As regards the abusive practices falling under Regulation 1017/68 (for which no immunity can be given, see above) the CFI identified five factors which, according to the Court, should be viewed as mitigating factors for the purposes of applying the Fines Guidelines and should lead to annulment of the fines. The factors identified where the fact that (i) the TACA parties themselves had brought the activities to the attention of the Commission, (ii) the lawfulness of the practices were assessed for the first time in the decision, (iii) the practices raised complex legal issues and (iv) the practices did not constitute a 'classic' abuse. Finally (v), the Court took the view that the TACA parties had had every reason to believe that no fines would be imposed in respect of those activities. (3)

As a final remark, it should be noted that the Court — despite the annulment of parts of the findings and the fines — ordered the TACA parties to pay their own costs. The Court reasoned this rather unusual finding by noting that the pleas were for the most part unfounded and their number so great (almost 100) as to amount to an abuse. The Court therefore held that the conduct of the applicants had substantially added to the burden of dealing with the case and thereby needlessly added in particular to the costs of the Commission. (4)

Lessons learnt

The liner industry has changed considerably since the TACA decision was adopted in September 1998. The decision sparkled an initiative of constructive discussions between Commission officials and industry representatives resulting in an indicative set of guiding principles for future conference agreements. The industry demonstrated their willingness to abandon their traditional practices and to put the guiding principles into practice when the remaining TACA parties notified an amended version of the TACA agreement in 1999. The Commission subsequently

(1) The US legislation required the TACA parties to notify their individual service contracts to the Federal Maritime Commission, together with a summary of the essential terms of such contracts (including ports, commodities, minimum volumes, duration, service commitments and liquidated damages for non-performance). This summary was published by the FMC and therefore made available to the industry.

(2) Court thereby rejected the Commission's argument that immunity under Regulation 4056/86 only applied to Article 81 EC (TACA judgment paragraph 1442-1444.).

(3) In reaching that conclusion, the Court noted that there existed genuine uncertainty at that time as to whether there was any immunity from fines under Regulation 1017/68. Moreover, the Commission did not inform the TACA parties prior to issuing the statement of objections that it intended to treat the practices also as an abuse of a dominant position. Lastly, the Commission had conceded in earlier decisions that where the same conduct was contrary to Article 81 and 82 EC, no fines should be imposed where that conduct had been notified to the Commission with a view of obtaining individual exemption. (TACA judgment paragraphs 1623-1633).

(4) TACA judgment paragraphs 1646-1657.

cleared both the inland and maritime aspects of this amended agreement, known as the Revised TACA (see further below). (1)

Even if the judgement will not require the TACA conference carriers to change the way they are organising their services today, the judgement is another welcome endorsement of the Commission's current policy in the sector. This refers notably to the Commission's firm opposition against any restrictions on the content and availability of individual service contracts — be it contractual or in practice. The latter aspect was thoroughly analysed and addressed in the Revised TACA decision, following concerns expressed by transport users. (2) In its decision, the Commission noted that the Revised TACA does not contain any of the restrictions set out in the TACA decision. Moreover, the Revised TACA parties agreed to place limits on the exchange of information within the conference of commercially sensitive information relating to service contracting. They also undertook to provide the Commission with periodical reports on their contract activity in order to allow the Commission to assure itself that the information exchange does not lead to a decrease in the number of individual service contracts. On the working assumption that the tariff arrangements would not effectively determine the individual service contracts rates, the Commission took the position that the amended Revised TACA provisions, including the concessions, were sufficient safeguards to prevent future restrictions in the availability and content of individual service contracts.

The findings of the CFI concerning the TACA parties' information exchange practices would not appear to be a reason for the Commission to change its policy in this respect. At this place, it should suffice to note that the US legislation, being the only factor upon which the Court classified the conference disclosure as an exchange of public information, has changed. (3) Furthermore, it is obvious that the assessment of an information exchange system under EU competition rules must be made on a case-by-case basis in the light of all elements of the specific arrangement, including the structure of the market, the nature and type of information exchanged as well as the frequency and organisation of the information exchange system.

The way forward:

It is clear that the TACA judgment has effects beyond the facts of the case. Once again has the Court stated that the block exemption — *despite* its exceptional nature — cannot derogate from the Treaty competition provisions and — *because of* its exceptional nature — must be given a strict interpretation. The findings of the Court with regard to the competition policy principles guarding the sector will naturally have to be taken into account by the Commission — both in its monitoring of conference activity in the current legal framework and in its analysis of the current regime in the review of Regulation 4056/86.

Currently there are around 27 liner shipping conferences operating on shipping routes to and from Europe. With the Court's endorsement of the TACA findings, the policy established in the Revised TACA decision concerning not only inland price-fixing but also individual service contracts continues to be entirely valid. The Commission views the presence of individual service contracts as one of the main guarantees of competition and customer-friendly services under the current framework and has made it clear to the industry that it expects all conferences to apply to the Revised TACA principles. (4)

Until recently, the Commission's actions in the liner sector have been limited to applying existing Community legislation to the individual case before it, without questioning or endorsing the ground for the existing block exemption. With the launching of the review of Regulation 4056/86, the Commission's analysis has entered into a broader

(1) See footnote 14. The decision has been thoroughly explained in a previous article, *The Revised TACA Decision — The end of the conflict?*, Eric FitzGerald, Competition Policy Newsletter 1/2003.

(2) See Revised TACA decision (footnote 14), paragraphs 64-72.

(3) With the entry into force of the Ocean Shipping Reform Act (OSRA) in May 1999, carriers were no longer required to make public all essential terms of service contracts.

(4) The principles identified by the Commission are the following: (a) conferences should refrain from inland price-fixing, (b) no restrictions should be placed on the right of conference members to enter into confidential individual contracts with transport users and (c) the collective regulation of capacity by members of a conference is only permissible where it is necessary in order to adapt to a short-term fluctuation of demand, and it must not be combined with a price increase. That being said, it needs not be repeated here that the clearance of the Revised TACA conference was made possible due to the very special circumstances of the case, notably the very competitive conditions on the transatlantic liner shipping market.

and deeper concept. (1) The Commission is now also in particular analysing whether the block exemption for liner conferences has worked as it was intended to work and whether it is still justified in a modern liner shipping market. The Courts' findings in the TACA case as well as previous judgments in the sector will obviously be an important element in such a review. The Commission has taken notice of the Court's general findings concerning the *'wholly exceptional nature of the block exemption'* (2) as well as its reasoning in various specific issues which might be of relevance in the review exercise. (3) Most noteworthy, the Court has made it clear that *'[I]n Regulation 4056/86 the Council did not intend to derogate, and indeed could not have derogated, from Article 81(3) of the Treaty. On the contrary, the Council refers on several occasions, in particular in the 13th recital in the preamble to Regulation 4056/86 and in Article 7 thereof, to the need to ensure that the block exemption does not cover practices which are incompatible with Article 81(3)'.* (4) The findings of the Court in this and other issues are so clear and thoroughly reasoned that neither the industry, nor the Commission can ignore them in the review of Regulation 4056/86.

(1) For a detailed background of the review, see *A time for a Change? Maritime competition policy at the crossroads*, Mario Monti, Antwerp (2003) and *Recent developments in EU competition policy in the maritime sector,* Joos Stragier, London (2002). Both speeches are available on http://europa.eu.int/comm./competition/speeches. In March 2003, the Commission took the first step in the envisaged three-stage approach of the review by publishing a consultation paper, inviting comments from governments and the industry on a number of issues relating to, mainly, the liner conference block exemption. The written consultation phase was followed up by a public hearing, which took place in Brussels on 4 December 2003. All documents related to the public hearing can be found at http://europa.eu.int/comm./competition/antitrust/others/maritime, including a link to the Commission's consultation paper and the submissions received in response thereto.

(2) TACA judgment paragraph 1118.

(3) This concerns for example the question of comity considerations, where the Court held that '*national practices, even if common to all the Member States cannot be allowed to prevail in the application of the competition rules set out in the Treaty. A fortiori, therefore, the practices of certain non-member States cannot dictate the application of Community law'*. (TACA judgment, paragraph 569).

(4) TAA judgement, paragraph 162.

Commission adopts cartel decision imposing fines in sorbates cartel

Bjarke LIST, Directorate-General Competition, unit E-1

In a decision adopted on 1 October 2003, the European Commission found that Hoechst AG, Chisso Corporation, Daicel Chemical Industries Ltd, Nippon Synthetic Chemical Industry Co Ltd and Ueno Fine Chemicals Industry Ltd operated a cartel in the sorbates market between 1979 and 1996. The companies were fined a total of 138,4 million. Chisso escaped a fine altogether, because it was the first to provide crucial evidence that helped the Commission to prove the existence of the cartel.

Summary of the infringement

The individual fines imposed on the companies are the following: Hoechst AG 99 million, Daicel Chemical Industries Ltd 16,6 million, Ueno Fine Chemical Industries Ltd 12,3 million and Nippon Synthetic Chemical Industry Co Ltd 10,5 million.

Sorbates are one of the most widely used chemical preservatives in Europe to prevent the development of moulds, bacteria and other micro-organisms in foods, for example in mayonnaise and sausages as well as beverages. They are also used for the coating of cheese wrapping paper or in cosmetics.

In the mid nineties the five companies concerned controlled about 85% of the sorbates market in the European Economic Area (EEA). Until it transferred its sorbates business to Nutrinova in 1997, Hoechst was the largest producer of sorbic acid — the main type of sorbates — followed by Daicel. Hoechst is based in Germany and the other four companies all have their headquarters in Japan.

The investigation, which started in the autumn of 1998 when the Commission was approached by representatives of Chisso under the Commission's 1996 Leniency Notice, clearly established the existence of a cartel in breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

The participants in the infringement usually met twice a year to discuss and agree on prices and volume allocations. These meetings alternated between various locations in Europe and Japan. The Japanese producers would hold preparatory meetings in order to agree on prices and volumes to be discussed in the joint meetings.

The United States and Canada have also investigated and punished price fixing and other restraints of trade by certain producers of sorbates. The companies concerned in the different proceedings are not exactly the same. In the US Hoechst, Nippon, Daicel, Ueno and Eastman pleaded guilty to the charges and agreed to pay fines of USD 132 million. In Canada Hoechst, Eastman, Daicel and Ueno were fined CAD 7.39 million.

Calculation of fines and the application of the 1996 Leniency Notice

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

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into two groups according to their relative importance in the market concerned. Hoechst was by far the largest producer of sorbates both in the world-wide market and in the EEA market and it was therefore placed in the first group. Daicel, Chisso Nippon and Ueno were all placed in the second group.

In the case of Hoechst an upward adjustment of the fine was done to take account of its size and its overall resources. The Commission took also into account in setting the fine for Hoechst that it had been an address of previous decisions finding an infringement of the same type (Commission Decisions relating to a proceeding pursuant to Article 81 of the EC Treaty: 94/599/EC *(PVC II)* of 27 July 1994; 89/191/EEC *(PVC I)* of 21 December 1988; 86/398/EEC *(Polypropylene)* of 23 April 1986; 69/243/EEC *(Dyestuffs)* of 24 July 1969). . The fine imposed on Hoechst also reflects its position as co-leader in the cartel together with Daicel. However, the final amount for Hoechst also includes a 50% leniency reduction for co-operating in the investigation.

Chisso was the first undertaking to provide decisive evidence on the cartel and, as it fulfilled also the other conditions for full immunity pursuant to the 1996 Leniency Notice, it was granted a full immunity from fines.

As mentioned above, in the case of Daicel, the gravity of the infringement was aggravated by its role as a leader of the cartel. The fines imposed on Daicel, Nippon and Ueno also include different levels of reductions according to their level of cooperation. Nippon were given a reduction of 40% as it cooperated with the Commission at an early stage. Daicel and Ueno, which were the last companies to cooperate with the Commission, were given reductions of 25 and 30%. All reductions included 10% for not substantially contesting the facts on which the Commission based its allegations.

Commission adopts a cartel decision imposing fines on industrial copper tube producers

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In the fifth decision against had core cartels adopted in 2003, the Commission imposed fines totalling EUR 79 million on the major European copper tubes producers, including Outokumpu, KME-group and Wieland Werke, for operating a cartel in the market for industrial copper tubes.

In a decision adopted on 16 December 2003, the Commission found that the leading European copper tubes producers, KM Europa Metal AG (together with its wholly-owned subsidiaries Europa Metalli SpA and Tréfimétaux SA), Wieland Werke AG and Outokumpu Oyj (together with its wholly-owned subsidiary Outokumpu Copper Products Oy), had breached cartel rules by colluding to fix prices and allocate market shares in the EEA market for industrial copper tubes in level-wound-coils (LWCs). Following an investigation which started in 2001, the Commission established that the infringement lasted from 1988 to early 2001.

The relevant product, LWC, is used primarily in air-conditioning and refrigeration (ACR) industry, the other industrial applications being fittings, refrigeration, gas heater, filter dryer and telecommunication. Industrial copper tubes are generally not sold to wholesalers but they are used by and supplied directly to industrial customers, original equipment manufacturers or part manufacturers in lengths ranging up to several kilometers. The estimated EEA market value of LWC tubes was ca. EUR 290 million in 2000 which was the last full year of the infringement.

The main purpose of the cartel was to stop price erosion and stabilise market shares. It was organised within the framework of the Swiss-based Cuproclima Quality Association for ACR Tubes which was established in 1985 with the legitimate purpose of promoting a quality standard for these industrial tubes. The regular meetings of this association held every autumn among the competing manufactures gave the participants an opportunity to agree upon target prices, the compliance of which was monitored by exchanging in the spring meetings detailed information on sales volumes and prices charged to customers. The cartel meetings, which were conducted without documentary support, mostly took place on the second day of the Cuproclima meeting session, after the official agenda had been discussed. While the trade association as such was not subject to the Commission's proceedings, it was put into liquidation immediately after the Commission initiated its investigation.

The Commission characterised the behaviour in question as a ‘very serious’ infringement of the Community and EEA competition rules, and adopted a Decision under Article 81(1) and Article 53(1) of the EEA Agreement, imposing fines of a total amount of EUR 78,73 million. The highest fine was imposed on the companies of the KME-group, amounting to EUR 39,81 million, whereas Wieland Werke received a fine of EUR 20,79 million and Outokumpu of EUR 18,13 million.

This case was characterized by a number of reorganisations of some of the groups participating in the infringement, which resulted in a complex exercise of imputation of liabilities among different companies.

Outokumpu Oyj, the parent company of the Finnish Outokumpu-group, participated directly in the infringement from May 1988 until December 1988, whereafter its newly-formed subsidiary Outokumpu Copper Products Oy (‘OCP’) took over the industrial tubes activity and continued the infringement. Outokumpu Oyj has controlled the entire capital of OCP sine the formation of the latter. The Commission regarded Outokumpu Oyj and OCP as a single undertaking, jointly and severally liable for the infringement.

As regards the KME-group, including KM Europa Metal (‘KME’), Europa Metalli and Tréfimétaux, two different periods were distinguished for the purposes of imputation of liabilities. During the first period from 1988 to 1995, Tréfimétaux was wholly-owned by Europa Metalli and their management was closely intertwined so that they were considered to have formed a single undertaking, implying joint and several liability for the infringement. Although their ultimate holding-company SMI (Società Metallurgica Italiana SpA) acquired around 77% of Kabelmetall AG (renamed as KM Europa Metal) in 1990, the Commission found that it formed a separate undertaking from Europa Metalli and Tréfimétaux until the restructuring of the group in 1995. KME's management was separate from that of its sister companies until the said restructuring, in which

KME obtained 100% control in both Europa Metalli and Tréfimétaux. During the period from 1995 to 2001, the KME-group was treated as a single undertaking with KME, Europa Metalli and Tréfimétaux having joint and several liability for the infringement.

Calculation of fines

In fixing the amount of the fines, the Commission took into account the gravity and duration of the infringement, as well as the existence, as appropriate, of aggravating and/or mitigating circumstances. The role played by each undertaking was assessed on an individual basis. In particular, the Commission took into account the subsequent reorganisations in the KME-group.

All the undertakings concerned were found to have committed a very serious infringement. Within this category, the undertakings were divided into two groups according to their relative importance in the market concerned. Further upward adjustment was made in the case of Outokumpu, with regard to its large size and overall resources. All participants committed an infringement of long duration (exceeding five years).

In Outokumpu's case, the Commission took into consideration the fact that it had been addressee of a previous decision finding an infringement of the same type [Commission decision 90/417/ECSC *Cold-rolled Stainless steel flat products* ([1])]. On the other hand, Outokumpu was rewarded by a mitigating factor for its cooperation outside the 1996 Leniency Notice, as it was the first undertaking to disclose the whole duration of the cartel extending over more than 12 years (see below).

Application of the Leniency Notice

As the investigation into the industrial tubes cartel started in 2001, the 1996 Leniency Notice was applicable in this case. All the addressees of the decision cooperated with the Commission in its investigation. In this case, the only applicable section of the 1996 Leniency Notice was Section D, since all the addressees came forward only after the inspections which produced sufficiently evidence for the Commission to open the proceedings and fine the undertakings for an infringement of at least four years.

Outokumpu applied for leniency immediately after the Commission's inspections, disclosing the existence of the cartel from 1988 to 2001. It started cooperating with the Commission significantly earlier than the other participants and its cooperation was complete and extensive. It was therefore granted the maximum reduction of 50% for its cooperation.

Wieland Werke and KME started cooperating with the Commission at a later stage in the procedure, more than a year and a half had lapsed from the inspections, and only as response to the Commission's formal requests for information. They were therefore rewarded with smaller reductions than Outokumpu, 20% and 30%, respectively. The difference reflects KME's more extensive disclosure in terms of the duration and continuity of the infringement.

([1]) OJ L 220, 15.8.1990, p. 28.

Commission fines five companies in carbon and graphite products cartel

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On 3 December 2003, the Commission imposed fines ranging from 1 million to 43 million on five producers of electrical and mechanical carbon and graphite products for participating between 1988 and the end of 1999 in a cartel covering the entire European Economic Area. The total of fines imposed was 101 million. The cartel practised price-fixing and market sharing. It also undertook co-ordinated actions against competitors. A sixth company received immunity from fines for having been the first to denounce the cartel to the Commission. Four of the five fined companies obtained reductions of fines ranging from 40% to 20% for co-operating with the Commission after having received a request for information.

Summary of the infringement

Electrical carbon products are primarily used to transfer electricity to and in electrical motors. The most important products in this group are carbon brushes and electrical current collectors. Applications are in the automotive, consumer products, industrial and traction (public transport) markets. Examples of applications in the automotive area are starters, alternators, fuel pumps, air conditioning and powered windows in cars and trucks. Consumer product brushes are used in power tools like drills, in vacuum cleaners, electric shavers, mixers and many other domestic appliances and consumer durables. Industrial applications are for instance in assembly lines and elevators. Traction brushes are used in railway and other public transport applications, mainly in locomotives and in auxiliary electrical motors.

Mechanical carbon and graphite products can withstand high friction, are non-reactive, resistant to wear and, if they contain graphite, may also have a lubricating function. They are primarily used to seal gases and liquids in vessels and to keep low-wear parts in machines lubricated. Carbon and graphite products are also sold in blocks, which require further processing. The Commission's investigation and Decision cover this entire product group, which was found to have been the object of a single complex infringement.

Following an investigation which started in September 2001 with an immunity application by Morgan Crucible Company plc, the Commission concluded that the latter plus Carbone Lorraine S.A., Schunk GmbH and Schunk Kohlenstofftechnik GmbH (which are treated as one company for the purpose of this decision), SGL Carbon A.G., C. Conradty Nürnberg GmbH and Hoffmann & Co. Elektrokohle AG (now part of the Schunk Group) participated in a cartel in the European Economic Area between 1988 and 1999.

More than 140 reported cartel meetings took place during the infringement period. The functioning of the cartel was essentially unchanged throughout this period:

— The senior executives for carbon and graphite products in the member companies met in periodic European Summit meetings. Summit meetings were held twice per year.

— Technical Committee meetings at European level were in principle also held twice a year, in spring and autumn, preceding the Summit meetings. The main purpose of Technical Committee meetings was to agree on price levels and percentage price increases for the different products in different countries. They were also used to reach agreement on 'policy' aspects of companies' sales strategies, such as (upward) harmonisation of prices across Europe, the price levels to be applied in respect of large customers, how to handle competitors, and surcharges for different alleged purposes.

— Local meetings were held on an ad hoc basis in Italy, France, the United Kingdom, the Benelux, Germany, and Spain (covering also the Portuguese market). These meetings discussed price increases in the country concerned, as well as the accounts of single local customers.

— Regular contacts between representatives of the cartel members were necessary to ensure that the agreements made in the meetings were upheld in daily practice by all parties. Representatives also kept regular contact to co-ordinate specific bids made to large customers. Such contacts occurred on a weekly and sometimes daily basis, by phone, fax, or, occasionally, meetings.

In 1998, the last full year in which all members participated in the cartel, the cartel covered more than 90% of the EEA market for the product concerned, this market having a total estimated value in that year of 291 million, including the value of captive use.

Calculation of fines and application of the Leniency Notice

The Commission considered that the undertakings concerned had committed a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The nature of the infringement and its geographic scope were such that the infringement must qualify as very serious, irrespective of whether or not the impact of the infringement on the market could be measured.

Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures that it has sufficient deterrent effect. Carbone Lorraine and Morgan were the largest sellers of electrical and mechanical carbon and graphite products in the European Economic Area in 1998, with market shares of more than 20%. They were therefore placed in a first category. Schunk and SGL, with market shares between 10% and 20%, were placed in a second category. Finally, Hoffmann and Conradty, with market shares below 10%, were placed in a third category.

Most of the undertakings concerned participated in the infringement during the entire period from October 1988 to December 1999. The only exceptions were Hoffmann, which participated from September 1994 to October 1999, when it was acquired by Schunk, and Carbone Lorraine, which participated from October 1988 to June 1999.

The Commission considered that there were no aggravating or attenuating circumstances in this case.

The 10% worldwide turnover limit mentioned in Article 15(2) of Regulation 17 was applied to Hoffmann and Conradty to limit the fines imposed on these small companies.

As Morgan's immunity application was made to the Commission before the entry into force of the 2002 Leniency Notice, the 1996 Leniency Notice was applied. Morgan was granted immunity from fines for having been the first undertaking to report the cartel to the Commission. Carbone Lorraine was granted a 40% reduction for its co-operation in the Commission's investigation. Among the companies qualifying for a significant fine reduction, Carbone Lorraine was the first company to co-operate with the Commission and provided the most useful contribution. Like the other companies that co-operated with the Commission, it also did not substantially contest the facts on which the Commission based its allegations. Schunk was granted a 30% reduction for its co-operation in the Commission's investigation. The evidence it provided arrived later and its co-operation was more limited than that of Carbone Lorraine. Hoffmann, now part of the Schunk Group, co-operated in the same manner as Schunk. It was also granted a 30% reduction. SGL, which was the last company to co-operate, was granted a 20% reduction. Conradty did not cooperate with the Commission.

The arguments of Carbone Lorraine regarding inability to pay were rejected, as were those of SGL. The latter company was, however, granted a 33% reduction of its fine for the reason that it was *both* undergoing serious financial constraints *and* had relatively recently already been imposed two significant fines by the Commission for participation in simultaneous cartel activities. Carbone Lorraine argued that it was in the same position as SGL, but this claim was found incorrect.

Commission fines members of the organic peroxides cartel

Torsten PETERS, Directorate-General Competition, unit E-2

In a decision adopted on 10 December 2003, the European Commission has imposed fines totalling nearly 70 million on Atofina, Peroxid Chemie, Laporte (now known as Degussa UK Holdings), Perorsa and AC Treuhand AG for operating a cartel in the market for organic peroxides. Akzo received full immunity from fines for having revealed the cartel. Organic Peroxides are chemicals used in the plastic and rubber industries.

Summary of the infringement

The cartel began already in January 1971 and lasted until the end of 1999. This makes it the longest-lasting cartel ever uncovered by the Commission. It was based on agreed market shares for each participant, combined with customer allocation and co-ordinated price increases.

In 1971 the conspirators at that time — Akzo, Luperox (later absorbed by Atochem which, in the meantime has been renamed as Atofina), and Peroxid Chemie [which became part of Laporte plc. and later of Degussa AG([1])] set up a formal written agreement which spelled out in detail the definition of the products, quotas and the way, how compensation and mediation mechanisms should apply. The cartel had also a number of side arrangements on specific organic peroxides and for three regions — Spain, France and UK. Peroxidos Organicos (Perorsa) of Spain joined the cartel in 1975 and played in particular an active role in Spain.

The Commission found that the functioning of the cartel was supported since 1993 by a Zurich-based company called AC Treuhand, which did not produce organic peroxides. Its role was to organise the cartel, to mediate between the parties, and also to collect and audit statistics in order to enable smooth functioning of the cartel. AC Treuhand and the other parties to the agreement met regularly, often in Zurich. Some documents — in particular the 'pink' and 'read' papers with the agreed market shares — were also stored by AC Treuhand in Zurich and parties were only allowed to consult these documents, but not to take copies. Other documents were faxed to the private homes of some collaborators. Travel reimbursements were made by AC Treuhand directly from Switzerland to the participants attending the cartel meetings, so that no traces about the illegal meetings could have been found in their offices.

AC Treuhand was found to have violated Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement by organising meetings, mediating conflicts between the parties, proposing market shares and hiding incriminating evidence. AC Treuhand acted as an association of undertakings and/or as an undertaking.

Calculation of fines and application of the 1996 Leniency Notice

The Commission found that that the parties concerned had committed a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

The following table summarizes the fines and the duration of the infringement for each participant:

Name	Duration	Fine
Akzo	1971-1999	—
Atofina	1971-1999	43.47 m
Peroxid Chemie	1971-1992	8.83 m
Peroxid Chemie & Degussa UK (jointly and severally)	1992-1999	16.73 m
Perosa	1976-1999	0.5 m
AC Treuhand	1993-1999	1 000

The fines before the application of the Leniency Notice were calculated taking into account the gravity and the duration of the infringement, the need for deterrence (for this reason a further upward adjustment was made in the case of Akzo and Atofina taking into account their large sizes and respective resources) as well as the existence, as appropriate, of aggravating and/or mitigating circumstances.

As an aggravating circumstance the Commission took into account that this is not the first time Atofina, Degussa UK Holdings and Peroxid

([1]) In 1992, Laporte plc. became sole owner of and responsible for Peroxid Chemie. In 2001, after the cartel ended, Laporte plc. was bought by Degussa AG and renamed as Degussa UK Holdings.

Chemie have been caught in cartel agreements. Atofina was involved in four other cartels before: Peroxygen products (Decision of 23 November 1984), Polypropylene (Decision of 23 April 1986), LdPE (Decision of 21 December 1988), PVC (Decisions of 21 December 1988 and of 27 July 1994). Laporte (now Degussa UK Holdings) and Peroxid Chemie were also part of the peroxygen cartel. The fines were increased by 50% for each of these three companies.

The fine for AC Treuhand was considered apart. The Commission acknowledged that addressing a decision to an undertaking and/or an association of undertakings having a cartel organiser and facilitator role is to a certain extent novelty. Therefore, the Commission considered it appropriate to impose only a limited fine of 1 000 on AC Treuhand. But the message is clear: organisers or facilitators of cartels infringe European competition law and heavy sanctions will be imposed from now on.

Akzo was the first to approach the Commission in early 2000 with decisive information on the cartel, and, therefore, received a 100% reduction of the fine in accordance with the Commission's 1996 Leniency Notice.

Atofina also came up with useful information and received a leniency reduction of 50% of its fine. Moreover, as Atofina gave crucial information on the continued existence of the cartel in 1993 and before, it received, as special attenuating factor of cooperation outside the Leniency Notice, a substantial reduction of its fine before leniency.

Peroxid Chemie and its parent company Degussa UK Holdings (formerly Laporte plc.) applied for leniency after receiving from the Commission requests for information according to Article 11 of Regulation 17. While their leniency application contained useful information, it added only little new compared to what was already submitted by Akzo and Atofina before.

A fine of Euro 8.83 million was imposed on Peroxid Chemie for the period 1971 to 1992. This includes the application of the 10% turnover cap mentioned in Article 15(2) of Regulation 17 and a 25% reduction for leniency. A second fine of 16.73 million Euro (after 25% leniency reduction) was imposed on Peroxid Chemie and Degussa UK Holdings jointly and severally for the period 1992 to 1999. Degussa UK Holdings hence was held responsible as from 1992, when it gained full control and ownership over Peroxid Chemie.

The 10% turnover limit mentioned in Article 15(2) of Regulation 17 was also applied to Perorsa. Perorsa was the last company to submit evidence in the context of a leniency application and received a reduction of 15%.

The territorial restrictions case in the gas sector: a state of play

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1. Introduction

On 6 October 2003, the Commission services announced the closure of their investigation into the supply relationship between Russian gas producer Gazprom and Italian wholesaler ENI ([1]). Just as other cases recently settled ([2]), this case shows how the Commission's Competition Directorate General ('DG COMP') applies antitrust rules in the European gas sector. In this regard, it is impossible to overemphasise the complementary roles of the Gas Directive ([3]) which addresses, amongst other issues, state barriers to integrated energy markets, and of regulatory and antitrust enforcement which address behaviour by commercial companies having restrictive or abusive effects ([4]). This is because the regulatory and the competition approaches — implemented both at national and Community level — have the same objectives and reinforce each other. This article provides an overview of the achievements since DG COMP started its investigation into territorial restrictions in 2000. The investigated territorial restrictions prevent wholesalers from reselling the gas outside the countries where they are traditionally established, which is incompatible with European competition law and undermines the ongoing creation of a European gas market. Indeed, clauses of this sort keep national markets artificially separated and force the various importers to 'stay at home,' thereby denying them new sales opportunities liberalisation creates and disallowing consumers in other Member States the possibility to benefit from alternative suppliers.

Historically, the investigated clauses find their origin in the fact that European energy markets were divided up into horizontal — and vertical — segments, which hindered competition and integration. In the gas sector, producers did not sell gas directly to final customers (disregarding certain exceptions), while the wholesaling importers limited their sales activities to specific geographical areas ([5]), namely those in which they owned and operated pipelines. The investigations addressed here are intended to transform that traditional structure into a competitive one. The current investigations concern, at this stage, the Russian company Gazprom, Sonatrach of Algeria, NLNG of Nigeria and many of their European customers.

The territorial restriction cases should be seen in the context of a three-pronged approach of the Commission intended to achieve a structure favourable to competition in the electricity and gas markets, first by increasing supply competition, second by ensuring effective access to energy networks (which remain natural monopolies even after liberalisation), and third by guaranteeing free consumer choice by challenging consumer lock-in ([6]). The current territorial restrictions cases essentially focus on the creation of upstream gas-to-gas supply competition, but also address, where appropriate, related restrictions concerning the two other fields of action. Although they are sometimes entered into by competitors or potential competitors, the Commission has, in practice, dealt with all of these cases as vertical agreements ([7]). In this perspective, the pending territorial restric-

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([1]) IP/03/1345, 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses'.

([2]) See list provided in MEMO/03/159.

([3]) Directive 2003/55/EC of the European parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176, 15.7.2003, p. 57.

([4]) See speech of M. Monti, 'Applying EU competition law to the newly liberalised energy markets', World Forum on energy regulation, Rome, 6 October 2003 (SPEECH/03/447).

([5]) Mario Monti, 'The single energy market: the relationship between competition policy and regulation', SPEECH/02/101 on 7.3.2002.

([6]) See in this regard, amongst others, Michael Albers, 'Energy Liberalisation and EC Competition Law', Fordham 28th Annual Conference of Antitrust Law and Policy, 26.10.2001 and Alexander Schaub, 'Emerging competition in European energy markets', Institute of European Studies, Centre for Competition policy, Madrid, 26.2.2002, both available on DG COMP's website

([7]) See Commission notice 'Guidelines on Vertical Restraints' (hereinafter 'Vertical guidelines'), OJ C 291, 3.10.2000, p.1 (recital 26) and article 2 of block exemption 2790/99.

tion cases complement the cases challenging joint commercialization by gas producers ([1]), together enhancing gas-to-gas competition in the upstream parts of the gas supply chain.

2. The NLNG case

On 12 December 2002, the Commission announced that it had settled its investigation into territorial sales restrictions with Nigerian gas company NLNG ([2]). NLNG is the second largest supplier of liquefied natural gas (LNG) in Europe with approximately 5 billion cubic meters of gas shipped every year to customers in Italy, Spain, France and Portugal. The investigation showed that only one of the many European contracts entered into by NLNG contained a territorial sales restriction, from which NLNG has agreed to release its customer.

In the discussions and subsequent settlement with the Commission, NLNG also undertook not to include a number of clauses, identified by the Commission as being restrictive, in its future gas supply agreements.

Most prominent amongst those are obviously the territorial restriction clauses.

Furthermore, NLNG confirmed that none of its existing gas supply contracts contain so-called profit splitting mechanisms affecting the EU markets and that it would not introduce such mechanisms in future contracts. Profit splitting mechanisms are clauses obliging the buyer to pass over to the producer a share of the profits made when reselling the gas outside the territory agreed upon (normally a Member State) or when the gas is resold to a customer using the gas for a different purpose than that agreed upon. They hence have a similar object and/or effect as territorial sales restrictions ([3]) and are equally void in accordance with Article 81(2) of the EC Treaty.

NLNG finally undertook not to introduce use restrictions into its future gas supply contracts. Use restrictions are clauses preventing the buyer from using the gas for other purposes than those agreed upon. It is noteworthy that in the recent DUC/DONG case ([4]), a similar form of a use restriction was identified in the gas supply agreements between the DUC gas producers and Danish gas wholesaler DONG. The contracts provided that DONG had to report to the DUC partners the volumes sold to certain customer groups in order to benefit from special price formulas for these customers. From the point of view of the Commission services, these reporting obligations effectively amounted to a ‘use restriction’, as DONG is not free to sell the gas to whichever customer without losing the benefit of the specific price formula. Such use restrictions are hardcore restrictions to the extent they lead to market partitioning, which is incompatible with EC competition law and the creation of a common gas market.

In view of the above commitments, the Commission's investigation into NLNG's European gas supply contracts was closed. The commitments confirm that non-EU producers can successfully market their gas in the Union without making use of these clauses. In other words, these producers can achieve sufficient revenues from the sale of gas in the EU when respecting competition rules. Indeed, in July 2002, Norwegian companies Statoil and Norsk Hydro had already accepted this when they undertook vis-à-vis the Commission not to introduce territorial restrictions and use restrictions in their gas supply contracts with European importers ([5]).

3. The Gazprom cases

On 6 October 2003, Commissioner Monti announced that DG COMP had reached a settlement with ENI and Gazprom regarding a number of restrictive clauses in their existing gas supply contracts. This achievement is particularly significant not the least because of the huge volumes of gas involved, as ENI is one of the biggest European customers of Gazprom with approximately 20 billion cubic meters of gas bought every year. ENI is the first of the European importers concerned to have reached an agreement with Gazprom, Europe's largest external gas supplier, as regards the deletion of territorial restriction clauses in existing gas supply contracts.

When announcing the settlement of this case, Commissioner Monti pointed to a number of its particularities: ‘this settlement was made possible

([1]) See Dominik Schnichels and Fabien Valli,‘Vertical and horizontal restraints in the European gas sector — lessons from the DUC DONG case’, Competition Policy Newsletter, 2003, n° 2, p. 60, and following and IP/03/566.

([2]) IP/02/1869 of 12 December 2002, ‘Commission settles investigation into territorial sales restrictions with Nigerian gas company NLNG’.

([3]) See vertical guidelines, recital 49.

([4]) See above footnote n° 1.

([5]) See IP/02/1084.

because the Commission did not initiate formal procedures, as would have been the normal course of action, but allowed the companies concerned to find a commercial solution for the competition problem we identified. This goes to show that during the initial delicate transition phase from monopolised to liberalised energy markets, the focus should lie, in some occasions, on Commission's interventions improving effectively the market structure, rather than on formal procedures imposing fines' ([1]).

Principally, the tripartite settlement consists, first, of a chapter dealing with contractual issues (Gazprom and ENI have deleted a number of restrictive clauses in their contracts) and, secondly, of accompanying measures which ENI has offered to the Commission. The latter should, on the one hand, enhance liquidity in the relevant parts of the European gas market and, on the other, facilitate gas transport to Italy for all interested shippers. They also aim at ensuring that the improvements to the contracts have a real effect on the market.

The contractual chapter of the settlement essentially contains the following elements:

1) The parties have deleted the territorial sales restrictions imposed on ENI from all of their existing gas supply contracts. The amended contracts now provide for two delivery points for Russian gas, as opposed to one only in the past. Most prominently, ENI is free to take the gas to the destinations of its choice from these two delivery points.

2) The parties also committed to refrain from introducing the contested clauses in new gas supply agreements. Gazprom had already made this intention public in 2002. ENI committed — along the same lines as NLNG — not to accept such clauses or any provision with similar effects (e.g. use restrictions and profit splitting mechanisms) in all its future purchase agreements with any gas producer, be they for pipeline gas or gas in liquefied form (LNG).

3) The parties deleted a provision in the existing contracts that obliged Gazprom to obtain ENI's consent when selling gas to other customers in Italy (consent clause). The companies had already implemented in practice the amendment now formalised, allowing Gazprom to start selling to ENI's competitors in Italy.

The main features of the accompanying measures are the following:

1) ENI made a commitment to the Commission to offer significant gas volumes to customers located outside Italy over a period of five years. The primary beneficiaries are likely to be customers in Austria and Germany. It is noteworthy in this regard that ENI already has interests in the latter country, where it recently acquired together with Energie Baden Württemberg (EnBW), a controlling stake in regional gas wholesaler GVS, which is mainly active in Southern Germany ([2]). If ENI has not sold sufficient volumes during the first half of the commitment period, which started on 1 October 2003, it will however have to organise an auction offering certain gas volumes at Baumgarten, the border point between Austria and Slovakia, where Russian gas is delivered to a number of EC customers.

2) ENI also undertook to promote an increase of the capacity in its majority-controlled Trans Austria Gasleitung (TAG) pipeline, which runs through Austria from Baumgarten to the Italian border and is used to transport gas from Russia and elsewhere to the Italian market ([3]). The expansion has to be completed between 2008 and 2011 depending on certain developments in the Italian market.

3) ENI finally offered to promote an improved third party access regime (TPA regime) facilitating the use of the TAG as a transit pipeline. This commitment includes amongst others the introduction of one-month transport contracts, an effective congestion management system, the introduction of a secondary market and the regular publication on the Internet of the available capacity. The new TPA regime will be inspired by the Guidelines for Good Practice developed by the European Commission, European Regulators and European gas industry in the context of the so-called 'Madrid Forum' ([4]). The main beneficiaries of this commitment will be customers in Italy, who are interested in buying Russian gas for entering into competition with ENI or for their own needs.

([1]) SPEECH/03/447, mentioned above.

([2]) See decision of the Commission of 17 December 2002 ENBW/ENI/GVS (M. 2822) and press release IP/02/1905.

([3]) See also in this regard, the decision of the Italian competition authority in the Blugas case, available at www.agcm.it.

([4]) See website of DG TREN at www.europa.eu.int/comm/energy/gas/madrid/index_en.htm.

In view of these benefits for gas consumers, the Commission's investigation into territorial sales restrictions contained in the gas supply contracts between Gazprom and ENI has been closed. At the same time, DG COMP decided to close its probe into the gas supply relationship between Gazprom and Gasunie of the Netherlands after verifying that their contracts do not contain territorial sales restrictions and after Gasunie explicitly confirmed it was free to sell the gas delivered by Gazprom wherever it wishes. In this respect it is important to note that the gas is delivered to Gasunie at the German / Dutch border.

DG COMP continues, however, its investigation regarding other contracts involving Gazprom and the importers concerned, most prominently contracts with two companies in Germany and Austria.

DG COMP in this context clarified that it does not oppose long term upstream gas supply contracts which have no restrictive objects or effects ([1]). In this regard Commissioner Monti emphasised, more particularly, that the Gazprom- ENI case ‘had no impact on the producers' ability to sell their gas in the Union under long term contracts. To the contrary the settlement strengthens the legal certainty of these contracts’.

4. The Sonatrach cases

As mentioned before, the Commission is also looking into the gas supply contracts concluded by the Algerian gas company Sonatrach and its main European customers. The Algerian Energy Ministry and Sonatrach informed the Commission services in 2003 that Sonatrach will no longer introduce any provisions limiting cross border sales into its future gas supply contracts with European importers. DG COMP welcomed this constructive step because it opened up the possibility to deal also with the existing supply contracts containing restrictions by way of settlement.

Accordingly, Sonatrach undertook to discuss the modification of the existing contracts with its European customers concerned. DG COMP has called on all parties to intensify negotiations in good faith and to establish an ambitious timetable in order to reach an agreement soon. These negotiations are still ongoing.

5. Conclusion and state of play

The settlements reached in the NLNG and Gazprom-ENI cases contain important guidance as regards the application of EC competition law to upstream gas contracts. Together with the cases relating to the joint marketing by gas producers, these cases outline a number of important limitations applying to gas supply agreements.

Several chapters of the cases have not been finalised yet. Although the settlement achieved with Gazprom and ENI constitutes an important breakthrough, Gazprom still has to bring a number of contracts with other European importers in line with EU law. Sonatrach and the Commission have also managed to bring their respective positions closer to each other. Sonatrach should however, together with its Community counterparts, bring its existing contracts in line with EC antitrust law. Whatever the timing and the outcome of the still pending cases, the different settlements already achieved mark important milestones towards the enforcement of competition rules in the sector and the creation of a European gas market.

([1]) See also recital 25 of Gas Directive 2003/55/EC.

Merger Control: Main developments between 1st September 2003 and 31st December 2003

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Recent cases - Introductory remarks

Between 1 September and 31 December 2003, 70 transactions were notified to the Commission. This figure is slightly less than in the previous four-month period (75) and represents a significant decline compared to the same period in 2002 (102). The Commission adopted 74 final decisions during this period. Of these 2 decisions followed in-depth investigations (1 clearance and 1 conditional clearance) and 3 were conditional clearances taken at the end of an initial investigation (Article 6 (2) decisions). In total the Commission cleared 72 cases in Phase 1. Of these clearance decisions 40 were taken using the simplified procedure. In addition the Commission made two referral decisions pursuant to Article 9 of the Merger Regulation. The Commission also opened 2 new in-depth investigations (Art. 6(1) (c) decisions) during this period.

A – Summaries of decisions taken under Article 8 of Council Regulation (EEC) No 4064/89

1 – Cases declared compatible with the common market under Article 8(2) of the ECMR without commitments

SEB /MOULINEX

On 11 November 2003 the Commission granted an unconditional approval of the SEB/Moulinex merger in relation to Spain, Finland, Ireland, Italy and the United Kingdom.

In January 2002 the Commission had referred the case to the French authorities for the examination of the merger's impact on the French market; had authorised the operation unconditionally in relation to five Member States Finland, Ireland, Italy, Spain and the United Kingdom and had made its approval in nine other EU countries subject to the granting of licences involving the Moulinex brand.

On 3 April 2003 the Court of First Instance (CFI), hearing appeals from two rival companies, Philips and Babyliss, annulled the authorisation decision with regard to these five markets. While broadly upholding the Commission's analysis, it held that the Commission had not given sufficient reasons for finding that no problems arose on certain markets in the countries concerned.

SEB is one of the largest manufacturers of small electrical household appliances, possessing global brands (Tefal, Rowenta) as well as more local brands such as Calor and SEB in France and Belgium, Arno in Brazil and the Mercosur countries, and Samurai in the countries of the Andean Pact. Moulinex, which is also a French company, used to be a direct competitor of SEB, possessing two globally known brands, Moulinex and Krups. Under these various brands the two companies produce deep fryers, toasters, electric coffee makers, kettles, food processors, irons and a host of other small electrical household appliances.

New analysis

Following the judgment of the CFI, the Commission carried out a new, wide-ranging investigation of the markets in the five countries concerned in order to assess the operation's effect on competition. This investigation led the Commission to conclude that the operation did not give rise to concerns in relation to the creation or strengthening of a dominant position on any of the relevant markets, whether by adding the market shares generated by the operation or through its overall position in the small electrical household appliance sector taken as a whole (portfolio effect).

2 – Cases declared compatible with the common market under Article 8(2) of the ECMR with commitments

GE/ INSTRUMENTARIUM

In September the Commission approved, subject to conditions, the acquisition by GE Medical Systems of the Finnish firm Instrumentarium. The proposed acquisition was notified to the Commission on 28 February 2003.

GE is active globally in several business areas and, through GE Medical Systems, markets a wide range of medical devices including diagnostic imaging equipment (e.g. x-ray machines), electromedical systems (e.g. patient monitors) and IT solutions for hospitals. Instrumentarium is active in the areas of anaesthesia, critical care, and medical imaging technology through the brands Datex-Ohmeda, Ziehm and Spacelabs, a US-based patient monitor manufacturer that it acquired last year.

The markets concerned had undergone a significant consolidation in recent years, as the main players became bigger through the acquisition of smaller manufacturers. The notified transaction further accentuated this trend, by bringing together two of the four leading players in Europe in patient monitors. It also led to high market shares in a number of EU countries on the market for perioperative monitors, which are devices used by anaesthesiologists to monitor patients during operations. The analysis of the submissions made by customers and competitors and the econometric studies conducted by the Commission on the basis of bidding data also revealed that the transaction removed a particularly close competitor from the market, therefore significantly increasing GE/Instrumentarium's market power in perioperative patient monitors vis-à-vis its customers, i.e. hospitals.

Although the transaction did not present any overlaps with regard to anaesthesia-delivery systems and ventilators, since they were made by Instrumentarium only, the investigation raised concerns that GE could, in the future, favour its own critical care and perioperative patient monitors as well as its Clinical Information System (1) (CIS) by withholding the interface information necessary for competitors' own systems to interface with the anaesthesia delivery systems and other relevant equipment sold by the merged company.

In response to the competition concerns raised by the Commission, GE undertook to divest Spacelabs, including its worldwide patient monitoring business. In conjunction with this, GE undertook to enter into a series of supply agreements with the purchaser, including for Instrumentarium's renowned gas monitoring module, a key component in operating room monitors. This package of remedies removed the horizontal overlap between the activities of GE and Instrumentarium in the perioperative monitoring market and would ensure the emergence of an effective competitor to the merged entity.

GE/Instrumentarium also undertook to provide the necessary electrical and mechanical interface for third parties' patient monitors and CIS to be able to interconnect with its own equipment used in operating theatres and intensive care units, including anaesthesia delivery devices and ventilators.

The Commission also analysed the impact of the merger in the X-ray machine markets for mobile C-arms and mammography devices. However, the in-depth investigation did not reveal any serious competition concerns, in particular in view of the significant position of competitors and other specific features of these markets.

The Commission co-operated closely with the US Department of Justice in the review of the GE/Instrumentarium case.

B – Summaries of decisions taken under Article 6

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

ALCAN/PECHINEY

On 29 September the Commission cleared the proposed acquisition of French aluminium producer Pechiney by Alcan of Canada. The transaction was notified to the Commission on 14 August.

Canada's Alcan and Pechiney of France are aluminium companies. Their activities include bauxite mining, alumina refining and power generation as well as aluminium smelting, manufacturing and recycling. Both have research and development departments and also make fabricated products, most importantly packaging, including aerosol cans, cartridges and flexible packaging. The transaction would create the number one aluminium company in terms of global turnover, followed closely by current world leader Alcoa.

The Commission's market investigation identified concerns in the overall market for flat-rolled aluminium products (FRPs) and particularly with regard to beverage and food can stock as well as beverage can end stock (can tops). It should be noted that these markets are already concentrated and the combination of Alcan and Pechiney would

(1) Clinical Information System are IT solutions used for automating patient records and medical readings.

result in high to very high market shares. The investigation also highlighted concerns in the markets for aluminium aerosol cans and aluminium cartridges that require rigid packaging.

The Commission's concerns were increased by the finding that neither the existing degree of demand and supply side substitutability, nor increased imports from outside the European Economic Area would be sufficient to constrain the behaviour of the combined Alcan/Pechiney. Furthermore, although many industry customers were found to be of significant size it was considered that their buyer power would not be sufficient to deter the merged entity from acting independently from competitors and customers alike.

Finally, the probe also indicated serious doubts with regard to three technology markets where the transaction would combine the two leading active licensors in the aluminium metal production chain. This concerns the licensing of alumina refining technology, smelter cell technology and anode baking furnace technology.

Conditions

In order to meet the Commission's regulatory concerns, Alcan offered to:

- divest either its 50% share in AluNorf and its Göttingen and Nachterstedt rolling mills <u>or</u> Pechiney's Neuf-Brisach, Rugles foil mill and, at the purchaser's option, the Annecy rolling mill. Both divestment packages include state of the art production facilities which are equally capable of solving the competition problems identified. Alcan's Latchford casting house can also be added to either the AluNorf or Neuf-Brisach packages at the purchaser's option. In addition, Alcan will transfer research and development resources to the buyer. This package would allow a potential buyer to act as a fully competitive force in the FRP industry.
- eliminate the overlap in relation to the two companies' activities in aluminium aerosol cans and aluminium cartridges.
- continue offering licenses for the technologies referred above at terms and conditions comparable to those applied prior to the transaction, and divest Alcan's anode baking furnace technology altogether.

These conditions ensure that the markets will continue to have sufficient, strong and capable suppliers to the benefit of industry users and, ultimately, the consumer. Moreover, a potential purchaser will have to demonstrate to the Commission its capability of maintaining and developing these assets as an active force in the aluminium industry.

GE/AGFA

On 5 December the Commission cleared the proposed acquisition of Agfa's non-destructive testing (NDT) business by General Electric (GE) of the US. GE is a diversified industrial corporation active gobally in numerous fields including ultrasound NDT activities which are operated as part of its US-based Panametrics subsidiary. GE proposed to acquire Agfa's NDT equipment and NDT related X-ray film business from Agfa-Gevaert, a Belgian company that develops, produces and distributes a wide range of analogue and digital imaging systems and products.

NDT devices are portable or stationary equipment used to test all types of materials or products without deforming or damaging them in order to guarantee their safety and quality. This includes testing of tyres for cracks, oil pipelines for hidden corrosion, density of plastic coverings and even gruyere cheese.

The Commission's market investigation identified concerns that the concentration could create a dominant position in the market for portable Ultrasound Non Destructive Testing devices (for occasional tests). In order to remove these concerns, GE offered to divest its entire ultrasound NDT business which are operated as part of its subsidiary Panametrics, consisting of portable and stationary equipment as well as transducers, the consumable part of NDT devices. The undertaking also includes distribution networks, brands, intellectual property and know-how. In order to remove the Commission's concerns regarding the viability of the NDT part of Panametrics as an effective competitor in Europe, GE proposed an up-front buyer, which is Canadian company R/D Tech. The Commission considered this to be a satisfactory solution since R/D Tech is an experienced player on the European NDT markets.

The Commission also verified whether the combination of Agfa, as the most important X-ray film supplier for NDT uses, with GE as a significant X-ray film consumer for NDT purposes carried a risk of market foreclosure for other suppliers of film. But it concluded that Agfa faces credible competitors for the supply of NDT X-ray films and GE's total needs in any case appeared to account for only a marginal part of Agfa's output.

The Commission co-ordinated its review closely with the Federal Trade Commission (FTC).

Article 22 referral

The Commission initially had no automatic jurisdiction over the acquisition, as it did not meet the turnover thresholds fixed by the Merger Regulation. The operation was in fact notified in no less than seven countries: Germany, Austria, Greece, Ireland, Spain, Portugal and Italy. These Member States invoked the provisions of Art 22(3) which enables Member States to refer a case which does not have a Community dimension to the Commission.

PRISA / POLESTAR / IBERSUIZAS

In December the Commission approved a proposed Spanish joint venture, which will bring together the printing activities of Spanish media group Prisa and those of British graphic arts company Polestar. On 6 November 2003 Polestar, Prisa and Ibersuizas notified the Commission of their intention to combine the bulk of Polestar's and Prisa's activities in the publications printing market into a newly created joint venture company.

Prisa is a Spanish conglomerate with activities in the media sector (press, radio, TV, entertainment etc.) as well as in graphic arts through its subsidiary Prisaprint. Polestar is a British conglomerate whose core activity is graphic arts. Ibersuizas is a Spanish financial holding company.

In Spain, Polestar already has a strong position in the market for rotogravure printing, a process used to print high quality publications with large runs of pictures or photos. Eurohueco is the other main player in the Spanish market. The Bertelsmann group controls Eurohueco, but Prisa owns a 10-percent stake giving it a member on the board of the company.

To remove the Commission's concerns the parties undertook to divest Prisa's interest in Eurohueco and undertook not to re-acquire a participation in the company. This will restore the competitive structure prior to the creation of the joint venture.

C – Summaries of referral decisions taken under Article 9

Article 9 of the Merger Regulation is intended to fine-tune the effects of the turnover- based system of thresholds for establishing jurisdiction. This instrument allows the Commission, if certain conditions are fulfilled, to refer the transaction to the competent competition authority of the Member State in question. If for instance the transaction threatens to create a dominant position restricting competition in distinct markets within a specific Member State the Merger Regulation allows the Commission to refer cases to national authorities in such circumstances if they request a referral. This arrangement allows the best placed authority to deal with the case in line with the subsidiarity principle.

BAT / TABACCHI ITALIANI

On 23 October 2003 the Commission decided to refer to the Italian competition authorities the examination of the proposed acquisition of Italian tobacco company Ente Tabacchi Italiani by British American Tobacco.

BAT (British American Tobacco) is an international tobacco company active in the manufacturing, marketing and sales of cigarettes and other tobacco products globally. ETI (Ente Tabacchi Italiani) is a public stock company active in the manufacturing, marketing and sales of tobacco products in Italy. Its wholly-owned subsidiary, Etìnera S.p.A. (‘Etìnera’), distributes these products in Italy.

This transaction is the final step in the privatisation of ETI by the Italian Government. On 16 July 2003, BAT, along with two commercial partners, Axiter S.p.A. and FB Group S.r.l., was selected as the preferred bidder for ETI. ETI is Italy's second-largest tobacco company in Italy after Philip Morris. After the merger, BAT would be the leader for the low-price segment of the market.

The proposed acquisition was notified to the Commission on 15 September 2003. On 13 October the Italian competition authority (the Autorità Garante della Concorrenza et del Mercato (AGCM) asked the Commission to refer the case to Italy in application of Article 9 of the Merger Regulation. The Commission concluded that the request was well-founded in that it coincided with its own preliminary findings that the increased level of industry concentration and the elimination of a vigorous player from the market may create or reinforce a dominant position in the tobacco markets in Italy. In referring the case to Italy, the Commission thus recognised the inherently Italian character of the transaction and entrusted the national authorities to deal with the specificities of the case.

ECS / SIBELGA

On 19 December 2003 the Commission decided to accept the request of the Belgian Ministry of

Economic Affairs to refer the examination of the entire transaction arising from the agreements between Sibelga and Electrabel on the supply of electricity and gas to eligible customers in the Brussels region.

To comply with the Belgian Act liberalising the electricity and gas market, the joint public/private local authority energy organisations have to divest themselves of a section of their business, that of supplying gas and electricity to customers who are eligible to choose their supplier but who have not expressed a preference, an arrangement known as 'default supply'. The local authority organisations had concluded an agreement with Electrabel under which they would transfer this business to Electrabel and in return acquire a financial stake in Electrabel.

The Belgian authorities had ruled on seven similar transactions already referred to them by the Commission and on seven others which were within their jurisdiction. These transactions were authorised after Electrabel gave a number of undertakings designed to remedy the strengthening of their dominant position arising from the transactions.

The Commission's investigation found that Electrabel currently still had a dominant position in the Belgian and Brussels markets for the supply of electricity and gas to eligible customers and that this transaction threatened to strengthen that dominant position.

To ensure that decisions taken on similar transactions are consistent, and in view of the Commission's referral of the earlier cases, the Belgian competition authorities asked that this new transaction be referred to them. The Commission found that the transactions threaten to strengthen Electrabel's dominant position on the markets in the supply of gas and electricity to eligible customers, and that these markets are national or local. It therefore decided to accept the request.

GE/Instrumentarium: a practical example of the use of quantitative analyses in merger control

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On 2 September 2003, the European Commission approved, subject to conditions, the acquisition by General Electric Medical Systems ('GE') of the Finnish firm Instrumentarium. The Commission was concerned that GE and Instrumentarium would hold too high a share of the patient monitoring market, which would have been detrimental to hospitals.

The Commission's concerns were removed following GE's offer to sell off Spacelabs, a one-year-old acquisition by Instrumentarium, together with a series of supply agreements, as well as the commitment to ensure interoperability of its anaesthesia equipment, patient monitors and clinical information systems with third parties' devices.

This case illustrates how statistical and econometric evidence can complement the qualitative approach in assessing the impact of a proposed operation when the combined market share is high but the overlap limited and the markets at stake encompass differentiated products acquired through tenders.

In 2002 GE announced its intention to acquire, by way of a voluntary public tender, the Finnish medical firm Instrumentarium, a leading hospital equipment manufacturer. The deal was notified to the Commission for regulatory clearance in Europe on 28 February 2003. The transaction was also notified in the US and the Commission cooperated closely with the US Department of Justice in the review thereof.

General Electric is active globally in several business areas and, through GE Medical Systems, markets a wide range of medical devices including diagnostic imaging equipment (e.g. x-ray machines), electromedical systems (e.g. patient monitors) and IT solutions for hospitals. Instrumentarium is active in the areas of anaesthesia, critical care, and medical imaging technology through the brands Datex-Ohmeda, Ziehm and Spacelabs.

I. Presentation of the relevant markets

The markets concerned have undergone a significant consolidation in recent years, as the main players became bigger through the acquisition of smaller manufacturers. The merger further brings together two of the four leading players in Europe. The investigation confirmed that the following relevant product markets were horizontally affected by the operation:

(i) Patient monitors which are machines that take measurements of physiological parameters as a representation of a patient's well-being whilst a patient is either undergoing treatment or recovering. Three product markets were distinguished depending on the type of care area in which these products are used: perioperative, critical care or general ward monitors.

(ii) C-arms which are mobile fluoroscopic x-ray machines used in hospitals and clinics to provide continuous viewing in real-time during diagnostic, surgical and interventional procedures.

(iii) Mammography which is a specific type of X-ray imaging device exclusively used for medical examination of the female breast: the X-rays produce an image of internal breast tissue with the purpose of detecting malignant growths. The image of the breast made by X-ray can be analogically recorded on a film, using an X-ray tape, or digitally recorded and displayed through a digital receptor (plate) and using a computer. The investigation confirmed that analogue mammography and digital mammography had to be considered as distinct product markets.

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Two related product markets have also been examined: (i) anaesthesia equipment, used to deliver anaesthetic gases to patients during operations, and Clinical Information Systems (CIS), used for automating patient records, patient medical readings and other clinical information. The former market had already been considered by the Commission in case No COMP/M.2861-Siemens/ Drägerwerk/JV cleared on 30 April 2003.

GE submitted that the affected markets are increasingly EEA-wide. However, the market investigation disclosed evidence supporting the existence of national markets, e.g. various players' presence differs substantially across Member States; price lists and also actual transaction prices differ from one country to the other; since after-sales, training and maintenance are key factors in taking the final purchasing decision, national presence, either directly or through distributors, is critical.

II. The market for perioperative monitors

Perioperative patient monitors are used in the perioperative area, i.e primarily in the operating rooms as well as in the induction and recovery rooms, in order for anaesthetists to monitor the patient's vital signs.

The Commission reconstructed each supplier's share of this market in each Member State over the past years. According to the investigation, the merged entity would hold strong positions in five countries, namely France (50%-60%), Spain (80%-90%), Germany (40%-50%), the UK (80%-90%) and Sweden (80%-90%). Besides, due to the presence of only four major players (Instrumentarium, Siemens, Philips and GE), the proposed operation had the effect of reducing the number thereof from four to three. Nevertheless, the question arose whether the merger was bringing a significant change to the market. GE's position on the perioperative monitoring market is indeed not as strong as that of Instrumentarium's, and the overlap is therefore limited, ranging from 5% to 15% depending on the country.

a) Characteristics of this market

Competition in the market for perioperative monitors is driven primarily by product differentiation, whereas capacity constraints appear to play no significant role in manufacturers' decisions on price and quantity.

Because the market for perioperative monitors is not significantly different from a standard differentiated product market, the Commission took the view that, even though products are procured mostly in a bidding process, this does not invalidate market shares as a first indication for market power. Individual customer preferences are reflected in the technical specifications of the tender limiting the number of eligible bidders for a specific project to those suppliers meeting the given set of requirements. According to the Commission's market investigation, winning bids are not necessarily allocated to the lowest-price bidder, but to the supplier that best meets the individual hospital's requirements on both technical and economic grounds. Anaesthetists effectively play a key role in selecting equipment. Also, there are no significant differences in the size of the markets over the years and the number of tenders per year is fairly high, while the value of each contract won is on average relatively low.

In order to assess whether the parties' market shares overestimated or underestimated their market power, and with a view to ascertain the likely change brought about by the merger, the Commission further examined the closeness of substitution between the merging parties' products on the basis of both qualitative and quantitative criteria.

On the qualitative side, the market investigation revealed that, although GE's now discontinued alliance with Draeger had a positive influence on its sales of perioperative monitors before 2002, GE was and would still be, absent the merger, a strong competitive constraint on Instrumentarium. Indeed, GE's monitors are considered by many customers and independent surveys as close substitutes to Instrumentarium's, irrespective of the previous alliance with Draeger. GE was also able to retain a sizeable market share in 2002 despite the fact that it is in a transition period during which it has to re-establish its own distribution network in the perioperative monitoring market.

b) Quantitative approach

Given the specific features of this case (e.g. purchases through tenders and limited overlaps), the Commission sought to supplement its qualitative assessment with statistical and econometric analyses of past tenders. This exercise aimed mainly to gather additional evidence to estimate the competitive constraints that the various players, and in particular the merging parties, exercise on one another.

To this end, each major supplier of perioperative monitors (Instrumentarium, GE, Siemens and

Philips) was requested to provide electronic files containing precise information about all the tenders in which it took part in each of the fifteen member states over the past five years. For each tender, it had to specify the hospital, the date and the equipment at stake as well as the price offered (and the discount off the price list when possible), which companies were present, which one won the tender and which one was the second best (the 'runner-up').

In addition, the parties were requested to provide the invoices of all the bids they won, the related bidding documents and their price lists in order for the Commission to analyse in greater detail how the tenders unroll and to compute the discounts offered by each of the merging parties when they were missing. Hospitals were also solicited in case of missing information (e.g. identities of the competitors present in a given tender). This allowed the Commission to build up a database containing information relating to several thousands of tenders across the fifteen Member States.

Based on this database the Commission conducted two types of empirical analysis: first it computed summary statistics of the various tenders (statistical analysis), and secondly it sought to measure to what extent the presence of one of the merging parties in a given tender had an impact on the price offered by the other (econometric analysis).

Statistical analysis

The statistical analysis of the various tenders brought to the fore useful information on how the various players compete and how they perceive their positioning in the market place. For example, the Commission computed how often the merging parties actually encounter each other in the tenders. Because the players cannot take part in all tenders but have to select those whose technical specifications make them believe that they have chances to win, the frequency of encounter is a valuable indication as to how close the merging parties are to each other. As a competitive effect may occur only when the merging parties are both present, the frequency of encounters also provides information on the extent of the likely impact of the merger.

The Commission also looked at the number and the identities of the other bidders participating in the tenders where the parties were both present. Lastly, it checked to what extent the presence of one of the merging parties affects the other's chances of winning bids.

This analysis was carried out for each Member State and provided additional evidence that the merging parties were close competitors in five countries: Germany, France, Spain, the UK and Sweden.

In Germany, for example, the combined market share of the merging parties pre-merger was in the range of 40%-50% and, despite a limited overlap, Instrumentarium encountered GE in 70%-80% of the tenders while its encounters with Siemens and Philips were scarce. Besides, when the two merging parties met, they faced no other bidder in 40%-50% of the cases and only one in a further 30%-40% of the cases. Furthermore, in a vast majority of the latter tenders, the extra bidder belonged to the group of fringe players. This gave a further indication that GE, despite its lower market share, had presented a significant competitive constraint on Instrumentarium. In these cases, the effect of the proposed transaction would have been similar to a reduction of the number of competitors from two to one in a majority of the tenders.

Similarly the Commission computed Instrumentarium's likelihood of winning a bid depending on whether GE was present. It turned out that, in Spain, for example, Instrumentarium was more likely by 15 percentage points to win bids when GE was not present compared with situations where GE is present. Again this was additional evidence of the significant constraint exercised by GE on Instrumentarium.

Based on Instrumentarium's and GE's bidding data, GE also carried out a statistical analysis of the tenders in which both GE and Instrumentarium took part. The study focussed on the identities of the runners-up in the bids won by Instrumentarium. The runner-up is the second-best choice of the customer, and thus it should provide the main competitive constraint to the winner of the tender under scrutiny.

Thereby the study showed that GE was not the main rival of Instrumentarium in several countries (and/or in other product markets). It also revealed that GE was indeed by far the most frequent runner-up to Instrumentarium in some Member States, such as Germany, France or Spain. In France, for instance, while GE's market share is below 10% and Instrumentarium's in the range of 40%-50%, GE was the runner-up to Instrumentarium in more than half of the tenders, and in a much higher proportion than Philips and Siemens. This again points toward GE being more of a constraint to Instrumentarium than its limited market share may have initially suggested.

Econometric analysis

The Commission conducted an econometric analysis to determine the likely price impact of the merger. To this end, the Commission sought to estimate to what extent the prices offered by one of the merging parties depended on the presence of the other bidders and particularly the other party to the concentration.

Because of data limitation, it was not possible to directly measure that price effect. Most tenders concerned various pieces of equipment and without additional data on product characteristics it was not possible to control for the price difference that is solely the result of difference in product characteristics. As an alternative the Commission used discount off list price. Discounts are pervasive in this market, and allow comparison across bids. However, even the construction of a discount variable proved difficult due to the lack of reliable information. The Commission managed to build a meaningful data set for discounts offered by GE and Draeger in tenders they won in France.

Multivariable regression analysis helped identify the effect of Instrumentarium on GE's discount while controlling for other factors that also impact that discount, such as the value of the bid or the presence of other players. The Commission estimated a simple, yet robust econometric model. The dependent variable of this reduced form model was the discount offered for GE monitors. The Commission estimated one regression for the discount offered by GE and a separate regression for the discount offered by Draeger when selling GE monitors. In both cases, the regression results showed that the presence of Instrumentarium had an impact on the discount offered on GE monitors. The discount was 2% and 7% higher when Instrumentarium also participated in the bidding. These results were statistically significant, and provided additional evidence that Instrumentarium was exerting a significant competitive constraint on GE. Philips, a competitor to the merging parties, also submitted its own econometric study using a similar reduced form model that was based on Philips's own bidding data for several Member States. The regression results indicated that when both GE and Instrumentarium participated in a tender, Philips offered a higher discount as compared with tenders where only one of the merging parties was present. Although these results were statistically significant, they applied to tenders won or lost by Philips and thus did not fully reflect the actual price paid by the hospital. When focusing only on tenders won by Philips, however, the results were not as robust. The Commission concluded that the simultaneous presence of the merging parties had at least an impact on the competitive behaviour of Philips, if not on the actual prices charged to customers.

c) Access to File

Given the complexity and the extent of the empirical analysis, the Commission gave the parties access to the database and the computer programs used to generate its empirical results. This allowed GE to check the validity of the empirical methods used by the Commission and the robustness of the results.

Because the data were confidential it was simply not possible to forward directly the data to the parties. The Commission invited the parties to come and work on its premises. The economists working on behalf of the parties signed confidentiality agreements and were subsequently given access to the database as well as the computer programs used by the Commission. They were allowed to work in a data room, furnished with computers that did not allow them to contact the outside world. The output generated by the parties' economists was thoroughly checked so that no confidential information would leave the Commission premises.

d) Conclusion on horizontal effects

Based on the qualitative and quantitative evidence collected during the investigation, the Commission came to the conclusion that in the above mentioned Member States the merger would not only lead to the creation of a new entity holding high market shares but also would remove the significant competitive constraint that the two merging firms exerted on each other prior to the operation. Because fringe players play a minor role on the market and customers do not appear to be in a position to exercise a significant countervailing buyer power, in those five countries the merged entity would thus have had the ability to act to an appreciable extent, independently from competitors and ultimately consumers, and therefore to significantly raise prices charged to customers.

III. Other affected markets

a) Other horizontal effects

The Commission also analysed the impact of the merger in the X-ray machine markets for mobile C-arms and mammography devices, on the basis of both qualitative and the quantitativecriteria. However, the in-depth investigation did not reveal any competition concerns, in particular in view of the significant position of competitors and other specific features of these markets.

b) Vertical effects

Although the transaction does not present any overlap with regard to anaesthesia-delivery systems and ventilators, since only Instrumentarium (not GE) manufactures these types of equipment, the investigation also raised concerns that GE/Instrumentarium would give preference to its critical care and perioperative patient monitors, as well as to its Clinical Information System (CIS: IT solutions used for automating patient records and medical readings), by withholding the interface information necessary for competitors to be able to interface with the anaesthesia delivery systems and other relevant equipment sold by the merged company. This would not be in the interest of hospitals as it would reduce their choice of suppliers and lead to potentially higher prices.

IV. Proposed remedies

In response to the competition concerns raised by the Commission, GE undertook to divest Spacelabs — a firm recently acquired by Instrumentarium — including the company's worldwide patient monitoring business, in conjunction with a series of supply agreements including Instrumentarium's renowned gas module. This package of remedies removes the horizontal overlap between the activities of GE and Instrumentarium in the perioperative monitoring market and is aimed at ensuring the emergence of an effective competitor to the merged entity.

Furthermore, GE/Instrumentarium will provide the necessary electrical and mechanical interface for third parties' patient monitors and CIS to be able to interconnect with its own equipment used in operating theatres and intensive care units, including anaesthesia delivery devices and ventilators.

As a result, the Commission cleared the proposed operation subject to this set of conditions and obligations.

It is noteworthy that the Commission also recently reviewed a separate deal in the same sector concerning the setting-up of a joint venture between Siemens and Draeger for the manufacture and sale of medical ventilators, anaesthesia-delivery systems and patient monitors. This operation was cleared by the Commission on 30 April 2003 subject to similar conditions: the divestiture of Siemens's world-wide anaesthesia delivery and ventilation business, and the commitment to provide the necessary interface information in order to ensure interoperability with competitors' devices.

V. Conclusion

To the extent it was possible to perform the heavy and time-consuming task of gathering all the relevant data, this case shows that a quantitative approach, be it statistical and/or econometric, can constitute a useful complement to the more ‘traditional’ qualitative approach when assessing the likely effects of a merger on competition.

Such quantitative analyses, which may have to be very extensive when the relevant geographic markets are national, may or may not, provide conclusive information. It is also crucial to simultaneously resort to other types of analyses, to check that the empirical model specifications is consistent with the facts of a case and, above all, to consider that these quantitative studies, when relevant, may partly shed light on the competitive assessment of a proposed transaction.

'Unscrambling the eggs': dissolution orders under Article 8(4) of the Merger Regulation

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On 20 January 2004, the Council adopted a recast Merger Regulation (2) (the 'recast Merger Regulation') to replace Regulation 4064/89 (3) (the 'original Merger Regulation') following a proposal made by the Commission on 11 December 2002 (4). The reform is comprehensive making changes in almost every provision of the original Merger Regulation. Amidst other, more high-profile changes such as amendments to the substantive test or changes to the referral mechanism, the recast Merger Regulation will also introduce changes to Article 8(4) of Reg. 4064/89, a rarely used provision which empowers the Commission to order the dissolution of an implemented concentration which is found to be incompatible with the common market. Article 8(4) in the recast Merger Regulation will clarify the powers of the Commission with respect to implemented concentrations that are found to be incompatible with the common market. The provision will make clear that the Commission has the power to order the full dissolution of an implemented concentration which is found to be incompatible with the common market. It will be accompanied by a new provision in Article 8(5) of the recast Merger Regulation enabling the Commission to impose interim measures to restore or maintain conditions of effective competition in situations of unauthorised implementation.

This paper looks at the history of Article 8(4) and its application under Regulation 4064/89 and discusses the amendments made by the Council with respect to this provision in the recast Merger Regulation.

The need for a dissolution provision in a system of ex ante merger control

Article 8(4) or any similar provision empowering the competition authority concerned to order the dissolution of a merger is an essential complementary mechanism in a merger control system which is based on the principle of ex ante control.

The system put in place under the original Merger Regulation is a system of ex ante control based on two basic, intertwined principles: mandatory notification of all concentrations with Community dimension (Article 4(1) of the original Merger Regulation); and a stand-still obligation (also known as 'suspensive effect' or 'bar on closing' obligation) prohibiting the implementation of concentrations prior to an authorisation decision (Article 7(1) of the original Merger Regulation). In other words, the merging parties cannot proceed with the implementation of their concentration without a prior authorisation decision by the Commission. Those basic features will be retained in the recast Merger Regulation.

If this system were applied without exceptions and were always strictly adhered to by the undertakings concerned, there would evidently not be any need for a provision empowering the Commission to order dissolution of implemented transactions.

However, both the original Merger Regulation and the recast Merger Regulation contain certain exceptions to the overarching stand-still obligation which, where applicable, allow merging parties to

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(2) Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings, published in OJ L 24, 29.1.2004, p. 1. The recast Merger Regulation enters into force 20 days following its publication in the Official Journal. It becomes applicable to merger cases as of 1 May 2004.

(3) Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ('the Merger Regulation'). OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13.

(4) COM(2002) 711 final 2002/0296 (CNS) of 11.12.2002.

implement a concentration prior to having received an authorisation decision by the Commission. This possibility is envisaged in Articles 7(3) and 7(4) of the original Merger Regulation (Articles 7(2) and 7(3) of the recast Merger Regulation) which allow respectively the prior implementation of public bids ([1]) or the possibility for ad hoc derogations from the stand-still obligation allowing the prior implementation of a concentration, before an authorisation decision or even before it is notified to the Commission. ([2])

In addition, despite the severe consequences specified in the Merger Regulation for breach of the stand-still obligation ([3]), merging parties may have de facto implemented a concentration in breach of this obligation resulting in an anomalous situation which may require subsequent corrective measures. This may arise either because of disregard by the merging parties of the stand-still obligation or because the concentration was already implemented before the Commission acquired jurisdiction over it, for example in cases of a concentration without Community dimension which is subsequently referred to the Commission under Article 22. ([4])

Despite the establishment of an ex ante control system, with its principle of prior mandatory notifications and stand-still obligations, therefore, there may still be exceptional situations where a concentration is implemented and is subsequently found to be incompatible with the common market. In such situations, it is of the utmost importance that the legislation enables the competition authority in charge to take all the necessary corrective measures to protect conditions of effective competition by restoring the competitive situation prevailing prior to the implementation of the anti-competitive concentration.

Article 8(4) in the original Merger Regulation

In enacting the original Merger Regulation in 1989, the Council had foreseen these situations of problematic implementation and had afforded the Commission the necessary powers to take corrective measures in Article 8(4) of the original Merger Regulation. ([5])

Article 8(4) in the original Merger Regulation provides that:

'Where a concentration has been implemented, the Commission may, in a decision pursuant to paragraph 3 or by separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition'.

The provision was drafted in a flexible manner giving the Commission a very wide margin of discretion in imposing suitable corrective measures.

It is an understatement to say that the adoption of a decision under Article 8(4) is a difficult state of affairs for the companies concerned. Indeed, the provision principally aims at correcting situations of implementation of prohibited concentrations by

([1]) Article 7(2) of the recast Merger Regulation retains this exception and expands it to cover not only public bids but also that of *'a series of transactions in securities ...admitted to trading on a market such as a stock exchange, by which control ...is acquired from various sellers'.*

([2]) It is to be noted that the Commission's proposal for a provision (Article 7(4) in the Commission's proposal) empowering the Commission to issue Block Derogations by disapplying the suspensive effect laid down in Article 7(1) for categories of cases which, in general, do not lead to a combination of market positions giving rise to competition concerns, was not retained by the Council and therefore will not form part of the recast Merger Regulation.

([3]) Article 7(5) of the original Merger Regulation (Article 7(4) of the recast Merger Regulation) provides that the validity of transactions implemented in contravention of the stand-still obligation is dependent on a final authorisation decision being granted by the Commission either expressly or on the basis of an Article 10(6) presumption (clearance due to inaction by the Commission within the requisite time periods set out in Article 10 of the Merger Regulation). In addition, the Commission may impose fines for such violations pursuant to Article 14(2) of the original and the recast Merger Regulation.

([4]) This situation occurred in the cases of Kesko/Tuko and Blokker/Toys 'R' Us (which are described further below) which concerned concentrations referred to the Commission by Finland and the Netherlands respectively pursuant to Article 22.

([5]) Apart from the EC merger control system, other prior notification merger control systems such as notably that of the United States also contain provisions enabling the competition authorities concerned to 'undo' an implemented concentration which is found to be anti-competitive. Despite the introduction of a pre-merger notification requirement coupled with a stand-still obligation (during the so-called waiting period) enacted as part of the Hart-Scott-Rodino Anti-trust Improvements Act 1976 (HSR), US law (s. 11 of the Clayton Act, 15 U.S.C. s. 21) enables the US competition agencies to undo a completed transaction which is in violation of s. 7 of the Clayton Act by seeking an order requiring the acquiring company to 'cease and desist from such violations and divest itself of the stock, or other share capital or assets held … in the manner and within the time fixed by the said order'. See a recent dissolution order imposed in the case of Chicago Bridge & Iron Company (interestingly, a merger which had been legally notified and not challenged during the waiting period but later found to be anti-competitive) (http://www.ftc.gov/os/2003/06/cbiid.pdf) where the court (at page 120) reiterates established jurisprudence showing that 'the primary aim of relief in such cases is to 'restore competition to the state in which it existed prior to … the illegal merger'.

forcing the merged parties to separate, i.e. to undo their deal, usually within short deadlines. Given the severe consequences that such forced divestitures may have on the merging parties, it is not surprising that merging parties have generally adhered, whenever possible, to the stand-still obligation of Article 7(1) and, as a result, the Commission has needed to use this provision extremely rarely in the last 13 years of enforcement under the original Merger Regulation.

The Commission has adopted only four decisions pursuant to Article 8(4) in the following cases (1): Blokker/Toys 'R' Us (2), Kesko/Tuko (3), Tetra Laval/Sidel (4) and Schneider/Legrand (5).

Both Blokker and Kesko concerned implemented concentrations without a Community dimension which were referred to the Commission pursuant to Article 22 by the Netherlands and Finland respectively. In both cases, the Commission found that the concentrations were incompatible with the common market and, in both instances, it required the acquiring party to proceed to divestitures pursuant to Article 8(4). In Kesko, the Commission considered it necessary to order Kesko to divest itself of the daily consumer goods business of Tuko Oy and, in Blokker, it ordered Blokker to divest itself of at least 80% of the total share capital of the target company and to take other restorative measures as specified in the Decision (6).

The two recent cases of Tetra/Sidel and Schneider/Legrand concerned implementation of public bids which had been completed (unconditionally, in accordance with the then applicable French stock-exchange rules) pursuant to the exception of Article 7(3) of the original Merger Regulation, before the Commission had completed its review of the concentrations. In both cases, the Commission declared the concentrations incompatible with the common market pursuant to Article 8(3) and then ordered the separation of the undertakings in decisions adopted pursuant to Article 8(4).

Scope of application of Article 8(4) of the original Merger Regulation

Through its experience in using Article 8(4), the Commission had identified certain potential shortcomings with regard to this provision. In its Green Paper (7) launching the merger reform which culminated in the adoption of the recast Merger Regulation, the Commission invited comments inter alia on the functioning of and possible need for amendments to Article 8(4) of the original Merger Regulation.

Applicability of Article 8(4) to un-notified concentrations

The Commission was concerned with certain suggestions by legal commentators that Article 8(4) could only be applicable to 'notified' concentrations, i.e. that the Commission could not act in cases of implemented but un-notified concentrations. Proponents of this interpretation argued that Article 8(1) of the original Merger Regulation, by stating that all proceedings initiated pursuant to Article 6(1)(c) shall be closed by means of a decision as provided in Article 8(2) to (5), would limit the applicability of these provisions to cases where the concentration has been notified and a second phase proceeding has been initiated. Whilst the Commission, in the Green Paper, made clear that it did not share this interpretation, (8) it thought that it would be expedient to clarify the powers conferred to it by the Regulation with regard to mergers that have already been implemented.

The overwhelming majority of commentators shared the Commission's interpretation as to the applicability of Article 8(4) to un-notified concentrations. Nevertheless, a large number of respondents felt that the wording of Article 8(4) could be improved in order to clarify the scope of its applicability and the scope of the Commission's powers under this provision.

(1) Apart from these four cases where Article 8(4) was used expressly by the Commission in a decision, use of Article 8(4) in a combined 8(3)/8(4) decision was threatened in the case of Anglo American Corporation/Lohnro (Case M.754, Commission decision of 23.4.1997, OJ L 149, 20.5.1998, p. 21) in which, following remedies negotiations, a strict divestiture remedy with effectively the same terms as those in the Commission's draft Article 8(4) order was agreed and imposed as a condition in an Article 8(2) decision.

(2) Blokker/Toys 'R' Us, Case M.890, Commission decision of 26.6.1997, OJ L 316, 25.11.1998, p. 1.

(3) Kesko/Tuko, Case M.784, Commission decision of 19.2.1997, OJ L 110, 29.4.1997, p. 53.

(4) Tetra Laval/Sidel, Case M.2416, Article 8(4) Commission decision of 30.1.2002.

(5) Schneider/Legrand, Case M.2283, Article 8(4) Commission decision of 30.1.2002.

(6) See Article 2 of the Commission decision in Blokker, op. cit. footnote 11.

(7) Green Paper of 11 December 2001 on the Review of Council Regulation (EEC) No 4064/89.

(8) See Green Paper, point 224. According to the Commission, such an interpretation would run counter to the very purpose and wording of Article 8, in particular of Article 8(4), which refers to 'a concentration', without limiting the powers of the Commission to cases of "notified" concentrations (language used elsewhere in the Merger Regulation; for instance Articles 6, 8(2), 9(1), etc).

Scope of the Commission's powers under Article 8(4) — type of corrective measures

The Commission's experience in using Article 8(4), in particular in the recent Tetra/Sidel and Schneider/Legrand cases, had also revealed a number of potential shortcomings with Article 8(4) of the original Merger Regulation.

In particular, in past Article 8(4) cases, the Commission had encountered arguments that the provision did not enable the Commission, as an automatic consequence of a prohibition decision, to order the full dissolution of a prohibited, implemented concentration but that, instead, the Article required the Commission to proceed to a re-assessment of the competitive merits of the case in order to find an appropriate remedy-type solution requiring the necessary minimum amount of divestitures.

In both the Tetra/Sidel and Schneider/Legrand decisions which the Commission adopted pursuant to Article 8(4) of the original Merger Regulation, the Commission explained that the principal aim of Article 8(4) was to enable the complete separation of the merged parties in order to restore conditions of effective competition. In Tetra/Sidel, for example, the Commission stated that *'restoration of conditions of effective competition is the primary concern in proceedings pursuant to Article 8(4) of the Merger Regulation… Article 8(4) envisages that, in situations where concentrations prohibited by the Commission have already been implemented, the restoration of effective competition must, in principle, be effected by means of a separation of the undertakings or assets brought together through the prohibited transaction.'* (1) In both cases, the undertakings concerned disputed the Commission's competence to order a complete separation of the two undertakings by requiring them to divest all the shares or assets acquired. (2)

Both the Tetra/Sidel and Schneider/Legrand decisions under Article 8(3) (prohibition decisions) and 8(4) (divestiture decisions) were the subject of actions for annulment before the Court of First Instance which resulted in the annulment of both the Commission's prohibition decisions and divestiture decisions. (3) The annulment of the prohibition decisions is outside the scope of this paper; however, the CFI's findings in its judgments annulling the Commission's divestiture decisions are of interest for the interpretation of Article 8(4) of the original Merger Regulation.

The CFI annulled the divestiture decisions without the need for it to address in detail the pleas put forward by the applicants and the Commission on the interpretation of Article 8(4). The CFI disposed of the cases by relying on a simple legal premise: that the prior annulment by the CFI of the prohibition decisions necessarily deprived the divestiture decisions of any legal basis and resulted inevitably in their automatic annulment (4). However, certain *obiter dicta* in the CFI's judgment in Tetra Laval v. Commission suggest that the CFI agreed, in principle, with the Commission's interpretation of Article 8(4) of the original Merger Regulation that, once an implemented concentration is declared incompatible with the common market, the full separation of the merged

(1) See case Tetra/Sidel, M.2416, Article 8(4) Commission Decision of 30.1.2002, point 11, emphasis added. See also case Schneider/ Legrand, M. 2283, Article 8(4) Commission Decision of 30.1.2002, points 10 and 11, where the Commission states that '*il convient que l'opération en tant que telle soit dénouée au moyen d'une séparation complète de Schneider et Legrand'*.

(2) See Schneider/Legrand (M. 2283, Article 8(4) Commission Decision of 30.1.2002), point 25, where it is stated that Schneider thought that an imposition of divestiture going far beyond the level of control would be disproportionate. Likewise, in Tetra/Sidel (M.2416, Article 8(4) Commission Decision of 30.1.2002, point 31 et seq., where it is stated that Tetra argued that an order for a complete divestiture would be disproportionate. Similar arguments were advanced by Kesko in the Kesko/Tuko case (M.784, Commission decision of 19.2.1997, OJ L 110, 29.4.1997, p. 53). In its decision. the Commission specifically stated that it had taken the 'flexibility' arguments put forward by Kesko into account and that it had ordered only what was strictly necessary to restore conditions of effective competition on the Finnish markets for retail and cash-and-carry sales of daily consumer goods (see point 14 of the decision).

(3) See judgments in cases T-310/01 Schneider Electric SA v Commission (annulment of Article 8(3) decision); T-77/02 Schneider Electric SA v Commission (annulment of Article 8(4) decision); T-05/02 Tetra Laval BV v Commission (annulement of Article 8(3) decision); T-80/02 Tetra Laval BV v Commission (annulment of Article 8(4) decision).

(4) See Schneider v Commission, case T-77/02, points 43-45, and Tetra Laval v Commission, T-80/02, para 42.

parties is the logical consequence [1]. The revisions made in the recast Merger Regulation aim at emphasising this underlying principle [2].

The amended Article 8(4) and new Article 8(5) in the recast Merger Regulation

The recast Merger Regulation will include a revised Article 8(4) and will introduce a new Article 8(5) in order to deal comprehensively with issues of problematic implementation of concentrations where dissolution of a concentration or temporary hold-separate orders may be required.

Article 8(4) in the recast Merger Regulation — Dissolution orders

Article 8(4) of the recast Merger Regulation will provide as follows:

4. *Where the Commission finds that a concentration*
   - *(a) has already been implemented and that concentration has been declared incompatible with the common market, or*
   - *(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty,*

the Commission may:

- *require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible;*
- *order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.*

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.

The revision of Article 8(4) in the recast Merger Regulation addresses the concerns identified with the scope of application and scope of the Commission's powers under Article 8(4) of the original Merger Regulation.

Applicability of the revised Article 8(4)

Regarding the applicability of Article 8(4) to un-notified concentrations, the deletion of paragraph (1) of the original Article 8 (which has been added to the end of Article 6(1)(c) of the recast Merger Regulation), removes any possible doubts as to the scope of application of Article 8(4). By disassociating Article 8(4) from Article 6(1)(c), and by continuing to refer to "concentrations" and not to '*notified* concentrations' in both Articles 8(3) and 8(4), it will be clear that the Commission can prohibit and order the dissolution of any concentration that is found to be incompatible with the common market and not only notified concentrations.

Article 8(4) will apply to two categories of concentrations: (a) implemented concentrations (notified and un-notified) which the Commission scrutinises and declares incompatible with the common market; and (b) concentrations which are implemented in contravention of a condition attached to an Article 8(2) clearance decision in which the Commission found that the merger, in the absence of the condition, *'would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article 81(3) of the Treaty',* i.e. that the merger would be incompatible with the common market. These two categories, therefore, concern situations where the Commission has found that the concentration, as notified (for category (a)) or in the absence of the condition (in category (b)) would be

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(1) In its judgment, (in case T-80/02, *Tetra Laval v. Commission), th*e CFI held (at para. 36) *'first of all, that the scheme of the Regulation, and particularly the 16th recital, show that the objective of Article 8(4) is to allow the Commission to adopt all the decisions necessary for the restoration of conditions of effective competition. When, as in the present case, the concentration has been implemented pursuant to Article 7(3) of the Regulation, the separation of the undertakings involved in the concentration is the logical consequence of the decision declaring the concentration incompatible with the common market.'*

(2) See point 92 of the Explanatory Memorandum accompanying the Commission's proposal for a recast Merger Regulation, adopted on 11 December 2002, op. cit. footnote 4 above.

incompatible with the common market. In both those situations, the Commission could proceed immediately with an Article 8(4) procedure and could adopt a decision ordering the full dissolution of the implemented concentration.

The above-mentioned categories are the only situations covered by Article 8(4); The Commission will, therefore, not be able, without further examination, to use its Article 8(4) powers to order automatically the dissolution of a concentration where the implementation has been carried out in contravention of a condition attached to a decision, in which the Commission only expressed 'serious doubts' as to the compatibility of the concentration with the common market [i.e. either an Article 6(1)(b) decision or an Article 8(2) decision taken, in accordance with Article 10(2), on the basis of 'serious doubts' ([1])]. In such cases, instead of proceeding automatically with an Article 8(4) dissolution order, the Commission would have the power to adopt interim measures pursuant to Article 8(5) of the recast Merger Regulation (see below) and to examine the case further without being bound by time limits (pursuant to Article 8(7) of the recast Merger Regulation) with a view of adopting a final Article 8 decision. Only if the Commission found, following an in-depth examination, that the concentration would indeed be incompatible with the common market, could the Commission proceed with a final Article 8(4) dissolution order. Article 8(4) will thus be reserved solely for concentrations that are found to fulfil the incompatibility criteria of Article 2 and whose continued implementation would, therefore, result to significant competitive harm.

Scope of Commission's powers under the revised Article 8(4)

As regards the powers conferred to the Commission with respect to the measures it can order under Article 8(4), the wording has been amended to emphasise the overriding principle underlying this provision, that the situation prevailing prior to the implementation of the concentration *('status quo ante')* ought to be restored ([2]).

Thus, the Commission will be able to order the parties to dissolve the concentration in its entirety, in particular through the dissolution of the merger or the disposal of *all* the shares or assets acquired. Where such restoration is not fully possible through dissolution of the concentration, Article 8(4) provides the necessary powers for the Commission to restore the *'status quo ante'* as far as possible. Finally, the Commission can order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision, for example by imposing modalities for the divestiture such as the appointment of an independent trustee.

It should be noted that procedurally, the Commission will be able to impose such measures either in a single Article 8(3)/8(4) decision or in a separate Article 8(4) decision. All the procedural guarantees set out in Articles 18, 19(3) and 20(1) of the recast Merger Regulation are fully applicable in an Article 8(4) procedure, i.e. the Commission must communicate its objections to the parties, allow them the opportunity to make their views known (in a written reply and/or oral hearing), consult the Advisory Committee and publish its decision in the Official Journal.

Article 8(5) of the recast Merger Regulation - Imposition of interim measures

Article 8(5) of the recast Merger Regulation will complement the revised Article 8(4) by enabling the Commission to take interim measures. Article 8(5) of the recast Merger Regulation will provide as follows:

5. *The Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration*

   (a) has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the common market has not yet been taken;

([1]) This category of decision (Phase II conditional clearance decision pursuant to Article 8(2) but based on a 'serious doubts' finding) is now specifically referred to in Article 8(7)(a)(ii) of the recast Merger Regulation. Such a situation may arise where the parties offer commitments, early in Phase II, in order to remove the Commission's serious doubts as to the compatibility of the transaction with the common market. According to Article 10(2), in such cases, if the Commission finds that the serious doubts are removed, it ought to clear the concentration without delay. For an Article 8(2) decision based on a finding of serious doubts see, for example, case M.2861, Siemens/Draegerwerk, Commission decision of 30.4.2003.

([2]) This was the objective underlying the Commission's proposal for the revisions in Article 8(4). See point 92 of the Explanatory Memorandum accompanying the Commission's proposal for a recast Merger Regulation, adopted on 11 December 2002, op. cit. footnote 4 above.

(b) *has been implemented in contravention of a condition attached to a decision under Article 6(1)(b) or paragraph 2 of this Article;*

(c) *has already been implemented and is declared incompatible with the common market.*

This provision applies to all situations of 'unauthorised' implementation including, implementation without having notified the concentration or without having obtained an authorisation decision or situations where the parties implement their concentration in breach of conditions attached to conditional clearance decisions pursuant to Article 6(1)(b) or 8(2).

The provision is flexible in order to allow the Commission to take any type of interim measure which is appropriate to ensure that conditions of effective competition are not jeopardised in the interim period pending a final decision as to the compatibility of the concentration with the common market and a possible final dissolution order under Article 8(4). Thus, the Commission will be able to impose hold-separate obligations preventing the undertakings from scrambling the eggs in an irreversible manner and monitoring the situation by the appointment of an independent trustee.

The procedure for adopting such decisions derogates from the standard procedure. Article 18(2) and 19(3) of the recast Merger Regulation will permit the Commission to act swiftly and take provisional interim measure decisions without hearing the parties or consulting the Advisory Committee ([1]). However, a hearing and consultation of the Advisory Committee must take place prior to the provisional interim measures decision becoming a final interim measures decision.

Conclusion

Despite the ex ante control system enshrined in the original and recast Merger Regulation which is designed to avoid situations of implementation of concentrations prior to authorisation, provisions enabling the Commission to order dissolution of concentrations that are found to be incompatible with the common market constitute essential complementary powers in the Commission's armoury.

In the recitals of the recast Merger Regulation, the legislator explains that it has entrusted the Commission with the duty of ensuring that the process of reorganisation does not result in lasting damage to competition and has, therefore, afforded the Commission the power of taking all the decisions necessary to establish whether or not concentrations with a Community dimension are compatible with the common market, as well as decisions designed to restore the situation prevailing prior to the implementation of a concentration which has been declared incompatible with the common market.

If past use is any guidance for the future, it should not be expected that the Commission will need to use the powers afforded to it in the amended Article 8(4) and new Article 8(5) of the recast Merger Regulation except in exceptional situations. The fact that these provisions are there, however, ensures that, in those rare situations where an anti-competitive concentration is already implemented, the Commission will have all the necessary powers to protect competition by being able to intervene effectively and to order the restoration of the status quo ante.

([1]) The same procedure is also established in Article 18(2) of the original and recast Merger Regulation with respect to Article 7(4) derogation decisions.

State aid and broadcasting: state of play

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As part of the reorganisation of DG Competition in 2003, a special focus was placed on the services sectors in the State aid area. This reflects the relative growth of the services industry and the increased codification of State aid in the manufacturing industry, which allowed shifting some focus and resources from the industry area to the services area. In practice, DG Competition has set up two separate units in charge of the services area.

Recently liberalised service sectors, such as the telecommunications, postal, and broadcasting industries, often raise specific State aid issues because their operations may have a dimension of public service obligation, imposed on one company or on parts of the sector and often compensated through State funding.

As regards the broadcasting area, DG Competition has made a significant leap forward in its assessment of the financing of public service broadcasters in Europe over the last year. This results from a policy consisting in systematically tackling the cases which have been brought to its attention in this area.

I. The ad-hoc funding measures

A first batch of three cases has been closed in 2003. These cases relate to ad-hoc State funding measures granted to the public service broadcasters during the 90's. These ad-hoc funding comprised a series of different measures, *e.g.,* capital injections, debt re-scheduling, operating aids, tax exemptions and subordinate loans. These measures are distinct from the recurrent funding mechanism that the Member States concerned have established long ago, generally under the form of a licence fee charged to the owners of radio and television sets or annual compensation directly from the State budget. The recurrent funding mechanisms were established before the entry into force of the EC Treaty in the Member States concerned. They are to be considered as existing aids and must be dealt with according to the existing State aid procedure set forth by the procedural regulation ([1]) (*see* Section II below).

The three cases closed in 2003 relate to the Portuguese (RTP), Italian (RAI), and French (France 2 and France 3) public broadcasters. All of these cases started with complaints filed by private competitors of the public broadcasters. In all of these cases, the Commission opened the procedure and closed it with decisions finding that the measures concerned constituted State aids but were compatible with the common market ([2]).

The Commission examined these cases in light of the recent judgment of the Court of Justice in the Altmark case ([3]) and also applied the principles set forth in its Broadcasting Communication ([4]).

Article 87(1) EC and the Altmark test. Without entering into the details of each case, the Commission's assessment in these cases followed identical patterns. The Commission found that the conditions provided by Article 87(1) were met and, therefore, that the measures at stake constituted State aid. As regards more specifically the condition that the State measure must confer an advantage on the beneficiary to be found State aid, the Commission applied the Altmark test. Of particular interest is the fact that all three cases failed to meet the second criterion listed in the Altmark judgment *i.e., the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner* ([5]). This shows how difficult it is, in the broadcasting area, for ad-hoc State financing measures to pass the Altmark test and thus escape the qualification as State aid.

The derogation of Article 86(2) EC. Once the aid was characterised, the Commission went on to assess whether the funding measures could qualify for the derogation set forth by Article 86(2) EC.

([1]) Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

([2]) *Financiamento de RTP pelo Estado*, decision n° C(2003) 3526 of October 15, 2003; *Misure in favore della RAI*, decision n° C (2003) 3528 of October 15, 2003; *Aides en faveur de France 2 et France 3*, decision n° C (2203) 4497 of December 10, 2003. None of these decisions have been published yet.

([3]) *Judgment of 24 July 2003, Case C-280/00, Altmark Trans*, not published yet.

([4]) Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320, 15.11.2001, p. 5.

([5]) Para. 95.

According to settled case law (1), three conditions have to be met to fall under this exception, namely (i) public service obligations must be clearly defined, (ii) the Member State must have explicitly entrusted the beneficiary with the public service tasks, and (iii) applying competition rules must obstruct the performance of these public service tasks. In addition, the Broadcasting Communication explains how the Commission contemplates to apply these principles. In particular, the Commission examined whether the funding measures concerned had overcompensated the costs generated by the public service tasks and no unnecessary market distortions occurred. The three most salient aspects of the application of Article 86(2) to the Portuguese, Italian, and French cases are briefly discussed below.

Public service remit in the broadcasting area. As to the scope of the public service, the broadcasting area presents some specificities compared to any other business areas. Indeed, the so-called Amsterdam Protocol on Public Service Broadcasting annexed to the EU Treaty allows the Member States substantial latitude in defining the scope of public service broadcasting. The Commission's task in this respect is limited to the manifest error of appreciation test. In these cases, this test did not raise any particular issues.

Absence of over-compensation. In all three cases, identification of the public service costs did not raise any serious issues. Indeed, in line with the Broadcasting Communication, all three broadcasters hold separate accounts for commercial and public service activities, which allowed the Commission to identify the eligible public service costs. As is common practice in the broadcasting area, the Commission deducted from these costs the net profit directly and indirectly derived from the public service mission (essentially the net profit on advertising). It goes without saying that the monies granted to the public broadcasters through the annual licence fee were discounted from the public costs for purposes of the over-compensation assessment. In none of the above-mentioned cases did the Commission find that there was over-compensation of public service costs.

No Side-effects in competitive markets. In the Italian and French cases, the Commission assessed whether the public broadcasters had used the State ad-hoc funding to undercut their competitors' prices in the commercial markets where they operate, *i.e.,* essentially the advertising market (2). The Commission compared the selling prices for advertising space of all television stations weighted against audience share and composition. In this respect, the Italian case did not raise serious difficulties. In the French case however, in line with the Commission's policy requirement towards more economics in all areas of competition law, this particular point was dealt with in cooperation with the Chief Economist team. This is because the market shares of the two public service channels were not in the same range as those of the private channels and, consequently, their advertising prices could not simply be compared with those of their private competitors. Indeed, the Commission had to take into account the 'power of screen' effect, according to which the bigger the audience of television stations, the more money per viewer's hit buyers of advertising space agree to spend on advertising time. Finally, the Commission's conclusion was that, despite differences in the broadcasters' advertising prices, the French public broadcasters had not undercut their competitors' prices. In summary, in none of the three cases did the Commission find any anticompetitive practices by the public broadcasters in the advertising market.

II. The recurrent funding mechanisms

The public broadcasters of Portugal, Spain, Italy, and France rely heavily on recurrent public funding. As mentioned above, these funding mechanisms were outside the scope of the Portuguese, Italian, and French decisions because they were found to be existing aid within the meaning of the procedural regulation. Accordingly, they have been dealt with under the existing aid regime established by Article 88(1) EC and the procedural regulation. This regime comprises an initial phase of bilateral cooperation between DG Competition and the Member States. If the issues are not solved during that phase, the Commission proposes appropriate measures to the Member States. If the Member States and the Commission do not reach a satisfactory agreement on these measures, the Commission then opens a procedure on the basis of Article 88(2) EC which will result in a formal Commission decision.

DG Competition's services in charge of state aids have already sent letters to the four Member States explaining what principles, in the view of DG Competition's services, should be implemented in the Member States' legislations to safeguard future compliance with State aid rules. In the four cases,

(1) Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229.

(2) Such conduct was not raised in the Portuguese case.

the main features of these safeguards cover, in very broad terms, (i) the introduction of mechanisms to avoid over-compensation of public service costs, (ii) market prices for the commercial activities of public service broadcasters, and (iii) the arm's length relationship between the public service broadcaster and their commercial subsidiaries. In addition, DG Competition's services invited the Spanish authorities to implement the separation of accounts requirement, in accordance with the Transparency Directive.

* * *

With this set of decisions on ad-hoc financing measures, the practical application of the State aid rules to public service broadcasters has been clarified to a great extent. In addition, the existing aid proceedings on the recurrent funding mechanisms pave the way towards increased legal certainty for both public and private broadcasters as to the legality of State financing in the broadcasting area.

«E la nave va»: développements récents de la politique des aides d'Etat à la construction navale

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1. Introduction

Au cours de la dernière année, l'activité des services de la DG Concurrence en matière d'aides d'Etat dans le secteur de la construction navale a été particulièrement intense. A côté d'une pratique décisionnelle toujours soutenue ([1]), le cadre réglementaire de la politique communautaire dans ce secteur a connu des développements de première importance, dans ses volets tant internes qu'externes.

2. Le volet interne: un nouveau cadre réglementaire pour les aides d'Etat à la construction navale

Depuis le début des années 1970, les aides d'Etat à la construction navale étaient soumises à un régime spécifique, établi par le Conseil et prévoyant une combinaison de règles à la fois plus strictes et plus souples par rapport à celles régissant la plupart des autres secteurs industriels. Notamment, en dérogation au droit commun des aides d'Etat, ce régime prévoyait la possibilité d'octroyer des aides au fonctionnement liées au contrat particulièrement élevées. Depuis 1998, le secteur était régi par le Règlement CE 1540/98 du Conseil concernant les aides à la con«struction navale («Règlement construction navale de 1998»). Ce règlement expirait le 31 décembre 2003. Son remplacement constituait donc le principal rendez-vous de la politique de concurrence dans ce secteur pour l'année 2003. Il a abouti à l'adoption par la Commission le 26 novembre 2003 d'un Encadrement des aides d'Etat à la construction navale ([2]) («l'encadrement»).

Le nouvel encadrement poursuit un double objectif.

D'une part, il se propose de *simplifier* et *normaliser* les règles relatives aux aides à la construction navale. Il s'agit d'un objectif qui s'inscrit dans le cadre de la politique globale de la Communauté en matière d'aides d'Etat, politique qui vise une plus grande transparence et simplification des règles applicables. Il s'agit également de l'aboutissement d'un processus initié par le Règlement construction navale de 1998 qui avait mis fin à un certain «particularisme» de la politique des aides dans ce secteur, en prévoyant la suppression progressive des aides au fonctionnement. L'abolition de cette forme d'aide particulièrement distorsive pour la concurrence est désormais un acquis ([3]), comme le confirme le nouvel encadrement. Lorsqu'on se rappelle que dans les années 1980 le taux maximal d'aides au fonctionnement se situait autour de 30% de la valeur contractuelle, on se rend compte du chemin parcouru.

Cette démarche de simplification et de normalisation se retrouve aussi bien dans la forme que dans les règles de fond de l'encadrement. Pour ce qui concerne la forme juridique, le choix d'un encadrement de la Commission, fondé sur l'article 87. 3 point c) du Traité CE, est conforme au recours aujourd'hui généralisé en matière d'aides d'Etats aux instruments de *soft law* de la Commission tels que les encadrements et les lignes directrices. Quant aux règles de fond, cette démarche se traduit par l'extension au secteur de la construction navale, dans la plus grande mesure du possible, des dispositions d'application horizontale. Ainsi s'appliquent désormais à ce secteur des textes dont il ne pouvait bénéficier auparavant, tels que les règlements d'exemption par catégorie en faveur des aides à la formation, à l'emploi et aux PME ainsi que le règlement sur les aides dites «de minimis». On rappellera que ces textes exemptent les catégories d'aides concernées de l'obligation de

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([1]) Voir par ex. IP/03/604 «Examen formel d'un régime de garanties italien dans le domaine de la construction navale» et IP/03/754 «La Commission adopte deux décisions concernant des aides d'État à certains chantiers public en Espagne».

([2]) JO C 317, 30.12.2003, p. 11.

([3]) Sauf pour ce qui concerne les aides disponibles de manière exceptionnelle, limitée et temporaire au titre du Mécanisme de Défense Temporaire mis en place pour contrer les pratiques commerciales déloyales auxquelles se livre la République de Corée dans le secteur de la constrcution navale. Voir ci-dessous.

notification préalable du projet d'aide à la Commission. Il convient enfin de mentionner un allégement des obligations de notification par rapport au Règlement construction navale de 1998 ([1]).

D'autre part, le nouveau texte prend en compte un certains nombres de caractéristiques propres à l'industrie de la construction navale, justifiant dès lors le maintien de plusieurs *mesures spécifiques* à ce secteur. Cette spécificité se retrouve dans quatre catégories d'aides: (1) l'aide à l'innovation; (2) l'aide à la fermeture; (3) les crédits à l'exportation et l'aide au développement ([2]) ainsi que (4) les aides régionales.

En matière de recherche, développement et innovation, le secteur présente sans aucun doute des particularités. Il se caractérise notamment par des séries de production très limitées ainsi que par l'ampleur, la complexité et la valeur des unités produites. En tenant compte de ces caractéristiques, le Règlement construction navale de 1998 avait introduit une disposition spécifique sur l'aide à l'innovation ([3]), faisant de ce secteur le seul à pouvoir bénéficier de cette forme de soutien. L'application de cette disposition ne s'est toutefois pas révélée entièrement satisfaisante ([4]). La disposition sur l'aide à l'innovation ([5]) a dès lors été reformulée et constitue, peut-être, l'apport le plus intéressant de l'encadrement.

Le nouveau texte s'efforce d'améliorer et de renforcer cette disposition, tout en maintenant bien entendu l'exigence d'un effet d'incitation à la prise de risque technologique. D'une part, l'encadrement contient une définition de la notion d'«innovation» davantage adaptée aux besoins particuliers du secteur et qui devrait rendre le recours à cette forme de soutien plus aisé, en allégeant notamment la charge de la preuve qui incombe au demandeur. Désormais l'aide à l'innovation pourra être accordée à des produits ou procédés nouveaux par rapport à l'«état de la technique» (ou «state of the art») dans l'UE. D'autre part, l'intensité d'aide maximale a été relevée de 10 à 20%. L'accent mis sur la promotion de l'innovation témoigne de la préférence donnée aujourd'hui à des mesures de soutien pouvant contribuer à une plus grande compétitivité de l'industrie européenne et ayant donc un effet à plus long terme, par rapport à des formes d'aides plus «traditionnelles» et «statiques».

Comme le Règlement construction navale de 1998, l'encadrement prévoit la possibilité d'octroyer des aides à la fermeture, aussi bien en cas de fermeture totale que partielle des chantiers. Ce type de soutien vise à encourager la fermeture de capacités économiquement non viables et la transition vers des segments spécialisés, de haute technologie La principale nouveauté est représentée par l'ajout d'une précision concernant le cumul des aides au sauvetage ou à la restructuration et des aides à la fermeture partielle. Un tel cumul est en principe interdit pendant une période de 10 ans, sauf circonstances exceptionnelles ([6]).

Ensuite, en matière de crédits à l'exportation et d'aide au développement, l'encadrement se réfère aux accords conclus en la matière dans le cadre de l'OCDE. Ces règles ayant été récemment modifiées, l'encadrement intègre ces changements ([7]).

Enfin, dans les même termes que le Règlement construction navale de 1998, l'encadrement contient des mesures spécifiques en matière d'aides régionales, plus strictes que les règles de droit commun. Elles prévoient en effet une intensité d'aide maximale réduite et une limitation des types de dépenses éligibles.

Avec l'adoption du nouvel encadrement, la Commission s'est en somme efforcée d'opérer un dosage entre éléments de simplification du régime des aides d'Etat à la construction navale et nécessaire prise en compte des besoins spécifiques du secteur. A travers des mesures telles qu'un soutien

([1]) Conformément aux règles de droit commun en matières d'aides d'Etat, le par. 27. de l'encadrement requiert la notification des régimes d'aides et des aides individuelles lorsque ces dernières ne sont pas couvertes par un régime préalablement autorisé par la Commission; alors que le règlement de 1998 prévoyait dans certains cas la notification des aides individuelles mêmes lorsqu'elles étaient couvertes par un régime.

([2]) C'est-à-dire les aides liées à la construction et à la transformation navales qui sont accordées, conformément à des règles définies dans le cadre de l'OCDE, sous forme d'assistance au développement en faveur de pays en développement.

([3]) Voir l'art. 6 du Règlement construction navale de 1998.

([4]) En particulier, l'exigence selon laquelle le produit ou le procédé *innovant* ne devait pas avoir été utilisé par un autre chantier de l'UE s'est avérée difficile à appliquer, car elle imposait une charge de la preuve très contraignante au demandeur potentiel.

([5]) Voir le par. 15 de l'encadrement.

([6]) Voir le par. 19. de l'encadrement.

([7]) Un nouvel Accord sectoriel sur les crédits à l'exportation pour les navires a été adopté dans le cadre de l'OCDE le 15 avril 2002. En vertu de la décision 2002/634/CE du Conseil modifiant la décision 2001/76/CE en ce qui concerne les crédits à l'exportation de navires, le nouvel Accord sectoriel sur les crédits à l'exportation pour les navires s'applique dans la Communauté.

renforcé à l'innovation, ce nouveau cadre réglementaire devrait contribuer à la mise en place d'un environnement propice à un renforcement de la compétitivité de l'industrie européenne.

L'existence de conditions de concurrence saine et loyale est, en effet, un élément clé pour la compétitivité de toute industrie. Cela vaut, bien entendu, aussi bien à l'intérieur qu'à l'extérieur de l'Union. L'aspect externe est d'autant plus important pour une industrie comme la construction navale qui connaît de graves problèmes de distorsion de la concurrence au niveau mondial.

3. Le volet externe: le triangle Séoul-Genève-Paris

Pour contrer les pratiques déloyales du secteur de la construction navale en Corée, une stratégie à deux volets a ainsi été mise en place par le Conseil, en juin 2002 sur proposition de la Commission (1). Cette stratégie comprend l'utilisation de deux instruments: (1) l'engagement d'une action contre la République de Corée devant l'Organisation mondiale du commerce (OMC) et (2) l'adoption d'un mécanisme de défense commerciale temporaire (MDT) autorisant le versement d'aides au fonctionnement de façon exceptionnelle, limitée et temporaire, en vue d'assister les chantiers navals communautaires opérant dans les segments de marché pour lesquels il a été démontré que l'industrie européenne a subi les effets néfastes de la concurrence déloyale coréenne (2).

Il convient, tout d'abord, de relever le caractère unique et originale de cette utilisation «défensive» et «externe» de l'instrument aides d'Etat. Elle résulte des difficultés d'application à cette industrie des instruments de défense commerciale traditionnels, mis en œuvre «à la frontière», tels que les droits antidumping ou les droits compensateurs. En effet, en vertu de l'accord du GATT, les navires sont considérés comme des biens en transit, et non comme des biens importés. La totale liberté d'immatriculation des navires rend également difficilement applicables à cette industrie les mesures de défense traditionnelles.

Dès lors, comme l'a récemment déclaré le Commissaire Mario Monti, "même si les aides d'Etat ne sont certainement pas la voie à suivre pour renforcer la compétitivité du secteur européen de la construction navale à l'échelle internationale, … dans le cadre de sa politique en matière d'aides d'Etat, la Commission sait tenir compte de circonstances exceptionnelles lorsque des intérêts communautaires sont en jeu."

En effet, la Commission a continué à poursuivre avec détermination la stratégie dite «à deux volets». D'une part, suite à l'échec des consultations pour trouver une solution à l'amiable, elle a demandé à l'OMC l'établissement d'un «Groupe spécial» (ou «panel») qui aura pour mission de trancher le différend commercial avec la Corée (3). Le groupe a commencé ses travaux à la fin de l'année 2003. D'autre part, elle a décidé d'étendre l'application du MDT aux méthaniers suite à une enquête approfondie, dans le cadre du règlement sur les obstacles au commerce (ROC), qui a confirmé que les pratiques déloyales coréennes ont porté préjudice aux chantiers navals européens opérant sur ce segment de marché (4).

Enfin, le 21 janvier dernier, la Commission a adopté une proposition de règlement prolongeant la validité du MDT d'un an, c'est-à-dire jusqu'au 31 mars 2005 (5). Cette prorogation se justifie par le fait qu'aucune solution négociée n'a été trouvée pour l'instant avec la Corée (6) et que la procédure contentieuse engagée devant l'OMC prend plus de temps qu'initialement prévu.

La présentation de l'approche de la Commission aux questions de concurrence internationale dans le secteur de la construction navale ne serait pas complète s'il n'était fait mention des négociations, actuellement en cours dans le cadre l'OCDE, en vue de la conclusion d'un «accord sur les conditions normales de concurrence dans l'industrie de la construction et de la réparation navales

(1) IP/02/1395.

(2) Le MDT a été institué par le Règlement (CE) 1177/2002 du 27juin 2002 (JO L 172 du 2.7.2002, p. 1). Dès l'origine, il a été conçu comme une mesure de caractère exceptionnel, limité et temporaire. Il a par conséquent été strictement limité dans sa portée (seuls trois types de navires sont éligibles) et sa durée (il expire le 31/03/2004). L'intensité maximale de l'aide est également plafonnée à 6% de la valeur du contrat.

(3) IP/03/821. La demande d'établissement d'un Groupe spécial concerne principalement des subventions aux exportations et à la restructuration accordées aux chantiers navals coréens (notamment à Daewoo).

(4) IP/03/895.

(5) IP/04/77.

(6) Le 22 Juin 2000, la Commission européenne et les autorités coréennes ont signé un procès-verbal agrée (ou «Agreed Minutes») concernant la construction navale mondiale ayant pour objet le rétablissement de conditions de concurrence loyales et transparentes. A ce jour, la Corée n'a toutefois pas encore mis en œuvre cet accord.

marchandes». La Commission soutient et participe activement à ces négociations dont l'objectif est de doter le secteur d'une discipline stricte en matière de subventions et de lutte contre les prix déloyaux. Pour la Commission, il est clair que pour être efficaces de telles règles doivent être accompagnées d'un mécanisme spécifique de règlement des différends et de sanctions dissuasives. Ainsi pourrait être trouvée une solution définitive, négociée et multilatérale [1] aux importantes distorsions de concurrence qui persistent sur le marché mondiale de la construction navale.

(1) En effet, 27 pays, représentant plus de 90% de la production mondiale dans ce secteur, participent à ces négociations.

The Multisectoral Framework 2002: new rules on regional aid to large investment projects

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1. Introduction

The Multisectoral Framework (MSF from now onwards) was adopted in 2002 and modified at the end of 2003. It entered into force on 1 January 2004 and will be applicable until 31 December 2009 (1).

Its aim is to establish a simple and transparent system of control of regional aid to large investment projects, replacing the 1998 MSF (2) and specific sectoral rules for steel, cars etc. In order to understand the new rules, it is useful to start by recalling some basic concepts of regional aid.

Regional aid is designed to develop the less favoured regions, by supporting investment and job creation in a sustainable context. The possibility to grant an appropriate level of aid in a less favoured region is an incentive which should compensate the regional handicaps and encourage firms to settle there, triggering a process of regional development.

This is why the 1998 Guidelines on national regional aid (3) foresaw the notification of regional aid 'maps' by all Member States and their approval by the Commission. These maps include:

— the list of less favoured regions, which are entitled to receive regional state aid;

— the maximum aid ceilings allowed in each region. These ceilings are modulated depending on the importance of the regional handicaps, and their pattern is approximately the following:

Extremely disadvantaged area ('87.3.a' areas)	35% - 40% - 50% of eligible costs of investment project
Disadvantaged area ('87.3.c' areas)	10% - 20% of eligible costs of investment project

This identification of the regions and of the maximum aid ceilings allowed is of strategic importance. Member states will rely on the maps to identify in which areas they can give aid, and to which extent.

The regional aid ceilings mentioned above rest, implicitly, on the assumption that regional handicaps affect all firms and investment projects in the same way, independently of sectors, size, technologies etc. However, the incentives that can be awarded according to the maps authorised by the Commission are not appropriate anymore when large investment projects are concerned. It is here that the Multisectoral Framework on regional aid to large investment projects comes into the play.

Large investment projects can effectively contribute to regional development.

However, large-scale projects located in a less favoured region are likely to be less affected by specific local handicaps. A large investment usually creates economies of scale which reduce the additional costs resulting from the location in a disadvantaged area. It can easily obtain capital and labour on a global market, therefore being untouched by the corresponding difficulties on the local market. Therefore, it would be disproportionately favoured, if it was entitled to the full regional ceiling which is designed for investment projects of all sizes.

Moreover, large-scale projects often have a very 'mobile' nature. They can be carried out in several alternative sites. This could lead to significant negotiating power on the part of the investor, and to a spiral of increasingly higher promises of aid from governments in order to attract the project to a specific area. The amount of the aid can be determined more by this play of powers, than by the effective link to the regional handicaps.

Finally, large-scale investments are more likely to have a considerable effect on trade, as the beneficiaries are often significant players on the market,

(1) The MSF is published in the OJ C 70, 19.3.2002, the modifications are published in the OJ C 263, 1.11.2003. For the steel sector and the car and synthetic fibres sectors it entered into force respectively on 24.7.2002 and on 1.1.2003.

(2) The old 1998 MSF (OJ C 107, 7.4.1998) 'did not have a significant impact on state aid levels for large investment projects', as section 2.1, point 8 of the new MSF states.

(3) OJ C 74, 10.2.1998.

and being usually capital-intensive they contribute less to job creation and unemployment reduction.

Taking into account all the above, the main economic rationale behind the MSF 2002 is to ensure a more restrictive approach for large 'mobile' investment projects. This is why, as we will see in the next paragraphs, the MSF provides for a substantial reduction of the regional aid ceilings in case of large scale projects.

Besides this main concern for limitation of aid, the MSF has other objectives worth mentioning: the wish for a simple and effective tool, transparency (through the integration in the MSF of a number of pre-existing frameworks), reduction of the administrative burden on administrations, enhanced predictability of the Commission decisions, and finally introduction or maintenance of stricter rules for sectors suffering from structural difficulties.

In the following paragraphs we will try to explain briefly the main features of the MSF 2002. The final paragraph is dedicated to a view into future perspectives.

2. Scope of application

The MSF 2002 applies to regional aid that aims to promote initial investment, including job creation linked to initial investment ([1]). The eligible costs of an investment project are determined on the basis of the guidelines on national regional aid (which include material investment such as land, building and machinery and immaterial investments, or wages in the case of job creation linked to initial investment).

As far as economic sectors are concerned, the MSF 2002 in principle is applicable to the same sectors to which the regional aid guidelines apply ([2]), with the sole exception of shipbuilding which is governed by sector-specific rules. In addition to that, the framework contains stricter rules for sectors suffering from structural difficulties (steel, motor vehicle and synthetic fibres sectors).

3. The reduction of the regional aid ceilings

The MSF 2002 contains one simple rule which defines the applicable reduction of the regional aid ceilings in function of the 'size' of the large investment projects. Large investment projects are implicitly defined as projects with eligible costs exceeding EUR 50 million. The rule is given in the following table:

Eligible expenditure	Adjusted aid ceiling
Up to EUR 50 million	100% of regional ceiling
For the part between EUR 50 and EUR 100 million	50% of regional ceiling
For the part exceeding EUR 100 million	34% of regional ceiling

As the table clearly shows, projects with eligible costs up to EUR 50 million are not subject to the aid ceiling reduction foreseen in the MSF. They can benefit of the full regional ceiling and no reduction applies.

When eligible costs exceed EUR 50 million, the MSF 2002 aid reduction becomes applicable. The regional aid ceiling must be 'adjusted'. This reduction starts at a medium pace (50% of regional ceiling), and then continues at a faster pace (34%) when the projects' costs exceed EUR 100 million.

The result is shown in the following graphs ([3]), which give a clear idea of how much the allowable aid amounts are reduced for large projects as a consequence of the entering into force of the new MSF. As graph 1 shows, for instance, a project with eligible costs of EUR 250 million, located in an area with a full regional aid ceiling of 40%, can get a maximum aid of 50,4 million under the MSF, whilst it could get up to 100 million without the MSF reduction. The graph also shows that there is no difference in aid amounts for projects with

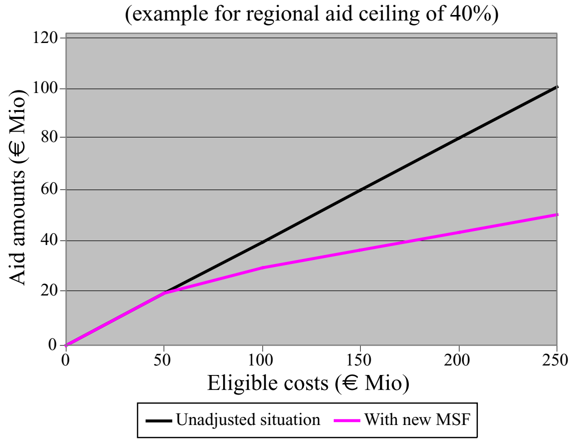
([1]) Regional aid in the form of operating aid does not fall within the scope of application of the framework. The framework does not affect the operation of the rescue and restructuring guidelines, nor of the existing horizontal frameworks, such as R&D and environment. Aid cases which fall under these provisions will therefore continue to be covered by them, also when they concern large investment projects.

([2]) Therefore, the MSF 2002 does not apply to sectors concerning the production, processing and marketing of products listed in Annex I of the treaty (agriculture and fisheries) and to coal. Special rules apply in the transport sector.

([3]) Graphs have been prepared by Patrick De Ridder.

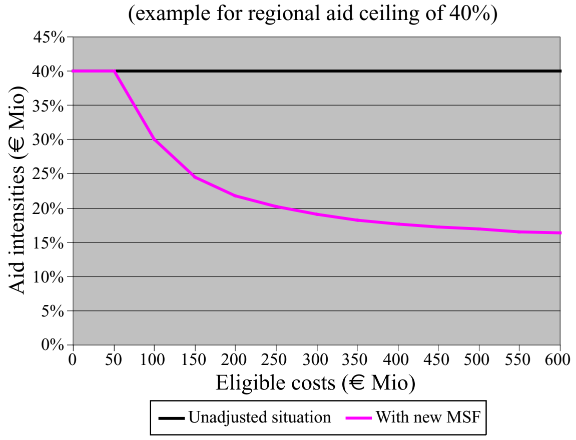
eligible costs up to 50 million; the reduction of the full ceiling starts from that point and then gradually increases (the red curve inclination changes in correspondence with eligible costs of EUR 100 million, where the MSF reduction passes from 50% to 34% of the full regional ceiling).

Graph 1: Effects of the MSF on the aid amounts (example for regional aid ceiling of 40%)



The same effect can be seen in terms of aid intensities in the following graph. Graph 2 shows what happens to an investment project in a region with a 40% full regional aid ceiling. Without the MSF, the investment would always get the 40% aid intensity, independently of its size. Under the MSF, on the contrary, the aid intensity remains at 40% only if the investment project costs are up to 50m euro. Once this threshold of eligible costs is exceeded, the maximum aid intensity allowed is progressively reduced. At the right end of the graph, we see that a project of 600m eligible costs can have a maximum aid intensity of 16,3%.

Graph 2: Effects of the MSF on the aid intensities (example for regional aid ceiling of 40%)



It is interesting to note also that the maximum aid intensities resulting from the MSF can be increased when the large investment is carried out by a small and medium enterprise (not a common case, but still possible) ([1]).

4. The cohesion bonus

The table and graphs above show the maximum aid intensities allowed by the MSF.

There is, however, the possibility to increase the said aid intensities if the project receives co-financing from the structural funds. This possibility is only valid for projects that are notifiable under state aid rules, i.e. if the aid amount proposed is more than the maximum allowable aid that an investment of 100 million could obtain.

In presence of structural funds co-financing, there are strong grounds to consider that the investment project in case can help pursuing the objectives of social and economic cohesion of the Community, reducing the disparities between the regions and effectively contribute to regional development. Projects of this size, in fact, have also to be notified under structural funds rules, and will be co-financed only if they offer a significant contribution to regional development.

Therefore, in such cases a 'cohesion bonus' can be applied which increases the applicable aid intensity by multiplying it by a factor of 1.15. The rate of co-financing must be at least 10% of the total public expenditure if the project is located in an area eligible for aid under Article 87.3.c of the treaty, or 25% if the area is eligible under Article 87.3.a area.

There is a maximum cap to the increase due to the cohesion bonus: the aid increase can never lead to an aid intensity higher than that allowed for an investment of EUR 100 million, i.e. 75% of the unadjusted regional aid ceiling.

5. Advance notification and ex post monitoring

The MSF 2002 establishes a notification requirement for individual cases of application of existing aid schemes (i.e. normally aid authorised by the Commission ([2])). No advance notification is

([1]) In this case, the SME bonus foreseen in the regional aid guidelines and in the SME Regulation No 70/2001 can apply, in addition to the maximum aid intensity of the MSF which, as signalled in point 51 of the framework, refers to the maximum authorised for large companies. This SME bonus is not subject to the aid ceiling reduction of the MSF.

([2]) The definition of existing aid is given in Article 1(b) of Council Regulation No 659/1999 (OJ L 83, 27.3.1999).

required of aid below certain thresholds, granted in accordance with an existing aid scheme approved by the Commission ([1]).

The notification thresholds for individual aid under approved schemes are much higher than in the 1998 MSF ([2]). According to the new MSF the notification is required, for aid granted in accordance with an approved scheme, only if the aid proposed is more than the maximum allowable aid that an investment of EUR 100 million could obtain (i.e. 75% of the unadjusted regional aid ceiling).

This means that the applicable notification threshold varies in function of the regional aid ceiling of the specific region where the project is located. For instance, in a region that benefits of a full regional aid ceiling of 40%, the maximum allowable aid that an investment of EUR 100 million could obtain under the scaling of the MSF is EUR 30 million. This is, therefore, the notification threshold in the region. However, if you consider a region that benefits of a full regional aid ceiling of 20%, then the maximum allowable aid that an investment of EUR 100 million could obtain is only EUR 15 million. Therefore, the notification threshold varies; it is lower in "richer" assisted regions with lower regional aid ceilings.

For all investments exceeding 50 million and not subject to notification, the MSF sets a new specific ‘ex post’ information requirement. In order to ensure transparency and effective monitoring, Member States must provide the Commission with summary information, in a special form, within 20 working days from the granting of aid for investment above 50 million. This information is published on the Internet and serves as a basis for an ex post monitoring by the Commission.

The publication on Internet is a transparency mechanism of particular relevance in the context of the new MSF. It grants information to third parties and eventual competitors, which will have the possibility to contact the Commission, provide information and file complaints. Any interested party may in fact inform the Commission of any alleged unlawful aid and any alleged misuse of aid (a ‘complaint’) ([3]) and the Commission will examine that information without delay.

This new MSF approach can prove particularly helpful for Member States, as it makes available a swift mechanism for the implementation of large projects in less favoured regions, it helps to reduce red tape and administrative burdens, and it does not slow down the investment project. We consider that, on the basis of the information available on past cases, the MSF 2002 will approximately result in a 50% reduction in MSF notified cases as from 2004 (effects of enlargement not being taken into account). This reduction in the number of the notified cases does not imply, as far as the Commission is concerned, a reduction in the level of controls nor in workload. The cases under the above transparency procedure will allow a thorough ex post monitoring by the Commission.

6. Assessment of cases notifiable under the MSF 2002

In cases where there is a notification of aid granted in accordance with an approved scheme, how will the Commission proceed to the assessment?

Once the aid is notified, the Commission will assess whether the notified aid is awarded in line with the approved scheme (i.e. respects the compatibility criteria as laid down in the regional aid guidelines and the progressive reduction of aid ceilings foreseen in the MSF).

Moreover, in order to avoid serious distortions of competition, the Commission will pay attention to investment in sectors where a single company has a high market share, or where the project constitues a significant increase in the production capacity of the sector, without a corresponding increase in demand. In these situations, aid is likely to have a strong detrimental impact on competition, while its beneficial effect on the region is doubtful. Therefore, no approval will be given when:

— the aid beneficiary accounts for more than 25% of the sales of the product concerned, before or after the investment;

([1]) Regional ad hoc aid, i.e. new individual aid not granted in accordance with an aid scheme approved by the Commission, always needs to be notified pursuant to Article 88(3) EC Treaty, unless it falls within the SME block exemption Regulation No 70/2001. It will be assessed on the basis of the MSF rules and in line with the general assessment criteria of the regional aid guidelines. This means that the Member State will have to provide a justification in terms of effect on regional development.

([2]) Under the old MSF, notification was required where the project costs were at least EUR 50 million, and the cumulative aid intensity was at least 50% of the regional aid ceiling and aid per job created or safeguarded amounted to at least EUR 40.000; or where the total aid was at least EUR 50 million.

([3]) Article 20 of Council Regulation No 659/1999, OJ L 83, 27.3.1999.

— the capacity created by the project is more than 5% of the size of the market, unless the market in question has an annual growth above the European average (1).

These tests do not apply, however, when the investment projects concerns a new product market, created through genuine innovation.

7. The 'sensitive' sectors

Besides the cases mentioned in the paragraph above, an important distortion of competition is likely to occur for investment projects in sectors suffering from structural difficulties. The MSF therefore separately regulates the granting of aid in such sectors, in order to prevent serious distortions of competition.

The framework prohibits any aid for investment projects in the steel industry, irrespective of the size of the investment. The prohibition also applies to SMEs, unless the aid is exempted under Regulation No 70/2001.

Moreover, a list of sectors with structural difficulties should have been established by the end of 2003. Due to the methodological and technical difficulties in establishing such a list, and taking into account the requests of Member States, the Commission decided to postpone the adoption of the list.

In the absence of a list of sectors, on 30 October 2003 the Commission proposed to all Member States, as appropriate measure pursuant to Article 88(1) of the Treaty, the extension of the existing transitional rules for large investment projects in 'sensitive' sectors until 31.12.2006. These rules foresee that no aid can be allowed to large investment projects in the synthetic fibres sector, and that only limited aid can be allowed in the car sector (30% of the corresponding regional aid ceiling).

All Member States accepted the Commission proposals, and the MSF 2002 has been accordingly modified (2). The technical feasibility and the political and economic opportunity to adopt a list of sectors with structural difficulties will be examined again by the Commission before the end of 2005.

8. Conclusion

The MSF 2002 seems to constitute an efficient tool to control aid to large investment projects and help economic and social cohesion in Europe.

At the same time these rules, which affect the realisation of large investment projects in the common market, have a clear importance and a high political impact. The new MSF still has to be put to the test, as no case has been decided up to now under the new rules; its implementation has to be reviewed carefully.

It is interesting to note that, between the lines, the new MSF might reveal a number of trends of current state aid policy: from the reduction of the impact of aid on de-localisation (which could be considered in the light of the enlargement context), to a more focused approach in the Commission control on state aid, relying on the responsible action of Member States and on the growing role of third parties. The Commission deals with all measures qualifying as State aid; however, the clear rules and low notification thresholds of the MSF can help setting priorities and concentrating resources on the most important cases and on the activities for which a particularly high level of attention should be maintained.

As a final point, we would like to signal that, in the context of a more efficient approach to community legislation, large part of the rules of the MSF 2002 could be integrated into the regional aid guidelines, profiting of the fundamental review which will take place in view of their expiry on 31.12.2006. The Commission already announced to Member States that the MSF 2002 might be revised in the context of the review of the regional aid guidelines.

(1) More precisely, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the European Economic Area's GDP.

(2) OJ C 263, 1.11.2003.

La Commission applique pour la première fois la jurisprudence Altmark dans le domaine d'électricité

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La Commission européenne a autorisé le 18 décembre 2003 une mesure visant à promouvoir des investissements dans de nouvelles centrales électriques en Irlande aux fins d'assurer la sécurité d'approvisionnement en électricité.

Dans cette décision, la Commission a appliqué pour la première fois les critères établis par la Cour de justice dans son arrêt *Altmark* et est parvenue à la conclusion que le dispositif notifié par les autorités irlandaises le 8/10/2003 ne contenait pas d'élément d'aide d'Etat.

Ayant constaté un manque de capacité de production d'électricité sur le marché national dans le futur proche, les autorités irlandaises ont mis en place un système permettant de combler un déficit d'offre d'électricité en Irlande.

Les autorités irlandaises ont lancé un appel d'offres transparent et ouvert à l'ensemble des acteurs communautaires. Les candidats remportant l'appel d'offre se sont vus attribuer des contrats prévoyant le paiement de primes pour la mise à disposition de leur capacité de production. Ces primes sont modulées en fonction de la part de leur investissement que les générateurs auraient pu récupérer sur le marché.

Les contrats avec deux générateurs ont été signés le 24 décembre 2003. Les centrales visées par le régime entreront en service dans le courant de l'année 2007.

Dans son arrêt *Altmark,* la Cour a établi quatre critères visant à déterminer si le paiement par l'Etat de compensations pour obligation de service d'intérêt économique général peut échapper à la qualification d'aide d'Etat au sens de l'article 87(1) du Traité.

Selon la première condition, l'entreprise bénéficiaire doit être effectivement chargée de l'exécution d'obligations de service public et ces obligations doivent avoir été clairement définies.

Deuxièmement, les paramètres sur la base desquels est calculée la compensation doivent être préalablement établis de façon objective et transparente.

Troisièmement, la compensation ne peut pas dépasser ce qui est nécessaire pour couvrir tout ou partie des coûts occasionnés par l'exécution des obligations de service public.

Enfin, dans la situation où l'entreprise bénéficiaire ne serait pas choisie par voie d'appel d'offre, la Cour prévoit la façon de déterminer le niveau de compensation nécessaire.

La mesure mise en place par les autorités irlandaises, respectant les quatre critères réunis, la Commission a décidé de ne pas soulever les objections.

La décision aborde en particulier la question de la qualification de service d'intérêt économique général dans le marché de l'électricité. Elle établit qu'étant donné notamment la situation insulaire de l'Irlande le fait d'assurer l'existence d'une «capacité de réserve» permettant aux distributeurs d'assurer la fourniture d'électricité à tous les consommateurs à tout moment de l'année, peut constituer un tel service d'intérêt économique général.

Ayant trouvé qu'un aspect particulier de la décision concernant les limites de la notion du SIEG nécessitait une justification claire et objective, la Commission a précisé ce qui suit.

En premier lieu, elle s'est référée à la notion de la capacité de réserve *(«capacity margin»)* qui est nécessaire pour atteindre un niveau convenable de sécurité d'approvisionnement. Dans le cas d'espèce, il s'agit de la capacité électrique nécessaire pour que chaque usager ne subisse pas en moyenne plus de huit heures de coupure d'électricité par an.

En deuxième lieu, la Commission a souligné qu'au vu de la spécificité géographique de l'Irlande, il n'était pas possible d'obtenir cette capacité à moyen terme en augmentant les interconnexions. En effet, l'Irlande ne peut être connectée électriquement dans des conditions économiquement efficaces avec d'autres parties de l'Union qu'avec l'Irlande du Nord. Or l'Irlande du Nord est elle-même en sous-capacité, et dépend de son interconnexion avec l'Ecosse. Cette solution ne serait donc pas économiquement faisable.

Energy taxation and state aid
The Netherlands: energy tax exemption for energy intensive end-users

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In November 2003, the Dutch authorities notified a fiscal State aid measure called *'Energy Tax Exemption for Energy Intensive End-users'*. The Dutch regulatory energy tax is a tax on natural gas and electricity consumption, introduced in 1996. The purpose of a regulatory energy tax is to tax energy consumption in order to reduce carbon dioxide (CO_2) emissions and to promote energy saving (1). In addition, the regulating energy tax contributes to the shift of taxation on labour and business profits to indirect taxation deemed necessary by the Dutch authorities.

The regulatory energy tax contains a degressive rate structure for gas and electricity. Up to an annual consumption of 5,000 m³ and 10,000 kWh, respectively, rates of 0.1285 and 0.0639, respectively, apply in 2003. When consumption is beyond these levels, lower rates apply. In 2003, a zero-rate applied to annual consumption exceeding 1 million m³ gas and 10 million kWh electricity.

Council Directive 2003/96/EC of 27 October 2003 on the restructuring of the Community framework for the taxation of energy products and electricity (2), hereinafter Energy Taxes Directive, was to be transposed into Dutch legislation from 1 January 2004. As a result of the new Energy Taxes Directive, electricity consumption by business users exceeding 10 million kWh would also have to be taxed. The introduction of a minimum rate for consumption exceeding 10 million kWh would lead to an additional tax burden for a group of energy-intensive businesses, who are already engaged in energy use reduction through various energy agreements with the Dutch authorities. Therefore, the Dutch authorities proposed to introduce a tax exemption scheme, which was subject to State aid notification.

Article 17(1)(b) of the Energy Taxes Directive provides an option to create a full tax exemption for business electricity users subject to stringent conditions and restrictions. The Commission noted that the notified tax exemption scheme is subject to strict conditions. The tax exemption scheme will only apply to undertakings that have concluded agreements with the Dutch authorities in the context of the Benchmark Energy Savings Covenants (BMEs) or long-term agreements (MJAs), hereinafter the energy agreements. In these energy agreements participating companies undertake to take energy saving measures. Participants in the BMEs must be among the best of the world in the field of energy efficiency as soon as possible, but not later than 2012. Participants in the MJAs have concluded agreements per sector as regards the energy efficiency percentages to be realized. Undertakings are allowed to sign either a BME or a MJA. The duration of all energy agreements is until 2012. More than 1000 Dutch companies have already signed such energy agreements with the Dutch authorities. However, not all of these companies will make use of the tax exemption scheme, as e.g. not all of these companies exceed electricity consumption of more than 10 million kWh per year. The Netherlands Bureau for Economic Policy Analysis (CPB) has calculated the CO2 reduction effects of a possible introduction of the Community minimum rates above 10 million kWh at 0,13 Mton in 2010. The effects resulting from the BMEs and MJAs are approximately 7 Mton in 2012 (3).

The tax exemption scheme will serve as a compensation for 206 undertakings for the energy saving commitments that follow from their energy agreements. In addition, some undertakings that will be faced with an increased tax burden do not yet participate in the energy agreements. The tax exemption scheme could provide an incentive to start or join an energy agreement in the future for these companies.

The duration of the notified scheme is until 31 December 2006, i.e. 3 years. If the minimum tax level of the Energy Taxes Directive would be transposed into the regulatory energy tax, the

(1) By decision dated 22 December 1998 (OJ C 88, 30.3.99), the Commission decided that the Dutch regulatory energy tax did not constitute aid within the meaning of Article 87(1) of the EC Treaty.

(2) OJ L 283, 31.10.2003, p. 51.

(3) The prognosis for CO_2 emissions prevented by Dutch industry on the basis of the BMEs amounts to 5.6 Mton CO_2 per annum in 2012 in the BMEs. This is supplemented by 1.3 Mton of CO_2 emissions per annum prevented by the MJAs.

Dutch authorities estimate the additional annual tax revenue for the level beyond 10 million kWh at approximately 8 million. As a result of the tax exemption scheme the Dutch authorities will suffer annual foregone tax revenues of 7 million. In other words, 1 million energy tax will be levied beyond 10 million kWh, namely on these companies that did not sign an energy agreement. The total budget of the notified measure is therefore 21 million.

Application of the State aid rules

First of all the Commission concluded that the Dutch energy agreements can be regarded as agreements between national authorities and energy intensive industries within the meaning of the Energy Taxes Directive. Next, the Commission noted that the beneficiaries of the notified scheme are a group of large, energy intensive companies in certain identified sectors. The advantage they receive through a tax exemption is funded through foregone tax revenues, i.e. State resources. The measure is selective as only certain undertakings will benefit from the scheme. Furthermore, the financial assistance provided to the recipient companies will strengthen their position, which may possibly lead to a change in market conditions. Such strengthening of the position of the relevant firms as compared with other firms competing with them within the Community must be regarded as affecting trade and potentially distorting competition. Article 87(1) of the EC Treaty and Article 61(1) of the EEA Agreement are therefore applicable.

Also, according to Article 26(2) of the aforementioned Energy Taxes Directive, measures such as tax exemptions, tax reductions, tax differentiation and tax refunds within the meaning of this Directive might constitute State aid and in those cases have to be notified to the Commission pursuant to Article 88(3) of the Treaty.

The purpose of the notified aid scheme is to contribute to the protection of the environment. The aid measure is therefore assessed by the Commission in the light of the Community guidelines on State aid for environmental protection ([1]), hereinafter the environmental guidelines. According to point 49(b) of the environmental guidelines, the Commission may take the view that a tax exemption to certain firms on a tax that is to be levied as the result of a Community Directive is compatible with Article 87(1) of the EC Treaty, when the tax exemption is authorised by the directive in question. Furthermore, point 49(b) states that the tax exemption must be necessary and it must not be disproportionate in the light of the Community objectives pursued. The Commission will be especially concerned to ensure that any such exemption is strictly limited in time. In order to assess the necessity and proportionality of the tax exemption, the Commission applied the substantive criteria of point 51(1) of the environmental guidelines.

By virtue of point 51(1)(a), first subparagraph, tax exemption decisions covering a 10-year period with no degressivity may be justified where a Member State makes a tax reduction subject to the conclusion of voluntary agreements between the Member State involved and the favoured undertakings on achieving environmental protection during the period for which the exemptions apply. Such agreements or undertakings may relate, among other things, to a reduction in energy consumption, a reduction in emissions or any other environmental measure. The substance of the agreements must be negotiated by each Member State and will be assessed by the Commission when the aid projects are notified to it. Member States must ensure strict monitoring of the commitments entered into by the firms or associations of firms. The agreements concluded between a Member State and the firms concerned must stipulate the penalty arrangements applicable if the commitments are not met. The Commission noted that the energy agreements of the notified measure are in accordance with the substantive criteria of point 51(1) of the environmental guidelines. Thus, the conditions set out in point 49(b) of the environmental guidelines on the necessity and proportionality of the tax exemption were fully met. Therefore the tax exemption scheme was considered compatible with the common market in accordance with Article 87(3)(c) of the EC Treaty.

([1]) OJ C 37, 3.2.2001, p. 3.

State aid and the effect on trade criterion
The Netherlands: measures in favour of non-profit harbours for recreational crafts

Melvin KÖNINGS, Directorate-General Competition, unit G-2

Following a complaint, on 5 February 2003 the Commission initiated the formal investigation procedure down in Article 88 (2) of the EC Treaty on the possible distortion of competition between the three following marinas in The Netherlands: *Enkhuizen, Nijkerk* and *Wieringermeer* ([1]). On 29 October 2003 the Commission took a final decision on the cases.

Although this case does not involve very significant amounts of aid, the case is of interest for the analysis developed in order to decide whether the measure constitute state aid under Article 87(1) of the EC Treaty. In particular, the Commission had to decide if the aid was likely to have an effect on trade.

Dutch marinas are operated by both non-profit organisations (usually sailing clubs) and private undertakings. According to the complainant several non-profit marinas had received State aid to build or maintain their moorings. Herewith these marinas are able to offer a lower rental price of the moorings for tourists who are passing by with their recreational crafts.

The municipality Enkhuizen decided in 1998 to build a new harbour for large riverboats and tourist vessels. Because of the construction of this new harbour, the existing entrance of the sailing club *KNZ&RV* to the river was removed. Moreover, the sailing club *KNZ&RV* got the opportunity to purchase a water area (26.000 m^2) of the municipality at the same price per m^2 as the municipality had paid for the same water in 1998 to the national authorities (i.e. 11.700). The price per m2 was 0,45 per m2 (one guilder). According to the complainant, the average purchase of this kind of water is approximately 15 per m^2. In the final decision, the Commission argues that it is not likely that the low value of the water area is appropriate. If the water area has a local destination of becoming a marina, this water area will have some market value and cannot be considered 'worthless'. The difference of opinion is on 378.300, which is most part of the alleged State aid. The Commission cannot therefore exclude the granting of an advantage to the Enkhuizen marina.

The municipality *Nijkerk* was the owner of a local marina, which was built in 1966. The marina was privatised in 2000 and sold to the tenant, the local sailing club *De Zuidwal.* In 1998 the marina was independently appraised at 417.477. This was the appraisal price for a marina without contamination, with maintenance in good order and when rented out (the marina without a tenant was appraised at 521.847).

The marina was contaminated and it had a lot of late maintenance. In the purchase agreement between the municipality and the club, the sailing club agreed on taking all costs for rehabilitation of the water and the late maintenance of the harbour facilities. The municipality estimated the costs for late maintenance and rehabilitation; the estimations were carried out by employees of the municipality, based on their practical experience. The municipality deducted these costs from the appraised value of the marina, resulting in a purchase price of 0,45 (one guilder) for the total marina.

Later on the Dutch authorities gave order for new independent appraisal reports on the costs for late maintenance and rehabilitation. As regards the costs for rehabilitation the Dutch authorities divided these costs to rehabilitate the nearby river *(Arkervaart)* and the marina. According to the Dutch authorities the marina is connected to the river and this river has many different polluting users who have no relationship with the marina. Hence, the Dutch authorities decided that the sailing club is not liable for any of the pollution, not even in the marina. Moreover, as the rehabilitation turned out to be very expensive in the course of 2002 the municipality decided to take 25% of the rehabilitation costs on its own account. Herewith, according to the Dutch authorities, the sailing club has even lost on the purchase agreement.

As regards the rehabilitation costs the Commission in its decision to initiate the procedure expressed doubts whether the purchase deal was carried out under the right application of the polluter pays principle. In principle the sailing club *De Zuidwal*

([1]) OJ C 69, 22.3.2003, p. 4.

was responsible (and liable) for the contamination of their marina. Following this principle, the marina should have been sold for 217.477. The Dutch authorities did not deliver clear appraisal reports on the pollution in the Nijkerk marina and it is not clear to what extent the sailing club is or could be held responsible for (part of) the pollution. It seems rather doubtful that the sailing club is not liable at all. Secondly, the Commission does not agree with the Dutch authorities that the marina was sold to the tenant itself for a purchase price including a tenant. After all, due to the purchase, the *De Zuidwal* obtained full free use of the marina. The sailing club could have sold the harbour immediately and make a profit of 95.370 (i.e. the difference between the two appraisal prices, with and without tenant). The Commission cannot therefore exclude the granting of an advantage to the Nijkerk marina through the measure.

Finally, as regards the *Wieringermeer* marina, the Dutch authorities provided sufficient additional information in order to conclude that no advantage is at stake.

Application of State aid rules

In order for a measure to be considered as a State aid within the meaning of Article 87(1) of the EC Treaty, four criteria have to be simultaneously satisfied. The criteria of State resources and selectivity were clearly met. As regards the effect on trade criterion, a reference case is Commission's decision on the Dorsten Swimming Pool ([1]). In this case the Commission concluded that this amenity was used by the inhabitants of the town and the surrounding area. Moreover, the Commission distinguished a difference between this kind of support and aid to promote major theme parks targeted at the national or even international market and advertised far beyond the area where they are located. The Commission concluded that by its very nature, aid in favour of facilities aimed at attracting international visitors is likely to effect trade between Member States. For the swimming pool in Dorsten the Commission took the view that there was practically no likelihood of intra-Community trade being affected. Therefore, the annual subsidy for the private operator of the pool in Dorsten does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

The Nijkerk marina has 200 moorings, of which on average only 0,25% is used by foreign tourists. The Commission concluded that the Nijkerk marina is used by the inhabitants of the town and the surrounding area and it is not aimed at attracting international visitors. The aid does not either refrain Nijkerk's inhabitants of using marinas outside the Netherlands. The support to the Nijkerk marina (if any) does not have an effect on trade and is therefore not State aid within the meaning of Article 87(1) of the EC Treaty.

In the Enkhuizen marina, on average 14% of the moorings are used by international tourists. The Commission made a distinction between *daily* moorings and *fixed* moorings. The effect on trade of support to daily moorings is by nature very limited. An (international) boat owner or tenant uses the marina which corresponds to the place where he is at a certain date and time and which appears to be appropriate given the size and depth of its hull. It is likely that an effect on trade of the support (if any) would primarily be related to the fixed moorings (permanent location of a boat). When choosing a fixed mooring the user has a choice between the Enkhuizen marina or a foreign one, as the (international) owner or long term tenant of the boat decides before or at the start of the season where to be in dock. It should be noted that the share of fixed moorings by international users is only 10% at Enkhuizen. In addition, the average annual turnover per fixed mooring (less than 1000) is rather low compared with the costs of maintenance, transport, financing and depreciation of pleasure boats and the additional costs of a water holiday. Therefore, the support to the Enkhuizen marina (if any) does not have an effect on trade and is therefore not State aid within the meaning of Article 87(1) of the EC Treaty.

The Commission therefore concluded that, even if some distortion of (local) competition is not excluded, the support (if any) to the alleged marinas has no effect on trade within the meaning of Article 87(1) of the EC Treaty.

([1]) Commission decision of 21.12.2000, N 258/2000 — Germany (Leisure Pool Dorsten), OJ C 171, 16.6.2001, p. 16.

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New documentation

European Commission Directorate-General Competition

This section contains details of recent speeches or articles on competition policy given by Community officials. Copies of these are available from Competition DG's home page on the World Wide Web at: http://europa.eu.int/comm/ competition/ speeches/index_2003.html

Speeches by the Commissioner, 1 September – 31 December 2003

Competition and Regulation in the Telecom Industry – The way forward – Mario MONTI – ECTA Conference – Brussels, Belgium – 10.12.2003

Il consumatore, operatore e beneficiario della politica comunitaria di concorrenza – Mario MONTI – Giornata della Concorrenza – Rome, Italy – 09.12.2003

New developments in State Aid Policy – Mario MONTI – British Chamber of Commerce – Brussels, Belgium – 01.12.2003

The New Shape of European Competition Policy – Mario MONTI – Inaugural Symposium of the Competition Policy Research Center 'How Should Competition Policy Transform Itself?' – Tokyo, Japan – 20.11.2003

The relationship between CAP and competition policy: Does EU competition law apply to agriculture? – Mario MONTI – COGECA Conference Helsinki Fair Trade – Helsinki, Finland – 13.11.2003

Recent developments in European air transport law and policy – Mario MONTI – European Air Law Association 15th Annual Conference – Brussels, Belgium – 06.11.2003

Comments and concluding remarks – Mario MONTI – European Commission, DG Competition, Conference on the 'Regulation of Professional Services' – Brussels, Belgium – 28.10.2003

Intervening against Government restraints on Competition: Reflections from the EU expertise – Mario MONTI – Lewis Bernstein Memorial Lecture Department of Justice – Washington DC, USA – 27.10.2003

EU competition policy after May 2004 – Mario MONTI – Fordham Annual Conference on International Antitrust Law and Policy – New York, USA – 24.10.2003

Applying EU Competition Law to the newly liberalised energy markets – Mario MONTI – World Forum on Energy Regulation – Rome, Italy – 06.10.2003

Concurrence économique et réglementation Politique – Mario MONTI – Cercle Europartenaires – Paris, France – 04.10.2003

La Concurrence Déclaration de M. Monti sur Alstom – Mario MONTI – European Commission – Salle de Presse, Breydel, Brussels – 22.09.2003

Speeches and articles, Directorate-General Competition staff, 1 July – 31 December 2003

Impact of Competition Law on Media – some comments on current developments – Herbert UNGERER – 4th ECTA Regulatory Conference – Brussels, Belgium – 10.12.2003

State Aid: The Commission's plans for reform – Procedural Reform – The Significant Impact Test – Philip LOWE – British Chamber of Commerce – Brussels, Belgium – 01.12.2003

Rechtsschutz im Bereich grenzüberschreitender Medienzusammenschlüsse – Hanns Peter NEHL – Internationale Medienenquete 2003 – Wien, Austria – 28.10.2003

Speech delivered by Philip Lowe at the Fordham Antitrust Conference – Philip LOWE – Thirtieth annual conference on international antitrust law and policy – Fordham, USA – 23.10.2003

Convention on the Future of Europe – Philip LOWE – The ICC Commission on Competition – New York, USA – 22.10.2003

How different is EU anti-trust? – A route map for advisors – Philip LOWE – Conference d'automne de l'American Bar Association – Brussels, Belgium – 16.10.2003

The interaction between the Commission and Small Member States in Merger Review – Philip LOWE – The Competition Authority – Merger Review Day – Dublin, Ireland – 10.10.2003

Scope and duration of media rights agreements: balancing contractual rights and competition law concerns – Miguel MENDES PEREIRA – IBC – 8th Annual Conference – Brussels, Belgium – 10.10.2003

Les grands chantiers de la politique européenne de concurrence – Philip LOWE – Université libre de Bruxelles (ULB), Les mardis du droit européen de la concurrence – Brussels, Belgium – 07.10.2003

Current issues of EU Competition Law – The new competition enforcement regime – *Ph*ilip LOWE – Key lecture at the study days of the International League of Competition Law – Barcelona, Spain – 02.10.2003

Commercialising sport: Understanding the TV Rights debate – Herbert UNGERER – FKG Sports Consulting – Barcelona, Spain – 02.10.2003

Competition Policy: Commercial And Consumer Paybacks – The European Dimension – *Jürgen MEN*SCHING – The International Institute of communications, 34th Annual Conference. In association with the Royal Institute of International Affairs – London, UK – 01.10.2003

Die Durchsetzung der EG-Wettbewerbsregeln im Recht der freien Berufe – Philip LOWE – Sitzung des Arbeitskreises Kartellrecht (Bundeskartellamt, Stand und Perspektiven der 7. GWB-Novelle – Bonn, Germany – 29.09.2003

Interview with Philip Lowe – Philip LOWE – Europolitix, an Internet publication on EU affairs – Web Newscaster – 25.09.2003

Legal and Regulatory Aspects of Public Service Broadcasting – Panel Contribution – *Herbert* UNGERER – Conference on Public Service Broadcasting, International Press Institute and Romanian Radio Broadcasting Corporation – Bucharest, Romania – 19.09.2003

Priorities of competition policy, contribution to Competitiveness and challenges from Enlargement – Philip LOWE – ProbusBNW Dialogue Dinner – London, England – 18.09.2003

Sport et télévision: Exclusivité et concurrence – Jürgen MENSCHING – Rendez-Vous International du Sport et de la Télévision – Monaco – 17.09.2003

European competition rules: The new enforcement system for Articles 81 and 82 EC is soon to be reality – Philip LOWE – Kangaroo Group Newsletter – September 2003 – 12.09.2003

Wettbewerb in der Telekommunikation: Brauchen wir die ex-ante-Regulierung noch? – Zeitschrift für Wettbewerbsrecht (ZWeR) 2003, S. 283. – Robert KLOTZ – Mit freundlicher Genehmigung des RWS-Verlages Kommunikationsforum – Köln (Cologne), Germany – 11.09.2003

Facing new challenges for EU Competition Policy – Philip LOWE – The European Antitrust Review 2003 – 20.08.2003

Meeting the Challenge of Modernisation – Philip LOWE – Oxford Competition Policy Conference – England – 15.07.2003

Community Publications Competition

New publications and publications coming up shortly

- ***XXXIInd report on Competition policy – 2002***
- ***Competition policy newsletter, 2004, Number 2 – Summer 2004***

Information about our other publications can be found on the on the DG Competition web site: http://europa.eu.int/comm/competition/publications

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Press releases
1 September – 31 December 2003

All texts are available from the Commission's press release database RAPID at: http://europa.eu.int/rapid/start/ Enter the reference (e.g. IP/03/14) 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/03/1797 – 19/12/2003 – Commission suspects TeliaSonera (Sweden) of having abused its dominant position in the provision of high-speed Internet access

IP/03/1748 – 16/12/2003 – Commission reaches provisional agreement with FA Premier League and BSkyB over football rights

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IP/03/1341 – 03/10/2003 – Commission proposes new safe harbour for the licensing of patents and know how

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IP/03/1246 – 15/09/2003 – EU/Japan: Commission welcomes new law allowing Japanese and EU lawyers to work in partnership

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IP/03/1788 – 19/12/2003 – State aid for R&D favouring small and medium-sized enterprises exempted from requirement of prior notification

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IP/03/1739 – 16/12/2003 – Commission approves aid to encourage the movement of intermodal containers by rail in the United Kingdom

IP/03/1738 – 16/12/2003 – Final decision on tax aid for takeovers of ailing companies

IP/03/1737 – 16/12/2003 – Commission secures withdrawal of the unlimited guarantee granted to EDF, thereby encouraging competition in the energy sector

IP/03/1697 – 10/12/2003 – State aid: Commission approves Italian scheme to encourage combined transport

IP/03/1696 – 10/12/2003 – Commission authorises French and Italian aid to experimental rolling motorway service between Lyon and Turin

IP/03/1688 – 10/12/2003 – Commission launches probe for state aid to Spanish steel company SOLMED

IP/03/1686 – 10/12/2003 – Public financing of television in France between 1988 and 1994 proportional to the cost of its public service obligations

IP/03/1685 – 10/12/2003 – Commission launches state aid probe into apparent VAT rebate in favour of Belgian firm UMICORE S.A.

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