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
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

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(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 Alunor and its Göttingen and Nachtstedt rolling mills or 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 Alunor 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 globally 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, Etrina S.p.A. (‘Etinera’), 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 2003, BAT, along with two commercial partners, Axiter S.p.A. and FB Group S.r.l., 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.