1. Policy developments

1.1 Guidelines for broadband networks

The European Commission has adopted Guidelines on application of state aid rules to the public funding of broadband networks. Over the last five years, the Commission has adopted more than 40 individual decisions developing coherent and consistent practice with regard to state support for the roll-out of broadband networks. The new Guidelines build on this experience.

In particular, they explain how public funds can be channelled into deployment of basic broadband networks and next generation access (‘NGA’) networks in areas where private operators will not invest. The Guidelines outline the distinction between competitive areas (‘black’ areas), where no state aid is necessary, and unprofitable or underserved areas (‘white’ and ‘grey’ areas), in which state aid may be justified if certain conditions are met. This distinction is then adapted to the situation of NGA networks (deployment of which is still at an early stage) by requiring Member States to take into account not only existing NGA infrastructure but also firm investment plans by telecom operators to deploy such networks in the near future. A number of crucial safeguards (such as detailed mapping, open tenders, an open access obligation or technological neutrality and claw-back mechanisms) are laid down in the Guidelines in order to promote competition and avoid ‘crowding out’ private investment.

The primary objective of the Broadband Guidelines is to foster wide and rapid roll-out of broadband networks, while at the same time preserving the market dynamics and competition in a sector that is fully liberalised. The Guidelines also specify that whenever state aid is granted to private operators it must foster competition by requiring the beneficiary to provide open access to the publicly funded network for third-party operators.

1.2 Technical amendment to the Temporary Framework

On 8 December 2009 a technical amendment to the Temporary Framework was adopted to open up easier access to finance and encourage long-term investment, especially in Member States with low labour costs. Member States will now be able to base the maximum amount of the investment loan covered by a guarantee either on the total annual wage bill of the beneficiary or on the EU-27 average labour costs established by Eurostat (the latest available data). (An earlier amendment made on 28 October 2009 allows separate compatible aid limited to €15,000 for farmers.)

2. Cases approved

2.1 Decisions taken under Article 106 of the TFEU: services of general economic interest

France Télévision

On 1 September 2009, the European Commission authorised a payment of state aid to France Télévision in 2009, as it complied with the Commission Communication on state aid for the funding of public service broadcasters. The Commission approved immediate payment of a €450 million subsidy for France Télévision’s public service broadcasting costs, for which provision had already been made in France’s Budget Act adopted in December 2008. However, at the same time, the Commission opened a formal investigation into several aspects of funding notified for subsequent years. The Commission is concerned about the use made of the taxes introduced by the reform and about possible overcompensation for public service costs up to 2011 and 2012. France will have an opportunity to comment on the concerns expressed by the Commission, which will also take stakeholders’ comments into account before taking a final decision.

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
Dutch social housing

On 15 December 2009, the European Commission endorsed commitments made by the Dutch authorities to bring the social housing system into line with EU state aid rules (7). In particular, the Dutch authorities will ensure that state funding is not used for commercial activities and that housing is allocated in a transparent manner based on objective criteria. The Commission also approved new aid of € 750 million for social housing projects in declining urban areas for the next ten years. The Commission found the aid compatible with the rules on services of general economic interest. In 2005, the Commission had expressed doubts about the social housing system in the Netherlands. It had received complaints from Dutch house-building companies that, with the help of state aid, social housing corporations were steadily expanding their commercial activities instead of using state funding to provide social housing. The state support for social housing corporations mainly takes the form of loan guarantees and grants. Following the Commission’s investigation, the Dutch authorities have undertaken to change the social housing system to make it more transparent and focus on a clearly defined target group of socially less advantaged persons. Commercial activities, by contrast, can no longer benefit from aid. On commercial housing markets, social housing corporations will have to compete on the same conditions as other operators.

In the interest of social mix and social cohesion, 90% of the dwellings in each housing corporation (‘woningencorporatie’) will be rented to a pre-defined target group of socially less advantaged persons. The remaining 10% may be allocated to other groups, but on the basis of objective criteria with an element of social prioritisation. The Commission concluded that social mix and social cohesion are valid public policy objectives, for which state aid may be justified. The Commission’s decision confirms its long-standing policy line that national authorities have a wide margin for defining the criteria and conditions for social housing and other services of general economic interest.

Polish post

On the same day as the Dutch decision, the European Commission also endorsed a scheme to compensate the Polish post for net losses incurred in discharging its public service obligations between 2006 and 2011 (8). The Commission found the compensation mechanism compatible with Article 106(2) of the TFEU, provided certain conditions are fulfilled. In particular, the Commission required Poland to improve the parameters for calculating, monitoring and reviewing the compensation, in order to avoid overcompensation, and the arrangements for repaying overcompensation. Poland must also ensure that any significant changes made to the Polish accounting system during the aid scheme are compatible with Article 14 of the EU Postal Directive (Directive 97/67/EC) and that the Commission is informed of such changes within three months of their introduction. The Commission authorised the measure until 31 December 2011.

Finally, the Polish post has been transformed from a state enterprise into a joint-stock company in which the Treasury holds 100% of the shares. As a result, it has lost the legal status which prevented it from going bankrupt, which was equivalent to an unlimited state guarantee. The company is now subject to ordinary bankruptcy proceedings.

Broadband Hauts-de-Seine

On 30 September 2009, the European Commission approved public co-financing of the roll-out of a passive, neutral and open broadband network covering the entire French department of Hauts-de-Seine, including the non-profitable areas (9).

The broadband infrastructure will be constructed and operated under a ‘public service delegation’, a form of concession under French law, lasting for 25 years.

The Commission concluded that the public funding totalling € 59 million would be used to offset the cost of complying with the obligations of a service of general economic interest imposed following an open and transparent tendering procedure and therefore was not state aid. In particular, the compensation does not exceed the cost of rolling out the network in the non-profitable areas of Hauts-de-Seine. The Commission found that the plan is in line with the precedent established by the Court of Justice in the ‘Altmark’ case and with the new Guidelines on the application of state aid rules to the financing of high-speed and very high-speed broadband networks.

In particular, the public service concession-holder chosen as a result of a prior competition procedure will have the status of ‘operator of operators’ and will not be able to deal directly with final consumers or sell services to them. The availability of ‘dark fibre’ (optical fibre that is sold and installed but not connected to active equipment) will make real competition possible at every level. The compensation granted (€ 59 million) is intended solely to offset the

(9) N 331/2008.
costs arising from the roll-out of such a network in non-profitable areas of Hauts-de-Seine.

2.2 Decisions taken under Article 107(3)(b) of the TFEU

2.2.1 Banking Schemes

On 11 September, the Commission endorsed a Finnish recapitalisation scheme for banks (10). Under this scheme the Finnish state will subscribe non-cumulative and unsecured subordinated loan instruments issued by eligible banks equal to up to one quarter of the amount of their own funds required. The subordinated loans would be reimbursed after three years upon approval by the Financial Supervisory Authority.

On 25 September, the Commission approved a Polish scheme to stabilise the financial system (11). Two kinds of support measures are envisaged: state Treasury guarantees for issues of new senior debt by banks and liquidity support measures in the form of Treasury bonds, either as a loan or to be sold with deferred payment. The Commission found the measure in line with its Guidance Communication on state aid to overcome the current financial crisis. In particular, the scheme provides for non-discriminatory access for eligible financial institutions, is limited in time and scope and contains safeguards to minimise distortion of competition.

The Commission authorised a Cypriot scheme (12) on 22 October 2009. Cyprus will issue special government bonds that it will lend to credit institutions to use as collateral to obtain liquidity from the European Central Bank (ECB) and on interbank markets. The credit institutions will use the liquidity raised for housing loans and loans to small and medium-sized enterprises on competitive terms.

The Commission approved amendments to an Irish measure (13) on 20 November. The material scope of the scheme has changed. The new guarantee excludes subordinated debt and extends to instruments with a maturity of up to five years. Previously, liabilities were covered until 29 September 2010 at the latest. Secondly, the duration of the scheme has also been altered. The instruments guaranteed under the scheme may be issued from 1 December 2009 until 1 June 2010. Finally, the new scheme aligns the guarantee fee to the remuneration structure set out in the Commission Guidance Communication on state aid to overcome the financial crisis.

On 8 December, the European Commission approved a Slovak scheme aimed at maintaining stability in the banking sector by providing capital injections and guarantees to eligible financial institutions (14).

Ad hoc aid

On 18 November 2009, the Commission adopted decisions on the restructuring of three major banks: ING, Lloyds and KBC.

ING

ING received a €10 billion capital injection from the Dutch state on 22 October 2008. This was authorised by the Commission as rescue aid on 13 November 2008 (15). After early redemption of €5 billion before the end of 2009, ING obtained better repayment terms worth approximately €2 billion. Moreover, ING received €12 billion under the Dutch liquidity guarantee scheme, approved by the Commission in October 2008 (16). Finally, on 26 January 2009, the Dutch government provided ING with an illiquid asset back-up facility covering 80% of a portfolio of $39 billion. The Commission approved the measure on 31 March for six months, while at the same time opening an in-depth investigation into the valuation of the portfolio and the degree of burden-sharing.

At the end of its investigation, the Commission was able to approve the restructuring plan for ING, including the illiquid asset back-up facility provided by the Dutch state (17). Approval of the facility became possible after an additional agreement between the Dutch state and ING. Under the restructuring plan notified, ING will pay a significant proportion of the restructuring costs, ING’s long-term commercial viability will be restored and the aid will not lead to undue distortion of competition. The restructuring plan envisages that ING will reduce the risk profile and complexity of its operations and will sell its insurance activities over time. Following a detailed timetable supervised by trustees, ING will also carve out a business unit (Westland Utrecht Hypothecbank (WUH)/Interadvies) to step up competition on the Dutch retail banking market. The Netherlands also committed itself to ban ING temporarily from acquiring other firms and from exercising price leadership. Furthermore, ING will need formal Commission approval for calling (i.e. repaying) hybrid and subordinated debt capital instruments.

(15) N 528/2008, see IP/08/1699.
(17) C 10/2009; the Netherlands and ING have announced an appeal before the General Court against the Commission decision. See http://www.europa.eu.int/9353000/1/j9vvh6nf08tecmv0/vic8ao6fx9wi7ctx=vg9wkec5q2y1, T-29/10 and T-33/10 respectively.
These commitments will stay in place for three years or until the full amount of the capital injection is repaid to the Dutch state, whichever is sooner.

**Lloyds Banking Group**

Lloyds Banking Group is the entity resulting from the acquisition of HBOS by Lloyds TSB in January 2009. In 2008, HBOS was on the brink of bankruptcy as a result of risky lending and heavy dependence on wholesale funding. In view of the importance of HBOS to the UK financial system, the UK government facilitated the takeover of HBOS by Lloyds TSB, notably by making a £17 billion (£19 billion) capital injection into the bank, which gave the state 43.5% ownership of Lloyds Banking Group. Approval of this recapitalisation was conditional on submission of a restructuring plan.

On 3 November 2009, a capital-raising share offer of £20.5 billion was announced. The Commission found that the state’s participation in this share offer worth £5.9 billion (£6.6 billion) constitutes state aid, since it made it easier to place the shares. This was therefore also assessed in the framework of the restructuring plan.

On the basis of this restructuring plan, the Commission concluded that this scheme is in line with its Communication on restructuring (18). In particular, the plan is that Lloyds will pay a significant proportion of the restructuring costs and ensure a sustainable future for the Group without continued state support and that there will be no undue distortion of competition.

In addition, the plan contains a divestment package for Lloyds Banking Group’s core business of UK retail banking to limit the impact of the aid on competition. The divested entity will have a 4.6% share of the personal current account market gained via a network of at least 600 branches. This proposed divestment package will make it easier for a new competitor to enter the UK retail banking market or strengthen the position of a smaller existing competitor on that market and will therefore remove the distortion of competition created by the aid.

Finally, the Commission found that the exit fee which will be paid by Lloyds Banking Group for not participating in the asset protection scheme is high enough to compensate for the advantage which the bank gained from its participation announced on 7 March 2009.

**KBC**

KBC has benefited from three aid measures:

- a recapitalisation of €3.5 billion;
- a second recapitalisation of another €3.5 billion; and
- an asset relief measure on a portfolio containing collateralised debt obligations (CDOs).

The Commission temporarily approved the first recapitalisation on 18 December 2008 (19) and the other two measures on 30 June 2009 (20), while simultaneously opening an in-depth investigation into several aspects of the asset relief measure. Final approval of the measures was conditional on presentation of a restructuring plan capable of restoring the long-term viability of the bank without continued state support.

The Belgian authorities submitted a plan for in-depth restructuring of KBC on 30 September 2009. KBC will retain its integrated banking and insurance model. However, it will divest or run down a significant number of businesses, including in Central and Eastern Europe, particularly those that are not fully in line with its core business model. Furthermore, it will divest a banking business (Centea) and an insurance business (Fidea) in Belgium which will stimulate competition on this core market. The restructuring plan also sets out how KBC will repay the two capital injections to the Belgian authorities.

The Commission’s in-depth investigation (21) into the asset relief measure dispelled its concerns, as it confirmed that the valuation of the CDO portfolio is in line with the Commission’s Communication on impaired assets. In addition, the remuneration paid by KBC to the Belgian authorities is above that required by the same Communication. Furthermore, the Commission found that the restructuring plan will secure the long-term viability of KBC, as the main cause of its difficulties, the CDO exposure, has been addressed by the asset relief measure and the run-down of the business that gave rise to the CDOs. The Commission also found that KBC has contributed adequately to the restructuring from its own resources by means of asset sales and various financial restructuring measures. The Belgian divestments, the other reductions of KBC’s business activities and the commitments provided by the Belgian authorities will sufficiently limit any distortion of competition brought about by the aid.

**Northern Rock**

On 28 October 2010, the Commission approved a package of measures to support the restructuring of UK mortgage bank Northern Rock (22). The bank will be split into a ‘good’ bank that will continue the economic activities of Northern Rock and a ‘bad’
bank, an asset management company which will run down the remaining assets. The financial support from the UK government includes recapitalisation of up to £3 billion, liquidity measures worth up to £27 billion and guarantees covering liabilities totalling several billion pounds. Following an in-depth investigation launched in April 2008, which was extended following substantial amendments to the original plan in May 2009, the Commission concluded that the aid is compatible with the EU rules on state aid and with the Commission’s Communications on application of the state aid rules to banks in times of crisis. The Commission also concluded that the restructuring is capable of restoring the ‘good’ bank’s long-term viability, as it will have only limited exposure to Northern Rock’s risky past lending. Therefore, it will be able to operate without state support in the long term and will eventually be sold to a third party. Moreover, the aid package will enable the ‘good’ bank to continue to provide lending to the real economy. The restructuring measures will correct the excessive pre-crisis expansion of Northern Rock and cut its market share to less than half the pre-crisis level. Please see the separate article on Northern Rock in this issue of the CPN.

Royal Bank of Scotland

Under a package of financial support measures approved by the Commission on 13 October 2008, RBS received state recapitalisation of £20 billion (€22 billion), giving the state a 70% stake in the bank. Approval of this recapitalisation was conditional on submission of a restructuring plan. This was submitted to the Commission on 2 June 2009 and contained additional state measures.

On 26 February 2009, the UK authorities and RBS announced that the bank would take part in the UK’s asset protection scheme (APS). The detailed terms of the APS and of the accompanying aid package for RBS were announced in November 2009: the state would cover 90% of the losses arising from a £281 billion (€309.1 billion) portfolio of assets. RBS would retain the first £60 billion (€66 billion) of losses and the residual 10% of all further losses. The state would provide a second recapitalisation of £25.5 billion (€28.05 billion) and give a commitment to provide up to £8 billion (€8.8 billion) of additional capital if the bank’s core tier-one ratio were to fall below 5% in the next five years.

The Commission considers that the proposed measures will ensure RBS’s return to long-term viability (23). The commitment to withdraw from all non-core and riskier business lines will reinforce its capital and liquidity position. The bank’s participation in the APS will cap the impact of any further impairment of the riskier assets on the bank’s capital position and help to restore market confidence in the bank.

The Commission also found that the level of first losses borne by RBS under the APS and the remuneration charged by the state for its different measures, together with the restructuring plan, would ensure fair sharing of the burden of past losses and an adequate contribution by the bank and its capital providers to financing the restructuring costs.

The restructuring plan provides for divestment of a number of businesses, including RBS’s insurance, transaction management and commodity-trading operations. These sales are important to generate resources which will limit the need for further aid to finance the return to viability, but also to limit the moral hazard (i.e. the danger that a company might take excessive risks if it considers that it will not have to pay for the consequences itself) and any distortion of competition brought about by the aid.

In addition, the plan contains a package for divestment from the UK SME and mid-corporate banking sector, a concentrated market in which RBS is the leading bank. The divested entity will have a 5% market share in the SME and mid-corporate banking market gained via more than 300 branches and 40 business and commercial centres. This will make it easier for a new competitor to enter the market or for a smaller existing competitor to strengthen its position on the market and will therefore stimulate competition.

LBBW

Landesbank Baden-Württemberg (‘LBBW’) benefited from two support measures: an injection of €5 billion of tier-one capital and an impaired assets relief measure in the form of guarantees of €12.7 billion for two portfolios of structured securities totalling €35 billion.

The restructuring plan provides for LBBW substantially to change its business model by focusing on its regional core banking businesses and reducing its capital market activities and proprietary trading. Overall, balance sheet reductions will total about 40% compared with the 2008 year-end figures.

In addition, LBBW will make a series of changes to its corporate governance with the aim of increasing corporate oversight and reducing the potential for undue influence over its day-to-day management. Amongst other things, LBBW will change its current legal status to that of a joint-stock corporation. New requirements regarding the qualifications of board members set out in the EU Banking Directive (Directive 2006/48/EC) will be complied with immediately. In addition, key parts of the voluntary German corporate governance code will be implemented by LBBW before the end of 2010.

LBBW has given a commitment to increase the remuneration of the impaired assets measure to be paid to the Land of Baden-Württemberg, thereby bringing the measure into line with the Commission Guidelines on impaired assets.

Moreover, the Commission concluded that the restructuring measures will enable LBBW to restore its long-term viability. In particular, there will be a clear focus on lending activities and the remaining capital market activities should no longer have the potential to jeopardise the bank’s soundness. LBBW will also make a sufficient contribution to the costs of the restructuring. In particular, LBBW has agreed to meet the Commission’s criteria on burden-sharing by allowing loss-participation by the holders of hybrid capital in the form of non-release of reserves. Finally, from the point of view of appropriate remuneration of the aid and burden-sharing, the Commission was satisfied that the measures set out in the restructuring plan will sufficiently offset the distortion of competition brought about by the aid. In addition, the Commission considers that the changes in corporate governance should ensure that LBBW’s soundness will no longer be put at risk and, thus, support its return to viability. On that basis, on 15 December 2010 the Commission approved the impaired asset relief measures and the restructuring plan for LBBW (24).

### 2.2.2 Real economy cases approved under the Temporary Framework

**Compatible limited amount of aid (N 408/2009, N 547/2009 and N 523/2009)**

The European Commission authorised Polish and Romanian schemes to provide relief to companies encountering financing difficulties as a result of the credit squeeze in the current economic crisis. The schemes meet the conditions set by the Commission’s Temporary Framework and do not apply to firms that were already in difficulty on 1 July 2008 (i.e. before the credit crunch).

The Commission also approved an amendment to a Lithuanian scheme allowing aid of up to €500,000 per company, initially approved on 8 June 2009. The amendment will extend the scheme, in particular to support small non-agricultural businesses in rural areas until the end of 2010.

**Aid for the production of green products (N 542/2009)**

The Commission authorised an Italian scheme offering interest-rate subsidies for the production of environmentally friendly (green) products. The measure will focus on the car component industry and, more precisely, on financing investments related to early adaptation to or exceeding the ‘Euro 6’ standard which regulates emissions from light passenger and commercial vehicles. The Commission concluded that the scheme will facilitate investments in products featuring early adaptation to EU standards to improve environmental protection. It therefore meets the conditions set in the Commission’s Temporary Framework for state aid.


The Commission authorised Dutch, French, Belgian and Austrian measures to provide insurance cover to exporters who are unable to obtain cover from the private market as a result of the current financial crisis. The Commission found the measure in line with its Temporary Framework for state aid measures to support access to finance in the current financial and economic crisis. In particular, the measures require market-oriented remuneration and focus specifically on the current unavailability of short-term export credit insurance cover on the private market. The Commission authorised the measure until 31 December 2010.

The Commission also approved an amendment to an earlier Danish scheme, which consisted of extension of the list of markets that are temporarily non-marketable, changes to the terms of the quota-share system, namely a reduction of both premiums and insurers’ and exporters’ minimum retention rate, and introduction of an additional top-up window to supplement the existing quota-share system.

Finally, the European Commission authorised a German scheme to limit the adverse impact of the current financial and economic crisis on the supply of export credit. Under the scheme, the German public credit institution Kreditanstalt für Wiederaufbau (KfW) will be allowed to purchase existing export loans from banks. These banks will have to use the cash received for granting new export loans to purchasers outside the European Union. The Commission found the draft measure in line with its October 2008 Communication on state support for financial institutions in the current financial crisis and authorised it for six months.

**Other measures (N 159/2009)**

The Commission endorsed a Finnish proposal for tax incentives for productive investment projects. Under the proposed scheme, for the 2009 and 2010 fiscal years Finland will temporarily double the depreciation rates for new factory and workshop buildings and for new machinery and equipment used in them.
The aim of the scheme is to stimulate investment in response to the current economic downturn. The Commission found that the tax incentive is a general measure, as it will be available to all enterprises with factory or workshop buildings, regardless of their location, size and sector. The measure therefore does not count as state aid. The temporary Finnish tax incentives for productive investment projects are a good example of how to stimulate investment, especially in times of economic downturn, without favouring certain companies, regions or sectors.

2.2.3 Decisions adopted on the basis of Article 107(3)(c) of the TFEU

Regional aid and regeneration

The Commission authorised establishment of urban tax-free zones in certain parts of Italy (25). The aim is to encourage regeneration of particularly deprived areas. In the 22 areas classified as urban tax-free zones, small and micro-enterprises starting up new business activities will be eligible for a range of tax exemptions.

The Commission considers that this upgrading of deprived urban areas will contribute to the Community objective of economic and social cohesion. The measure is in line with the Communication of 17 July 2006 on cohesion policy and cities.

Given the level of concentration of socio-economic difficulties and the strict geographical targeting of the planned measures, the Commission considered them necessary and proportionate to achieve the aim of urban regeneration without causing any distortion of competition contrary to the common interest. The Commission also concluded that the effects on trade would be very limited, for the following reasons:

- the main aim of the measures is to combat social exclusion in particularly difficult areas;
- the scheme concerns small and micro-enterprises only;
- the geographical scope of the measures is limited (they cover only 0.58 % of the population);
- the areas were selected on the basis of objective criteria such as the unemployment rate, employment rate, proportion of people under 24 in the total population and level of training.

Fiscal measures

Spanish goodwill

In 2007, the Commission initiated a formal investigation of a corporate tax provision that allows Spanish companies to amortise goodwill (i.e. write off, over a period of time, the price paid for acquisition of a business in excess of the market value of its assets) stemming from acquiring a stake in non-Spanish companies. This was in response to questions from Members of the European Parliament and complaints that the Spanish scheme was unlawful and had damaging effects in a number of takeover bids by Spanish companies.

Article 12(5) of the Spanish Income Tax Code stipulates that Spanish companies may amortise the financial goodwill resulting from acquisition of a significant shareholding in a foreign company during the 20 years following the acquisition. This results in an economic advantage equal to the difference between the acquisition cost of the shares and the market value of the underlying assets of the target. This is a clear exception to the general Spanish tax system that applies to Spanish-Spanish transactions, as it allows amortisation of goodwill even in cases where the acquiring and the acquired companies are not combined into a single business entity. The Commission found that the favourable treatment of Spanish acquisitions in other Member States was discriminatory and therefore unjustifiable (26). These advantages cannot be justified by the general logic of the Spanish tax system, as they mark a clear, unjustified exception to the common rules applicable to acquisitions. Consequently, the Commission requested Spain to abolish the corporate tax provision permitting this amortisation. The Commission also ordered Spain to recover any unlawful aid granted under this provision in connection with European acquisitions since 21 December 2007 (the date of publication of the notice of initiation of the formal investigation procedure, as the Commission recognised the existence of legitimate expectations). As regards application of this provision to acquisitions outside the EU, the Commission will continue its investigation.

Hungarian interest group taxation

In January 2003, the Hungarian authorities introduced new provisions allowing favourable taxation of net interest income received from affiliated companies belonging to the same corporate group. The measure allowed a tax deduction of 50 % of the net interest received from affiliated companies, with the result that only half of the interest would be taxed. Conversely, the affiliated company paying the interest would add 50 % of the amount of net interest paid to its tax base, therefore adding to its tax bill.

The Commission had concerns that the measure was likely to distort competition on the single market, as it was not open to all companies in Hungary and could therefore count as state aid.


Following comments submitted by third parties, the Commission concluded that the interest deduction measure was state aid, as it excluded several sectors (e.g. the financial sector) and certain types of companies (small companies).

However, due to the fact that the measure was introduced before Hungary joined the EU, combined with the uncertainties regarding classification of the scheme as aid at the time it was introduced, the Commission concluded that the scheme constituted existing aid which is generally assessed under a specific set of rules known as the ‘cooperation procedure’ (and does not entail recovery of the aid granted) (27). However, as Hungary has already adopted a law repealing the scheme with effect from 1 January 2010, there is no need to open the cooperation procedure.

R&D in the defence sector

The European Commission has concluded that Italian measures in favour of two R&D projects conducted by Agusta concerning helicopters (A139 and BA609) are of a military nature and therefore fall within the scope of Article 346 of the TFEU (which allows Member States to take measures necessary to protect their essential security interests). The Commission therefore closed its in-depth state aid investigation (28), opened in 2003 following a complaint. However, the Commission considers that these measures also have an impact on the civilian market. It will therefore continue to examine, with Italy, how these measures can be adjusted to the rules laid down in the Treaty, including the competition rules, in line with Article 348(1) of the TFEU.

Energy and environment

Alcoa

After an in-depth investigation opened in July 2006, the European Commission found that operating aid granted to aluminium producer Alcoa by Italy since 2006 was incompatible (29). The preferential electricity tariffs that Italy offered Alcoa for its aluminium smelters in Sardinia and Veneto from 2006 to 2010 only contribute to reducing Alcoa’s operating costs and have no other justification. They therefore give the company an unfair advantage over its competitors, which have to operate without such subsidies. The Commission therefore ordered Italy to end the illegal subsidies and to recover part of the aid already paid from Alcoa.

Under the original scheme, the Italian state-owned utility ENEL supplied electricity to Alcoa at a tariff set for ten years, i.e. until December 2005. The Commission approved this mechanism because, at that time, it was an ordinary business transaction concluded under market conditions and therefore free of state aid.

However, Italy adjusted the original financing mechanism and extended the tariff without adapting it to developments on the market. The current tariff no longer corresponds to market conditions but is a subsidised price, financed by a levy imposed on electricity consumers. Alcoa purchases its electricity from ENEL and the Italian state reimburses Alcoa the difference between the contractual purchase price and the historical tariff, which has been adjusted only marginally over time.

The Commission’s in-depth investigation found that the price subsidy mechanism following the adjustment and extension of the 1996 tariff was illegal state aid in favour of Alcoa since 2006. Electricity supplied below the market price reduces the beneficiary’s ordinary operating costs and enables it to sell its products at a lower price or a higher margin.

The decision therefore requires Italy to put an end to the preferential tariff and to recover the aid already granted. The aid in favour of the Veneto smelter must be paid back in full. However, in the case of the smelter in Sardinia, the Commission accepted that, under the specific circumstances and on the basis of the principle of sound administration, only the part of the aid granted until January 2007 should be recovered.

Production of ceramic products

After an in-depth investigation opened in February 2009, the European Commission found that a tax exemption which the Dutch state intends to grant for natural gas used in installations producing ceramic products would be in breach of EU state aid rules and therefore cannot be implemented (30). In particular, the Commission found that the tax exemption would provide a selective advantage to the Dutch ceramic sector and, hence, count as operating aid. The proposed tax exemption did not stem from the basic guiding principles of the Dutch system on the taxation of energy products. Such operating aid can be authorised only if it furthers, at least indirectly, environmental objectives, as required by the EU Guidelines on state aid for environmental protection. Reductions or exemptions from environmental taxes concerning certain sectors or categories of undertakings may make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement in internalisation of environmental costs, and to create further incentives to improve environmental protection. The Guide-
lines allow tax exemptions, under certain conditions, in cases where a tax without reduction would lead to a substantial increase in production costs which cannot be passed on to customers without causing substantial reductions in sales (the ‘necessity test’). As the Netherlands has not demonstrated how the measure would comply with the relevant Guidelines, the Commission concluded that it would be incompatible with the EU state aid rules.

3. Decisions under Article 108 of the TFEU

The Commission brought another case before the Court of Justice for failure to recover, this time from Arbel Fauvet Rail (France).

The European Commission also formally requested Spain to implement a European Court of Justice judgment (case C-177/06) declaring that Spain had failed to recover illegal and incompatible state aid granted by certain Basque provinces, as ordered by Commission decisions dating back to December 2001. If Spain continues to fail to comply with the ECJ decision, the Commission could take it to the Court for a second time and request the ECJ to impose fines until the aid has been fully recovered.