Recent cases – Introductory remarks

In the period from 1 May to 31 August, the Commission received 75 notifications, an increase of 12% over the 67 received in the previous four-month period. In the same period, the Commission took 83 final decisions, of which 73 were clearances in Phase I. Of these 5 were conditional clearances pursuant to Art. 6(2) and 36 were decisions adopted in accordance with the simplified procedure. While there were no prohibitions (pursuant to Art. 8(3)) in the period, there were three decisions adopted pursuant to Art. 8 (2). Of these two were adopted pursuant to conditions and obligations and one was granted unconditionally. In addition the Commission took two referral decisions pursuant to Article 9 of the Merger Regulation. Finally three new in-depth investigations were opened during the period.

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

Celanese/Degussa

On 11 June the Commission approved the proposed creation of a Joint Venture between the German chemical producers Celanese and Degussa. The parties will contribute most of their oxo chemicals businesses to the Joint Venture. The Commission was initially concerned about the parties’ strong position in several markets. But after an in-depth analysis it concluded that the presence of competitors with important spare capacities would exert sufficient competitive pressure on the Joint Venture.

Celanese and Degussa propose to contribute most of their oxo chemicals business to a newly created Joint Venture company, to be called European Oxo Chemicals (‘EOC’). Celanese AG is a chemicals firm operating worldwide with core business in basic chemicals, acetates, technical synthetic fibres, polypropylene foil and food additives. The oxo-chemicals to be contributed to the JV are oxo-alcohols, plasticisers and solvents and are intermediate products used in processing synthetic fibres, in the varnish and paint industries and in cosmetics and pharmaceuticals.

EOC will be active in the production of a number of oxo chemicals: butyraldehyde, butanol, 2-ethylhexanol (2-EH), di-octyl phthalate (DOP), butyl acetate, and carboxylic acids. Butyric aldehyde is produced from propylene and synthetic gas and is the first chemical step in the oxo-C3 chemistry to produce these products.

The Commission had opened an in-depth investigation because the concentration will lead to high market shares in several markets. However, the investigation revealed that the creation of the Joint Venture would not lead to the creation or strengthening of a dominant position. Market shares in these markets are not a reliable indicator of market strength, given the fact that most of the output is used internally, and only a small part of the production is sold on the merchant market. The behaviour of the market participants is thus not driven by their activities on the merchant market. This is especially true for the market for butyraldehyde, where only 3% of the production is sold on the market.

In addition, there are several competitors active on the relevant markets, including BASF (Germany), Atofina (France), Perstorp (Sweden), and Zaklady (Poland). These competitors have sufficient spare capacity to increase their sales and thus counteract any price increases or output reductions made by the parties.

Further competitive pressure is exerted by producers from outside the EEA, Zaklady (Poland) or other producers from Eastern Europe or the USA. These producers could increase their sales in the EEA, should the parties or the JV try to increase prices. This is especially true for Zaklady, which already competes on several of the markets concerned.
Verbund/EnergieAllianz

On 11 June the Commission also approved a link-up between the Austrian power company Österreichische Elektrizitätswirtschafts-AG (Verbund) and five Austrian regional power suppliers grouped together as EnergieAllianz, subject to conditions and obligations. The initial plan (known as the ‘Austrian power solution’ or ÖSL in German) would have created or strengthened dominant positions held by Verbund and EnergieAllianz, especially in the market for the supply of electricity to large customers. But the parties entered into significant commitments that fully resolve the Commission’s concerns. One of these commitments: the sale of Verbund’s controlling stake in APC, its distributor for large customers, must be completed before the merger can take place.

Under the terms of the deal notified to the Commission for regulatory clearance on 20 December, EnergieAllianz and Verbund will combine their activities in electricity trade and supply to large industrial customers with an annual consumption exceeding four gigawatt-hour (GWh). The parties will supply electricity via two newly created joint ventures, APT and E&S. The new operation will be roughly the 10th largest newly created joint venture.

After a detailed inquiry, the Commission concluded that the deal would create or strengthen dominant positions held by EnergieAllianz and Verbund in the markets for the supply of electricity to large customers, small distributors and small customers in Austria.

Whilst it is true that the liberalisation of the energy market in Austria already covers all categories of customers and that there is no shortage of capacity on the interconnectors with Germany, the Commission concluded that the relevant geographic product markets did not extend beyond Austria’s borders and that there was no guarantee that this situation would change in the near future.

Foreign competitors in Austria have so far only secured market shares of less than 5%, excepting some foreign holdings in Austrian regional suppliers. The geographic market is isolated because electricity prices to final consumers (excluding through-transmission and other charges) are lower in Austria than in Germany due to established customer relations and to marketing and cost advantages conferred on Austrian companies by their access to domestic production capacity, especially cheap, clean hydroelectric power. These factors act as barriers to foreign competitors wishing to enter the Austrian market.

Another major obstacle to entry is the cost of balancing energy for new entrants. Balancing energy is used to make up the difference between planned consumption and actual consumption in power supply control areas. At present ‘balancing energy’ cannot be supplied in sufficient volume from one control area to another. The control area relevant in this transaction comprises all of Austria with the exception of the two westernmost Länder, Vorarlberg and the Tyrol. In the absence of appropriate commitments, the planned transaction would lead to a higher cost risk to competitors, a substantial increase in balancing energy costs, and ultimately higher prices for consumers.

The parties’ combined share of these markets is high: depending on the class of consumer, it ranges from 50% to 75%. The situation would have been further worsened by the disappearance of Verbund as EnergieAllianz’s most important existing and potential competitor, by the parties’ leading position in power generation, and by existing links with competitors.

To overcome the Commission’s objections, Verbund and EnergieAllianz entered into the following commitments:

- Verbund will sell its 55% shareholding in APC, a company that deals with large customers and has a share of around 10 to 15% of the Austrian market. The effectiveness of this key commitment will be safeguarded by the conclusion of a power supply contract for three terawatt-hours (TWh) a year for at least four years - enough to cover the bulk of APC’s electricity requirements. The buyer will also be able to make short-term adjustments to its demand profile. Only once this sale is effective, and the Commission has approved the buyer found for APC, can the transaction be completed.

This commitment means that one of the independent firms already operating in Austria may be able to expand its business significantly by buying APC and thus provide an important counterweight to the parties’ market power. The same effect would also be achieved if an active foreign competitor were to enter the market by buying APC.

- until the end of 2007, Verbund undertakes not to exercise important voting rights it holds in the Styrian regional supplier Steweag-Steg, which is controlled jointly by EdF and the Land of Styria. Energie AG Oberösterreich, which belongs to EnergieAllianz, will likewise refrain until the end of 2007 from exercising its voting rights in the Salzburg regional supplier SAG; Energie AG Oberösterreich’s share in SAG is to
be transferred to a trustee until then. The parties’ large customers will also have the unilateral right to cancel their contracts once the merger has taken place and if they so wish.

- a volume of electricity totalling 450 gigawatt-hours, structured in line with the consumption profile of small Austrian customers, and including 50% hydroelectricity, is to be auctioned each year until July 2008. This is intended to increase liquidity, so as to encourage entry to and expansion on the Austrian small customers market and to improve the range of sources open to small distributors. The Commission has taken note of Verbund’s undertaking to sell the shares it still holds in the new suppliers in the area of small customers, MyElectric and Unsere Wasserkraft.

- To deal with the problem of balancing energy the parties submitted a package of commitments, which sets a price cap for a transitional period until an integrated cross-border market in balancing energy is achieved. This reduces the price risk to competitors and encourages the mutual integration of the markets in balancing energy in Austria and the neighbouring countries.

In assessing those commitments which are limited in time, the Commission took account of the fact that in the medium term, given the existing conditions in Austria with regard to the degree of market liberalisation and the adequate interconnection capacity to and from Germany, the scheduled entry into force of the new Electricity Market Directive and the Regulation on cross-border trade in energy can be expected to produce a lowering of the barriers to entry. This legislation is to become effective between 2004 and 2007, and among other things provides for advances in respect of the removal of charges for cross-border electricity supplies and with regard to unbundling.

The Commission took note of the fact that the Austrian Minister for Economic Affairs and Labour indicated that he was willing to implement the provisions of the Energy Market Directive concerning legal unbundling immediately. It also took note of the parties’ commitment to remove the existing bottlenecks in the Austrian high-voltage network as soon as the necessary permits have been granted, and to proceed with the development of interconnectors to Italy and Slovenia. Taken together, these measures will improve the scope for entry to the Austrian market.

The Commission acted in close and fruitful contact with the Austrian federal competition authority and the Austrian energy regulator, E-Control. The regulator will supervise the implementation of sections of the commitment package, especially with regard to balancing energy and energy auctions.

**DSM/Roche**

On 23 July 2003, the European Commission cleared the proposed acquisition of the Vitamins and Fine Chemicals division of Swiss company Roche by Dutch-based company DSM after a detailed investigation. The Commission had identified competition concerns in the market for feed enzymes, which are animal feed additives. DSM submitted a package of undertakings aimed at terminating its alliance with German fine chemicals company, BASF, for the production and distribution of feed enzymes and transferring its activities in the production of feed enzymes to a purchaser to be approved by the Commission. After careful evaluation of the commitments package, the Commission concluded that the remedies removed its competition concerns and to restore effective competition.

DSM and RV&FC are active in a broad range of product areas, however, the only overlaps are in feed enzymes, in particular non-starch polysaccharide degrading enzymes (NSP degrading enzymes) and phytase. NSP-degrading enzymes help animals release nutrients in their feed. Phytase is an enzyme used to increase the amount of digestible phosphorus in animal feed and to limit pollution by reducing the amount of phosphate in animal manure.

DSM and RV&FC belong to two different vertical alliances. DSM has an alliance with BASF and RV&FC with Novozymes, a Danish producer of industrial enzymes. In their respective alliances DSM and Novozymes are mainly responsible for research and development and production whilst BASF and RV&FC are mainly responsible for sales and distribution. Both alliances provide for a high level of economic integration and mutual interdependence.

The acquisition of RV&FC by DSM would have created a structural link between the two alliances and led to near monopolies on the market for phytase at both the levels of production and distribution.

In the course of the first-phase review of the case, DSM offered undertakings to terminate the DSM/BASF alliance and to divest its production and R&D activities in the field of feed enzymes. The Commission was not able to determine in a clear-cut manner, whether that solution would fully
restore effective competition. A second phase inquiry was therefore launched.

The review revealed that the commitments, as subsequently amended, enabled full transfer of production and R&D capability, including intellectual property rights and all other necessary assets from DSM to a suitable purchaser to be approved by the Commission. This will create an independent and viable competitor on the feed enzymes market.

The Commission co-operated closely with the US Federal Trade Commission, which also reviewed the operation.

B – Summaries of decisions taken under Article 6 of Council Regulation (EEC) No 4064/89

Konica/Minolta

On 11 July the Commission decided to clear the proposed acquisition of Minolta by Konica, two Japanese manufacturers of cameras, photocopiers and other imaging products. Both Konica and Minolta develop and manufacture imaging products and equipment, including cameras, photocopiers and photometers. Konica’s main business in the latter field consists in its shareholding in the Japanese firm Sekonic.

The acquisition was notified to the Commission, at the end of May, for regulatory approval under the Merger Regulation because both companies do significant business in the European Union. The Commission’s investigation showed that the activities of Konica and Minolta are largely complementary although they overlap in several product markets, photocopiers, compact cameras, digital cameras and photometers. Photometers are devices used by professional photographers to measure light intensity.

The Commission did not have concerns as regards the effects of the merger on competition in the market for photocopiers and cameras, since it considered that the merged entity would still lag behind market leaders Ricoh and Canon (photocopiers) and Olympus (cameras).

However the Commission did have concerns as regards the effects of the merger on the market for photometers where the acquisition might have led to the creation of a dominant position in this market. However since Konica offered to divest its approximately 40% stake in Sekonic, a Japanese manufacturer of photometers the Commission took the view that this removed the competition concerns.

The Commission’s investigation was carried out in close co-operation with that of the US Department of Justice.

Caemi/CVRD

In July the Commission authorised CVRD’s proposed acquisition of sole control of Caemi, currently controlled by the Japanese iron ore trader Mitsui and CVRD. CVRD acquired joint control of Caemi as a result of a transaction that the Commission had cleared subject to conditions in October 2001. The Commission concluded that the change from joint to sole control did not give rise to new competition concerns.

CVRD (Companhia Vale do Rio Doce) and Caemi are Brazilian-based mining companies active in the production and selling of iron ore, kaolin and bauxite. Since CVRD already had controlling shareholding in the target company, this transaction gave rise to a change from joint to sole control. The acquisition of joint control by CVRD and Mitsui took place within the framework of a previous operation cleared by the Commission in October 2001 (‘the first transaction’), following a second-phase investigation which identified serious competition concerns in the seaborne (world-wide) iron ore markets for pellets, DR pellets and the combination of DR pellets and DR lump.

In line with the approach adopted by the Commission when clearing the first transaction, the analysis focused on the markets for the production and sale of iron ore which were the only affected markets. The market investigation showed that the division of iron ore into three distinct relevant product markets, i.e. fines, lump and pellets, remained valid. Furthermore a large majority of respondents had confirmed that despite a significant increase in demand from the Chinese market the geographic scope of the iron ore markets continued to comprise all seaborne customers areas, that is to say, world-wide regions fully or partly dependent on seaborne supplies. Basically, most suppliers of iron ore still sell in both Pacific and Atlantic areas and most major customers continue to purchase from Australia, Brazilian and other producers.

The results of the Commission’s enquiry showed that the market dynamics (contractual practice, price settling and discounts policy) had not changed significantly since the original transaction was authorised and that CVRD’s competitive
position had remained substantially stable in the previous 18 months.

The Commission also considered that the existing links between the notifying party and the target should also be taken into consideration when assessing the competitive impact of the operation. CVRD already exercised decisive influence and played a predominant role in determining Caemi’s market strategy. It was therefore reasonable to expect that Caemi’s commercial strategy would not be substantially changed as a result of CVRD’s acquisition of sole control.

The Commission concluded that the notified operation had no significant impact on the relevant markets, as it did not alter the existing competitive situation resulting from the first transaction and because no additional competition concerns had been identified.

As the remedy attached to the decision authorising the first transaction, the sale of Caemi’s interest in Québec Cartier Mining Company (QCM), had not yet been implemented, CVRD undertook to assume responsibility for complying with this commitment. This is consistent with the Commission’s previous practice in such cases.

Candover/Cinven/BertelsmannSpringer

On 29 July the Commission decided to authorise the acquisition of joint control by the investment companies Candover and Cinven of the German-based academic and professional publisher BertelsmannSpringer. The transaction created links between BertelsmannSpringer and the Dutch publisher Kluwer Academic Publishers which had been acquired by Candover and Cinven in 2002. It also led to the creation of links between BertelmannSpringer’s business and that of the French professional publisher MediMedia that is co-controlled by Cinven.

Both BertelsmannSpringer and Kluwer Academic Publishers are active in the global market for academic publishing with a special focus on scientific, technical and medical (“STM”) journals, which are almost all exclusively published in English. This market deals with access to the latest developments in academic research. It exhibits some specific features: a main feature is the “must have” characteristic of certain journals. Universities depend on the information provided in such journals and cannot afford to cancel subscriptions without losing access to the most recent subjects of discussion in the academic community. A further significant feature of this market is the consider-

able rise in subscription prices, which has occurred over the past decade.

The Commission’s investigation found that BertelsmannSpringer and Kluwer Academic Publishers would as a result of the merger become the number two player in the market albeit lagging well behind the market leader Elsevier Science. Given the heterogeneity of journals and books published in different scientific disciplines and the heterogeneous nature of these books and journals even if published within a discipline, the Commission found no indication that a collective dominant position could have been created as a result of the merger.

BertelsmannSpringer and MediMedia are both active in the French and German markets for professional medical publishing. These markets comprise newspapers, magazines and drug directories mainly addressed to doctors and financed by advertising. Whereas the transaction did not raise competition concerns in relation to the German market the Commission’s investigation showed that the operation would lead to a dominant position on the French market. Candover and Cinven removed these competition concerns by offering to divest BertelsmannSpringer’s French business in the market for professional medical publishing known under the name ‘Groupe Impact Médecine’.

Procter & Gamble/Wella

On 30 July the Commission cleared the proposed acquisition by the American corporation Procter & Gamble of the German company Wella AG subject to a package of commitments. Procter & Gamble is an international group of companies engaged in the production of baby, feminine and family care products, fabric and home care products, beauty and health care products, snacks and beverages. Wella is an internationally active manufacturer of cosmetics focusing on hair care products for consumers and hair salons, hair salon furniture and equipment, training programs for hair salons, cosmetics and fragrances.

On 16 June 2003 the Procter & Gamble Company (P&G) notified the Commission of an agreement pursuant to which P&G proposed to acquire sole control of Wella AG (Wella). Both P&G and Wella are active in the markets for hair care products, fragrances and colour cosmetics. The proposed transaction did not raise competition concerns in the markets for fragrances and colour cosmetics.

With respect to haircare, only Wella is active in the markets for professional hair care products (hairdresser channel) whereas the parties have overlaps
in the markets for retail haircare products. The Commission considered that the operation as notified would be likely to create a dominant position for the whole range of hair care products (shampoo, conditioners, treatments, styling products and colorants) in Ireland, and in some hair care markets in Norway and Sweden.

In order to restore effective competition in the markets for hair care products, P&G undertook to grant an exclusive 5 year licence, followed by a 3 year black-out (non-use) period of: (i) the P&G hair care brand ‘Herbal Essences’ for the whole range of hair care products in Ireland, Norway and Sweden; (ii) the P&G colorant brands ‘Loving Care’, ‘Lasting Color’, ‘Glints’, ‘Borne Blonde’ and ‘Highlights’ and the Wella styling brand ‘Silvikrin’ in Ireland; and (iii) the Wella styling brand ‘Catzy’ in Norway. The Commission considers the remedy package consisting of the licensing of these brands together with certain other assets offered by the parties removed its concerns as regards the effects of the transaction in the hair care markets in Ireland, Norway and Sweden.

Teijin/Zeon

On 13 August the Commission approved the proposed creation of a joint venture bringing together the DCPD RIM (dicyclopentadiene reaction injection moulding) activities of Zeon and Teijin.

On 30 June Zeon and Teijin notified to the Commission their intention to combine the bulk of their world-wide activities in the production of DCPD RIM formulations and DCPD mouldings in a new joint venture company. In relation to plastic mouldings these products (which include septic tanks and truck parts) are bulky and difficult to transport. The joint venture company RIMTEC will produce moulded products in Japan only. Both companies supply DCPD RIM formulations in Europe.

Zeon is a Japanese company that is active in the design, manufacturing and distribution of synthetic rubbers, synthetic latex, chemicals, medical equipment, environmental and civil engineering materials. Zeon is also active in the DCPD RIM business and its subsidiary Zeon RIM manufactures mouldings. A second subsidiary Zeon Chemical Yonezawa manufactures the DCPD RIM formulation.

Teijin is a Japanese company that is the ultimate parent company of a group of undertakings active in developing and marketing fibres. With regard to DCPD RIM products, Teijin operates in this sector through its wholly owned subsidiary, Teijin Metton. Teijin Metton holds 60% of the shares in MTN Chemicals, one of the parents of the Metton America Incorporated (MAI) joint venture, which is also active in the DCPD RIM business. MTN Chemicals holds 60% of the shares in MAI. Teijin Metton also directly holds 25% of MAI’s shares.

Zeon and Teijin are the only suppliers of DCPD RIM formulations in Europe. The combination of their activities in this area therefore would have given rise to serious competition concerns. The parties however undertook to divest Teijin’s controlling interest in MAI to an independent and viable third party. As this divestment would remove the entire increment in market share resulting from the transaction the Commission decided to clear the operation subject to the implementation of this condition.

The Japanese Fair Trade Commission had previously approved the transaction.

C – Summaries of Decisions taken under Article 9 of the ECMR

Arla/Express Dairies

The European Commission decided, 10 June 2003, to refer part of the proposed merger between Danish-based dairy products company Arla Foods and Britain’s Express Dairies to the UK competition authorities, which then assessed the competitive impact in the markets for the supply of processed fresh milk and fresh cream in Britain. On the same day the Commission cleared the operation for the remaining product and geographical markets.

On 16 April, the Commission received notification of an operation whereby the dairy co-operative, Arla Foods amba, would acquire control of Express Dairies plc, thereby combining two of the four largest dairies in the UK. The United Kingdom asked the Commission on 15 May to refer the examination of certain parts of the case to its competition authorities, namely: (i) the market for the procurement of raw milk in the UK, (ii) the market for the supply of fresh processed milk in Great Britain and (iii) the market for the supply of fresh potted cream (non-bulk cream) in the UK. On these markets the UK argued that the transaction would create significant competition concerns and that its competition authorities were better placed to deal with these aspects of the case. The UK authorities also asked for the market for bottled milk (primarily supplied to milkmen) in
certain areas in England, where they considered that the transaction might affect competition.

The Commission considered that the operation would raise potential competition concerns which will be better dealt with by the British competition authorities on the markets for the supply of fresh milk, fresh non-bulk cream and for the supply of bottled milk.

However, the Commission did not identify any competition concerns on the market for the procurement of raw milk, on the basis of single or collective dominance. Therefore, the Commission rejected this part of the request and cleared the proposed transaction with regard to this market and the markets for which no referral had been requested. The Commission took great care to establish that the impact of the merger on the markets subject of a referral request was limited to the UK and, therefore, that the one-stop shop principle provided by the European merger control rules was respected.

Lagardère/Natexis/VUP

On 14 May 2003, the French authorities lodged an application asking that the planned acquisition of Vivendi Universal Publishing (VUP) by the French conglomerate Lagardère be referred to them under Article 9 of the Merger Regulation. The operation, which involves the two largest publishers in France, had been notified to the Commission on 14 April 2003.

The French authorities consider that the transaction threatens to create dominant positions in France on a number of markets forming part of the ‘book chain’ (markets in the acquisition of authors’ rights, publishing and distribution); they therefore requested a partial referral of the merger so as to be able to analyse the impact of the transaction in France on these various markets.

Following a detailed examination of the markets to which the French authorities’ request related, the Commission concluded that most of them are of supranational geographical dimension, covering the whole of the French-speaking area in Europe. Since one of the conditions for referral (i.e. the existence of separate geographic markets within the Member State) is not met, these markets could not be subject to referral.

As far as the markets for the sale of school books and other text books are concerned, the Commission found that the first of these two markets was a separate national market, as the French authorities claimed (notably because of the existence of national educational programmes); however, the Commission was unable to decide on the geographical dimension of the second of the two markets. Given the substantial overlap between these two markets and all the other activities forming part of the parties’ operations in the book chain, the Commission took the view that a single authority should examine the impact of the transaction on all the relevant markets. It also took account in reaching its decision of the Lagardère group’s preference for dealing with a single competition authority, particularly if only the market for the sale of school books was referred to the French authorities. Lastly, the Belgian authorities informed the Commission that they preferred the case to be dealt with at Community level. The Commission therefore adopted a decision, 23 July 2003, refusing the request of the French authorities for the partial referral of the case.

D – Summaries of judgements of Court of First Instance in competition cases.

Judgement of 3 April 2003 in Case T-342/00 – Petrolessence SA, Société de Gestion de Restauration Routière SA (SG2R) v. Commission

This judgement finds that the Commission did not go beyond the limits of its discretionary power in assessing whether the applicants could be accepted as buyers of certain assets in the course of divestitures on which a decision to allow a merger was conditioned. The refusal to accept the applicants as buyers was therefore upheld by the Court of First Instance (CFI).

By a decision adopted 9 February 2000 the Commission approved the proposed merger between TotalFina and Elf pursuant to Article 8(2) ECMR on condition that certain commitments submitted by the parties to the merger be fulfilled.

In its decision of 9 February 2000 the Commission had found that demand for fuel on motorways is distinct and different from off-motorway demand and that the supply of fuels on motorways is not constrained by the supply of fuels off motorways. The significant and persistent price differences between fuels sold on and off motorways confirmed this and the relevant product market was therefore that for the sale of fuels on motorways. The current competitive situation on the market for motorway fuel stations was close to being one of dominance exercised either solely by
TotalFina or else jointly with TotalFina in the role of leader.

The Commission found that the merger in question would lead to the creation of a dominant position on the market for motorway sales in France and that after the merger TotalFina Elf would have strong incentives to raise its prices or reduce its services. The proposed commitments aimed to overcome the competition problems identified by the Commission. In particular given that the merger raised substantial competition concerns inter alia on the sale of petrol on French motorways, the merged entity undertook to divest 70 French petrol stations to viable operators, potentially or actively present on the relevant market and capable of maintaining or developing effective competition. This divestment was to take place within a specified time-limit.

In order to comply with the commitment TotalFina lodged with the Commission on 12 August 2000 a request for approval of purchasers for all 70 of the stations which it had undertook to divest. By decision of 13 September 2000 notified to TotalFina the Commission rejected the request for approval. This rejection argued in particular that Petrolessence (the applicant), the proposed buyer of 6 stations, did not have the capacity to maintain and develop effective competition particularly with TotalFina Elf as it was a ‘new entrant without recent experience of the market for the retail sale of fuels...’. Petrolessence S.A. contested this decision on the grounds inter alia that the text of the commitments did not require the purchasers to be active in the petroleum sector.

The Court found that review by Community courts of complex economic assessments made by the Commission in exercising the discretion conferred on it by Regulation 4064/89 must be limited to ensuring compliance with the rules of procedure and the statement of reasons, as well as the substantive accuracy of the facts, the absence of manifest errors of assessment and of any misuse of power.

The Court found that the Commission had not exceeded its margin of discretion when evaluating the applicants’ candidacy. The Court also found that the applicants had not shown that the Commission had made a manifest error of assessment in taking the view that the applicants would not have been able to maintain or develop effective competition in the market as required by the commitments.

The CFI therefore rejected the appeal as unfounded and ordered the applicants to bear the costs (including those of the procedure for interim relief).

**Judgement of 8 July 2003 in case T-374/00 – Verband der freien Rohrwerke e. a. v. Commission**

On 8 July 2003, the Court of First Instance (CFI) rejected an appeal brought by third parties against two phase I Commission decisions clearing German steel maker Salzgitter AG’s acquisition of Mannesmannrohr-Werke AG (MRW), the tube business of former Mannesmann AG of Germany (now part of Vodafone).

**The Commission Decisions**

The Commission cleared the proposed acquisition by Salzgitter of MRW by way of two decisions, one of 5 September 2000 adopted under Article 6(1)b of the Merger Regulation and the other of 14 September 2000 taken under Article 66 of the ECSC Treaty (1).

Salzgitter is an integrated steel producer which makes a wide range of products, including large diameter spirally welded pipe. MRW is engaged in the production of steel tubes and pipes. Jointly with Dillingerhütte (DH), a subsidiary of France’s Usinor, MRW controls Europipe, a company which combines the former large diameter longitudinally welded pipe (LDLWP) interests of MRW and the former LDLWP and spiral welded pipe operations of Usinor. MRW also controls Hüttenwerke Krupp Mannesmann (HKM) jointly with Thyssen Krupp Stahl (TKS). HKM produces semi-finished products for its parents.

The Commission found that there were no competition problems in areas where the operation gave rise to overlaps, having regard to the parties’ relatively low share of the EEA-wide steel and tube markets and existing over-capacity in these industries. Nevertheless, in order to allay fears expressed by a number of smaller manufacturers of large diameter tubes who purchase raw materials from Salzgitter that after the operation this source of supply might no longer be available to them on competitive terms, Salzgitter made a declaration that it will continue to provide quarto plate and hot rolled wide strip on non-discriminatory terms. The ECSC decision took note of this declaration.

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(1) Cases COMP/M.2045 and COMP/ECSC.1336.
The Appeal

The appeal was filed by a trade association, Verband der freien Rohrwerke e.V. and two small German tube manufacturers, Eisen- und Metallwerke Ferndorf GmbH (Ferndorf) and Rudolf Flender GmbH & Co. KG (Flender). The applicants submitted that the Commission’s decision did not address the vertical issues raised by the concentration adequately. In particular, Salzgitter would after the operation have the means and the incentive to discriminate against independent tube manufacturers with regard to their requirements for quarto plate and hot rolled wide strip (the raw materials necessary to make tubes) so as to favour MRW’s and Europipe’s tube production.

The Judgement

The Court rejected the appeal against the ECSC decision as inadmissible on formal grounds. With regard to the Merger Regulation decision, it discussed the applicants’ arguments that the Commission had wrongly assessed the effects of the concentration on the markets for large and small diameter pipes, that it had not adequately taken into account the vertical integration of Salzgitter, Europipe and HKM resulting from the operation, and that it had not sufficiently motivated its decision. In doing so, the Court confirmed, referring to the case law in France v. Commission (1), Gencor (2) and Endemol (3), that in applying the Merger Regulation, the Commission enjoys a certain discretionary power, notably when making assessments of an economic nature.

The Court rejected the applicants’ argument that the merged entity’s market share of 30.5% on the market for large diameter pipes (4) would create a dominant position, and that the Commission had wrongly calculated the market shares. With regard to the vertical effects, the Court held that given Salzgitter’s market shares of below 10% on the EEA-wide market for quarto plate (the raw material for LDLWP) and of considerably below 25% on the EEA-wide market for hot rolled wide strip (the raw material for spiral welded pipes), the Commission did not have any ground for serious doubts.

The Court rejected the applicants’ argument that Salzgitter would be part of a dominant oligopoly in the market for quarto plate, since no evidence was provided as to whether the criteria for collective dominance (5) were fulfilled. The Court also noted that the Commission had discussed the effects of Salzgitter’s position as a supplier of quarto plate to independent tube makers in its ECSC decision, stating that the legality of the EC decision has to be assessed in its factual and legal context, of which the ECSC decision formed part. The Court also dismissed the applicants’ view that the product market for hot rolled wide strip should be defined narrowly to include only the output used for tube production, and that the geographic market should be national rather than EEA-wide. In fact, the Commission was able to show that hot rolled wide strip is interchangeable regardless of its final use, even though it may need further processing for some purposes, and that even under a narrower market definition, Salzgitter’s market share would not be such as to create a possible vertical competition problem. With regard to the geographic market, the applicants had not provided any evidence to rebut the Commission’s analysis leading to an EEA-wide market, which is also the Commission’s standard practice.

Since the Commission did not commit any manifest error in assessing the effects of the concentration on the market for large diameter pipes, the Court did not discuss whether Salzgitter’s commitment was sufficient to exclude any discrimination. This confirms that ‘take note’ commitments given by notifying parties in the absence of a competition problem do not have any legal relevance.

With regard to the market for small diameter pipes, the Court rejected the applicants’ claim that the Commission had not sufficiently analysed the effects of the concentration on this market, since there was neither a horizontal overlap nor a significant position of the merged entity on the upstream market for hot rolled wide strip.

The applicants further submitted that the Commission should have examined the effects on the relevant markets of the fact that Salzgitter, as a result of the operation, jointly with Usinor / DH controls Europipe, a manufacturer of large diameter pipes made from quarto plate and hot rolled wide strip, and jointly with TKS controls HKM, a producer of crude steel, slabs and quarto plate.

(1) ECJ, judgement of 31 March 1998, joint cases C-68/94 and C-309/95, France e.a. v. Commission.
(4) This market comprises both large diameter longitudinally welded and spiral welded pipes. Whereas large diameter longitudinally welded pipes are made from quarto plate, large diameter spiral welded pipes are made from hot rolled wide strip.
First of all, the Court, referring to the Matra judgement (1), stated that since the operation had been notified to the Commission under the Merger Regulation, and in the absence of any evidence of possible co-ordination between the parent companies of both Europipe and HKM, the Commission was under no obligation to analyse such effects under Article 81 EC. It furthermore held that there were no elements indicating that the links between Salzgitter, on the one hand, and Usinor / DH or TKS, on the other hand, would give rise to competition concerns relevant under the Merger Regulation, referring to evidence spelled out in the ECSC decision that Salzgitter’s exit as a supplier of quarto plate from the market would not have any significant impact, that there was no incentive for Usinor not to supply independent tube makers with quarto plate, and that in any event both the capacity utilisation rate of European steelworks producing quarto plate and entry barriers are low.

With regard to the claim that the Commission had not sufficiently motivated its decision, the Court, quoting the Air France case (2), held that the Commission must clearly state the reasons for which it is convinced that the notified operation does not give rise to serious doubts with regard to its compatibility with the Common Market. However, it is not under an obligation to discuss on its assessment every single legal or factual element that could be possibly linked to the notified operation and/or was submitted to it in the administrative procedure, notably in view of the necessity to quickly review cases under the Merger Regulation.

Conclusion

In this case, as in case T-342/00 Petrolessence SA, Société de Gestion de Restauration Routière SA (SG2R) v. Commission discussed above, the Court expressly confirmed the Commission’s discretion in making economic assessments when applying the Merger Regulation. If the contested decision is based on clear and convincing reasoning, the Court may accept that reasoning without examining the arguments brought against it in every detail. Furthermore, Commission decisions are to be interpreted in their factual and legal context, so the Commission does not need to discuss in its decision every possible legal aspect, provided that its reasoning explains clearly the grounds on which the decision is based.

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